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# REPORTS OF CASES

ARGUED AND DETERMINED IN

# THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-  
TION OF THE COURT (BAY'S REPORTS) UP TO  
AND INCLUDING VOLUME 25 OF THE  
SOUTH CAROLINA REPORTS

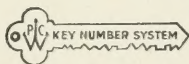
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VOL. 4 DESAUSSURE'S EQUITY REPORTS, HARPER'S EQUITY  
REPORTS, AND VOL. 1 McCORD'S EQUITY REPORTS



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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE  
OF SOUTH CAROLINA

AND

IN THE COURT OF APPEALS IN EQUITY

IN FOUR VOLUMES

BY

HENRY WILLIAM DESAUSSURE

SENIOR JUDGE OF THE COURT OF EQUITY, AND PRESIDING JUDGE OF THE COURT OF  
APPEALS IN EQUITY IN THE SAID STATE

VOLUME IV

*Justitia est velle omnibus quod æquum est.*

*The duties of life are more than life.—Bacon's Works, Vol. VI.*

COLUMBIA, S. C.

PRINTED AT THE TELESCOPE PRESS

1819

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ANNOTATED EDITION

ST. PAUL

WEST PUBLISHING CO.

1917

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LAW

District of South Carolina.

Be it remembered, that on the first day of June, Anno Domini One Thousand Eight Hundred and Eighteen, and in the Forty-second Year of the Independence of the United States of America, the Honorable Henry William Desaussure deposited in this office the title of a book, the right whereof he claims as author and proprietor, in the words following, to wit:

Reports of Cases argued and determined in the Court of Chancery of the State of South Carolina, and in the Court of Appeals in Equity. By Henry William Desaussure, Senior Judge of the Court of Equity, and Presiding Judge of the Court of Appeals in Equity, in the said State. Volume the fourth.

*Justitia est velle omnibus quod æquum est.*

The duties of life are more than life.—Bacon's Works, vol. 6.

In conformity to the act of congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also an act, entitled, "An act supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES JERVEY,

[L. S.]

District Clerk, South Carolina District.

(4 DESAUS.EQ.)

(vi)



TO

THE HON. THOMAS WATIES,

ONE OF THE JUDGES OF THE COURT OF EQUITY, AND OF THE COURT OF APPEALS  
IN EQUITY; IN THE STATE OF SOUTH CAROLINA.

It is a maxim of practical wisdom, that a man is best known by the companions of his choice. The latin proverb "*noscitur ex sociis*," and a correspondent one in almost every modern language, prove its antiquity and its universality. Let it then be my pride, as it has been my happiness, that I have enjoyed your friendship more than twenty years; seven of which we have passed together as brethren of the same bench, in perfect harmony and unreserved confidence.

Permit me to give public testimony of our mutual regard and affection, by inscribing to you this volume of Equity Cases, decided in that Court, of which you are a principal ornament. That you may long continue to be so, is my earnest prayer, and that of all who know how to value distinguished judicial qualities, united with the most engaging private virtues.

HENRY W. DESAUSSURE.

PRESENT STATE OF THE COURT OF EQUITY  
AND  
COURT OF APPEALS IN EQUITY

HENRY WILLIAM DESAUSSURE, } *Elected in Dec. 1808.*  
THEODORE GAILLARD. }  
THOMAS WATIES,—*Elected in December, 1811.*  
WILLIAM DOBEIN JAMES, } *Elected in December, 1813.*  
WADDY THOMPSON, }

All the above named Judges resigned their Commissions in December, 1817, but were re-elected in a few days after.



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# REPORTS OF CASES ARGUED AND DECIDED

## IN THE

### COURT OF EQUITY AND IN THE COURT OF APPEALS IN EQUITY

#### OF THE STATE OF SOUTH CAROLINA.

#### 4 Desaus. \*1

\*Case I.

SAMUEL TAYLOR v. WILLIAM JAMES,  
executor of William Ford.

(February, 1809.)

Georgetown—Heard by Chancellor Gaillard.

[*Appeal and Error* Ⓒ1185; *Gifts* Ⓒ41;  
*Trusts* Ⓒ58.]

A contract in writing by a father, for the purchase of a tract of land from a third person, in trust for his son, gives such an interest in the land to the son, that it cannot be divested or varied by any subsequent act of the father and the vendor. The failure of the inducement to a legacy does not invalidate the legacy, unless founded in fraud, or gross misrepresentation. It appearing to the court, that though the father was the nominal legatee, the son was the real object of the testator's bounty, it was decreed that the father should take as a trustee for the son. The court of appeals is merely appellate, and cannot receive or decide on an original application; even for a bill of review.

[Ed. Note.—Cited in Rutledge's *Adm'r v. Smith's Ex'rs*, 1 McCord, Eq. 132.

For other cases, see *Appeal and Error*, Cent. Dig. § 4637; Dec. Dig. Ⓒ1185; *Gifts*, Cent. Dig. § 20; Dec. Dig. Ⓒ41; *Trusts*, Cent. Dig. § 77; Dec. Dig. Ⓒ58.]

[*Wills* Ⓒ8.]

[A. purchased land, and took a bond conditioned to make title to B., a son of A., and paid the purchase money. The vendor afterwards, and near the time of his death, proposed to A. to give the land to C., another son of A., to which A. assented; whereupon the grantor inserted in his will a devise of the land to C., and proceeded as follows, viz.: "But as I have given a bond to A. (reciting it), and he has made payment to me, it is my will that the bond be given up, and the payment refunded." Held that, the land being vested in A. in trust for B. the devise to C. was invalid.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 13; Dec. Dig. Ⓒ8.]

The bill in this case states that complainant bargained with William Ford, the testator, in the year 1800, for one eighth of South Island, for £500 to be paid in five equal annual instalments. That complainant took

from the testator a bond to make titles to him for the same, in trust for his son Samuel Alfred Taylor. That he further agreed with the testator to sell to him three negro slaves,

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for, as he believes, £456 15s. 10d. and \*gave a bill of sale for them, the consideration money mentioned in which is the true sum for which the slaves were sold. That it was also agreed, that the purchase money of the said slaves, should be considered as a part payment of the said land, and was accordingly endorsed upon the said bond. That complainant bound said William Ford, to make titles to him, in trust for his said son, that he might compel the making such titles in case he should think proper to do so, but that the property, given as aforesaid in payment, belonged to complainant, and that his son had no claim or right thereto. That complainant made other payments to said testator on account of said land, which he charged in his general account, on which there is due to complainant a balance of \$779.76. That the business remained in this situation until the 5th of April 1806, when testator being very sick, made his will, and among other things devised half of his fourth of South Island to his nephew Francis W. James, and the other half being that which he sold complainant as aforesaid, to complainant's son William Ford Taylor. That testator further directed, as he had given complainant his bond to make titles to the half of the fourth of said island devised to William F. Taylor, and as complainant had made him payment thereon, that complainant's bonds should be given up, and the payments made as aforesaid be refunded out of his estate—And the testator appointed among others the honorable William James executor of his will; and he alone qualified thereon. That the will of the said William Ford was drawn by defendant. That complainant was



present, and was informed by defendant that testator was desirous of giving the part of South Island which he had sold to complainant, to complainant's said son William F. Taylor, but defendant not being able to understand the directions, desired complainant to explain them to him. That complainant thereupon, in the presence of said defendant, enquired of testator what were his wishes in that particular. Whereupon the said testator replied, that he wished to will the land sold to complainant to his said son William F. Taylor, if it was agreeable to com-

\*3

plainant, and to refund the money complainant had paid.—That complainant informed testator that it was agreeable to him, if it would afford the said testator any gratification. That the said testator further observed, in the presence of defendant, that complainant had paid him for the land; after which explanation the will was drawn as above mentioned, which will, so far as relates to this case, is in the words following, viz. "To William F. Taylor, son of captain Samuel Taylor, and his heirs forever, I devise the remaining one half of my one fourth of South Island; but as I have given the said Samuel Taylor my bond to make him titles to the said one half of the one fourth, and he has made me payments thereon, my will is, that the said bond be given up to him, and the payments to be refunded to him out of my estate." The bill prays that defendant may be decreed to pay to complainant £500 with interest, and to deliver up the bond to be cancelled.

The defendant by his answer admits the bargain for the sale of the land, but saith that whether complainant bargained for the same for himself in his own proper right or as a trustee for his son Samuel Alfred Taylor he is not informed, but submits the same to the court under the words of the bond, viz. That the bond was entered into by the said William Ford to make titles for the said land, in trust for the infant son of complainant, Samuel A. Taylor, and defendant prays the decision of the court whether the terms of the said bond or the said trust estate can be altered or varied. He admits that the negroes were sold as aforesaid for £456 15s. 10d. and that it may have been in part payment of said land, and that a receipt may have been written off as aforesaid, but he cannot admit that the negroes belonged to complainant in his own right, and that his son Samuel Alfred had no claim to the same, or that the same were unincumbered by any deed, settlement or judgment prior to the said transfer, and prays that complainant may be put to proof of the same before he shall be decreed to pay the legacy bequeathed to him by the will of the said William Ford, as otherwise defendant may be compelled to pay the value

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of the said \*negroes again when the said

Samuel Alfred comes of age, or might hereafter lose the same by prior incumbrances. Defendant cannot admit that any other payments were made towards satisfaction of said bond, and conceives himself bound as executor and guardian of his children to require the said complainant to produce vouchers, or other proof, to substantiate the amount filed with this bill. Nor does defendant recollect, or believe, William Ford, when giving him directions about that clause of the will which relates to complainant, his son William F. Taylor, ever admitted that the bond above mentioned was fully paid; but on the contrary, from the conversation which took place between complainant and William Ford, to explain the nature of said bond, and the payments thereon, the impression on the mind of defendant was, that they were not agreed as to said payments, and that William Ford considered the same only as partial. That complainant did not then state that the bond was given in trust for his son Samuel A. Taylor, nor did defendant know any thing of that circumstance until he afterwards found the counterpart of said bond among the papers of said testator. He admits the will, in which it will be seen that it is expressly stated that the bond was given to Samuel Taylor, and that the said Samuel A. Taylor, or the trust in his behalf, are not mentioned in the same; and that three of defendant's children are the principal devisees, and legatees under the same. Defendant also submits, whether the devise to William F. Taylor be not void, as the said William Ford had, before the making of said devise, by a deed under his hand and seal, parted from all the right he had in the said one eighth of South Island, to Samuel A. Taylor, and whether the said Samuel Taylor, by his verbal consent, could annul the said trust. He also submits whether complainant can take any thing under the clause of the will in his bill relied upon, since the principal object of the bounty of the said William Ford in the said devise was William F. Taylor, and if his intention as to him should fail, whether the bequest to complainant should likewise fail. And the judge, after stating the case

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conformably to the bill and answer, proceeds thus in his decree.

The bond in this case (above stated) is inaccurately worded, for in one part of it Mr. Ford makes an actual conveyance of these lands, and in another part he contemplates making titles to them as soon as the payments are made. But it appears to have been his intention that Mr. Taylor should have the possession of them immediately, for in the first part of the bond he uses the words "and given possession," and in the latter part of it he authorizes him to use and exercise the power and authority vested in him as proprietor of the one fourth part of the said island to his use and benefit;

and he further authorizes Mr. Taylor to use his name in procuring an order for a division of said island whenever he should think proper to do so. It is not material whether the paper recited be considered as an actual conveyance or as an agreement to convey, for, whatever for a valuable consideration is covenanted to be done, shall in equity be looked upon as done—thus money agreed to be laid out in land shall be taken as land, and e converso. *Lichmore v. The Earl of Carlile*, 3 P. Wms. 211. Agreements to perform are often considered as performed; for if a man covenant to lay out a sum of money in the purchase of lands generally, and devises his real estate before he has made such purchase, the money agreed to be laid out will pass to the devisee, *Green v. Smith*, 1. Atk. 572.

It was said by the counsel for complainant, that a specific execution of an agreement would not have been decreed against William Ford in his life time, unless the bond had been paid; but even if this were so, it appears from the complainant's exhibit A. that he had more than paid the purchase money to Ford previous to his death. For after crediting the balance due on the purchase of one eighth of South Island, he states a balance to be due to himself of \$799.78.

The agreement for the sale of the land was for a valuable consideration, between Mr. Ford and Mr. Taylor; and as between Mr.

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Taylor and his son Samuel A. \*Taylor, the cestui que trust, the consideration is also good. "Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seized though no other consideration appears." *Lloyd v. Spillet*, 2. Atk. 148. A father is bound by the laws of nature to provide for his children, and if he purchase lands in the name of a son unadvanced, it is an advancement for him. 2 Fonbl. 121, and 1. Atk. *Taylor v. Taylor*.

It is obvious that the complainant bought the lands on South Island for his son Samuel Alfred, and that he was to hold them in trust for him. Having done so, the cestui que trust acquired rights which he has not been deprived of by the rescision of the contract intended by Mr. Ford and Mr. Samuel Taylor. In 2 Fonbl. 166, chapter seventh, it is laid down that regularly no act of the trustee shall prejudice the cestui que trust; and there is a note in the same page in these words, "with respect to his powers (that is of the trustee) to prejudice his cestui que trust by alienation, the single case in which his alienation of the estate can bind, the cestui que trust, when being in possession of the estate, he conveys it for a valuable consideration, and without notice the purchaser will be entitled to hold the estate against the cestui que trust."

If Mr. Taylor, the trustee, had a right to rescind the agreement between him in trust

for his son Samuel Alfred and Mr. Ford, under the testator's will, then the interest of the cestui que trust will be destroyed.

The counsel for the complainant considered the agreement for the sale of the land as under the control, and capable of being rescinded by Mr. Ford and Mr. Taylor. They have rescinded the agreement if they could do it; but the court is of opinion, the rights of Samuel A. Taylor under the bond given to his father, in trust for him, are unimpaired; consequently, that the devise to W. F. Taylor is void. If so, is Mr. Taylor entitled to have his bond delivered up to him and the payments made on it refunded to him? There can be no doubt about the intention of the

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testator. He intended, as has been already observed, to rescind the agreement he had made with Mr. Taylor, in trust for Samuel A. Taylor, in order that he might give the lands, the subject of that agreement, to W. F. Taylor. What he says respecting the bond, and the payment made thereon, has in it more of the character of a contract than a legacy. "To W. F. Taylor, son of captain Samuel Taylor, and his heirs forever, I devise the remaining one half of my one fourth of South Island, but as I have given the said Samuel Taylor my bond to make him titles to the one half of the one fourth, and he has made me payments thereon, my will is that the said bond be given up to him, and the payments thereon to be refunded out of my estate." It is as if the testator had said to Mr. Taylor, I agreed to sell my land for a certain sum—I wish to have these lands back again, as I wish to give them to your son bearing my name, William F. Taylor—If you will let me have them to enable me to do so, the bond shall be delivered up to you, and the payments made on it refunded. If Mr. Taylor has not been able to revest the lands on South Island to Mr. Ford, to dispose of them as he wished, he cannot be entitled to the consideration agreed on for so doing. A quid pro quo was intended—Legacies are gratuitous. The court is of opinion that the testator did not intend a personal bounty to complainant. The principal object of the testator's bounty was William F. Taylor, and the devise to him having failed, the legacy to the complainant, as it has been improperly called, for it has none of the features of a legacy about it, so intimately connected with and dependent on it, that that must fail also.—Let the bill be dismissed with costs.

From this decree the complainant appealed and stated the following grounds, viz:

1. For that the decree supposes the bond made by William Ford to complainant to be an actual conveyance, when in fact and in law, it is only a contract to convey, and being executory in its nature, was liable to be disannulled, and was disannulled by the parties and consequently it was not competent for the court to revive it.



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\*2. For that it is determined by the decree that a use was created for Samuel A. Taylor by the said bond, whereas it can amount in law to no more than an intention to create a use, under which intention no obligation arises, and consequently the supposed cestui que trust acquired no right under it.

3. For that the decree determines that the contract aforesaid could not be rescinded or disannulled, or otherwise discharged by the parties, although it is unexecuted.

4. For that by the decree it is determined that the legacy to complainant is void, notwithstanding the plainest intentions of the testator to make the bequest, the said bequest being considered in light of a contract and not of a legacy, contrary to the rules for construing wills and legacies.

April, 1810.

The appeal was heard at Columbia, present Chancellors Rutledge, Thompson, Desaussure and Gaillard.

Mr. Grant for appellant—Mr. Richardson for respondent.

The court of appeals was unanimously of opinion, "that the bond or agreement to convey the land from William Ford to Samuel Taylor, in trust for his son Samuel Alfred Taylor, gave such an interest to S. A. Taylor, in the land, as could not be divested or varied by the act of his father, and Wm. Ford. That therefore the subsequent devise of the said land by Wm. Ford, to W. F. Taylor, cannot affect the rights of Samuel A. Taylor, in the said land, nor transfer them to W. F. Taylor." The decree of the circuit court was therefore affirmed as to the land. "The court was further of opinion (Judge Gaillard dissenting) that the failure of the devise of the land to W. F. Taylor, did not invalidate the bequest made by Wm. Ford to S. Taylor the father; for the failure of the inducement to a legacy does not invalidate the legacy itself, unless founded in fraud, or gross misrepresentation. The decree (on this point) therefore must be reversed. But as the court is doubtful whether under the circumstances of the case, S. Taylor, the legatee, ought not to be deemed a trustee to the amount of the legacy for his son W. F. Taylor, It was ordered and directed, that the cause be refer-

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red back to the circuit court, that the last mentioned point might be argued and decided."

February, 1811.

The cause was accordingly remanded to the circuit court at Georgetown, where it was brought to a hearing before Judge Gaillard, who then held that court.

The judge, after stating the manner, and the point, on which the cause had been sent down, proceeded as follows:

The circuit court did not consider the tes-

tator as intending to give a legacy to Wm. Taylor, when he ordered his bond to be delivered up to him, and the payments made on it refunded. The court of appeals thought otherwise. From the doubt expressed by the court, whether under the circumstances of the case, Mr. Samuel Taylor, the legatee, ought not to be deemed a trustee to the amount of the legacy for his son W. F. Taylor, it would seem that they did not intend to decide, to whom the legacy should belong, to the father or the son. The father was a party in the former suit, and claimed the legacy. The decree of the circuit court was, that the testator did not intend a personal bounty to him, and his bill was dismissed. If the court had made up its mind that he was entitled to the legacy, it is to be presumed that they would have said so when this part of the decree of the circuit court was reversed. I was under an impression, until I read the opinion of the court of appeals the other day, that W. F. Taylor was ordered to be made a party in the suit, that the court might decree the legacy to him. As the court of appeals has declared the legacy not to be void, it will rest with them to say to whom it belongs. From the manner in which this case is ordered back, the circuit court is bound to give its judgment whether S. Taylor is to hold this legacy in trust for his son W. F. Taylor; or in other words, whether the legacy is given to S. Taylor or to his son; for if given to him in trust for his son, or he is to hold it in trust for him, it is the same thing as if it had been given to the son himself, since he would have the benefit of it. I do not think W. F. Taylor entitled to this legacy, because it is not given to him. He was no doubt the

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principal object of the testator's bounty. The testator devised land to him, but this devise has been declared void by the circuit court, and its decision affirmed. This case may be considered as a hard one, but it is the case of every other devisee to whom land is devised which the testator had no right to dispose of. To give the legacy to W. F. Taylor, would be to convert a devise of land into a money legacy, and to raise the money to pay it out of the testator's personal estate. He has no claim upon the estate for this. I quote from Digest of Modern Chancery Cases, page 139, the case of Broome and Monk, reported 10 Vez. 597—"A devisee claiming the benefit of a contract for the purchase of an estate, directed to go to the uses of the will, the title proving defective, has no claim upon the personal estate, either to have the purchase money, or another estate purchased, or the purchase completed, notwithstanding the defect." The opinion of the court is, that S. Taylor ought not to be deemed a trustee to the amount of the legacy for his son W. F. Taylor.

Theodore Gaillard.



From this decree an appeal was made on the following grounds:

1. Because the court did not decree the legacy to the complainant.

2. Because the district court did not determine the question referred to it by the court of appeals, which was, whether S. Taylor should take the legacy in his own right, or as trustee for his son, and as the court decided that the son had no right to the legacy, it ought at the same time to have decided that the legacy should be taken by S. Taylor in his own right. The question for the court is, "Who shall take the legacy?" They decided that it does not fail. It is decided and the decision acquiesced in, that S. Taylor is not a trustee for his son—they call him the legatee and yet don't give him the legacy.

April, 1812.

The appeal was heard by the court of appeals at its sitting in Columbia. Present Chancellors Desaussure, Gaillard, and Waties. After hearing counsel the court took time to consider; and at its sitting in Nov.

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1812; \*present Chancellors Thompson, Desaussure, Gaillard and Waties, the court (Judge Gaillard dissenting) delivered its final decree.

This cause was originally tried at Georgetown, and the judge decreed that the bequest in the will of Wm. Ford (by which he directed the bond for £500 which had been given him for the purchase of a tract of land by S. Taylor, should be delivered up to the said S. Taylor, and that the payments which he had made under said bond should be refunded) had failed, and under the circumstances of the case, could not take effect. On an appeal this court was of opinion, that the legacy had not failed; and the decree was reversed, on the ground that the failure of the inducement to a legacy does not invalidate the legacy itself, unless founded in fraud, or gross misrepresentation. But as the court was doubtful whether under the circumstances of the case, Samuel Taylor, the legatee, ought not to be deemed a trustee to the amount of the legacy for his son W. F. Taylor, it was ordered and directed, that the cause should be referred back to the circuit court, that the abovementioned point should be argued and decided.

On the second hearing of the cause in the circuit court, the judge who presided was of opinion, and decided accordingly, that S. Taylor ought not to be deemed a trustee for his son W. F. Taylor. From this decision an appeal is made, on the ground, that the district court did not determine the question, which was referred to it by the court of appeals, whether S. Taylor should take the legacy in his own right or as trustee for his son; and that having decided that the son had no right to the legacy, it ought to

have decreed the legacy to the complainant, Samuel Taylor, in his own right.

This case has become entangled from the various decrees and orders which have been made in it. It therefore becomes necessary for this court to do final justice in the cause, and to put an end to litigation. The court has considered maturely the best mode of giving effect to the first decree of the court of appeals; and it appearing, that although the father (who is complainant in this suit)

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\*is the nominal legatee, yet the son was really the object of the testator's bounty, the court is of opinion, that the decree of the circuit court ought to be reversed; and that the said Samuel Taylor must be held to be trustee for the son. It is therefore ordered and decreed, that the decree of the circuit court be reversed, and that the case be sent down with directions that the defendant be ordered to deliver up the bond of Samuel Taylor, to the late Wm. Ford (originally given for a tract of land, amounting to £500) to the said Samuel Taylor; and that the amount paid by him on the bond to the said Wm. Ford be refunded to the said Samuel Taylor, with interest from one year after the death of testator, out of the estate of Wm. Ford, after payment of the debts of the estate: And that the said Samuel Taylor do hold the same in trust for his son W. F. Taylor, and accountable to him.

WADDY THOMPSON.

HENRY W. DESAUSSURE.

THOMAS WATIES.

Judge Gaillard also delivered his opinion:

The decree given by me in the circuit court, being affirmed by the court of appeals in that part which declares the devise to William F. Taylor void, and reversed in that part which relates to the payments made on Taylor's bond and the bond itself, the case is narrowed down to this—Ought Samuel Taylor, the legatee, to be deemed a trustee to the amount of the legacy for his son, William F. Taylor? This court has said that the failure of the devise of the land to William F. Taylor does not invalidate the bequest made by William Ford to Samuel Taylor, the father: the reason given is, that the failure of the inducement to the legacy, does not invalidate the legacy itself, unless founded in fraud or gross misrepresentation. The court goes on and says, it is doubtful whether under the circumstances of the case, Samuel Taylor, the legatee, ought not to be deemed a trustee to the amount of the legacy, for William F. Taylor. The devise and bequest are in these words "To William F. Taylor, son of captain Samuel Taylor, and to his

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heirs forever, I devise the \*remaining half of my one fourth of South Island; but as I have given the said Samuel Taylor my bond to make him titles to the said one half of the

one fourth, and he has made me payment thereon, my will is, that the said bond be given up to him, and the payment to be refunded to him out of my estate." It is this bond and these payments that constitute what the court held to be a bequest to Samuel Taylor, which could not be invalidated by the failure of the inducement to it. The circumstances therefore, which make it doubtful whether Samuel Taylor, the legatee, ought not to be deemed a trustee for William F. Taylor, do not arise from any supposed intention of the testator, that Samuel Taylor should hold the legacy in trust for his son. The doubt of the court must have arisen from the failure of the devise of the land to William F. Taylor; but surely the failure of a devise of land affords no inference that the testator intended to give money: As the testator had no right to the lands which he devised to William F. Taylor, the devise failed; but this does not give him a claim either to the bond or any other part of the testator's estate. A testator devises lands which he has not: It is clear that the devisee is not entitled to have the devise made good out of the personal estate of the testator. I consider this a clear point. Broome and Monk, 10 Vez. I am of opinion therefore, that Samuel Taylor ought not to be deemed a trustee to the amount of his legacy for his son William F. Taylor.

THEODORE GAILLARD.

Mr. James afterwards applied to the court of appeals for leave to file a supplemental bill in nature of a bill of review, stating newly discovered matter.

Whereupon the court of appeals made the following order:

On petition for leave to file a supplemental bill, in nature of a bill of review, stating certain newly discovered matter therein set forth. The court stated, that it "has considered the subject of the petition, and is of opinion that the application should be made in the first instance to the circuit court.

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This court is appellate \*merely, and cannot receive or decide on an original application. The petition is therefore dismissed.

HENRY W. DESAUSSURE.

THEODORE GAILLARD.

THOMAS WATIES.

May 2d, 1812.

#### 4 Desaus. 14

##### Case II.

ROBERT B. WITHERSPOON and Others v.  
JOSEPH M'KEE, Executor of Archibald  
M'Kee.

(February, 1809.)

Georgetown.—Heard before Chancellor Gaillard.

[*Life Estates* ⇐ 15.]

A bequest of two negroes, Cæsar and Sabina, and their increase, to the testator's wife

for life, and after her death, the said Cæsar and Sabina to be divided amongst his wife's daughters, (by a former husband,) does not carry the increase of Sabina to the said daughters. The words of the will show a different intention. The increase sinks into the residuum of the estate, and are distributable.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 34; Dec. Dig. ⇐ 15.]

This bill is brought to determine the right to the issue of a negro woman named Sabina, under the following clause of Archibald M'Kee's will, viz. "First, I give and bequeath to Elizabeth my well beloved wife, two negroes, to wit, Cæsar and Sabina, them and their increase, to her during her life, and after her death, the said negroes, Cæsar and Sabina, to be equally divided amongst my wife's three daughters, to wit, Jane Witherspoon, Margaret and Elizabeth O'Brian. The female slave Sabina had issue born after the death of the testator, and before the death of the widow of the testator, to whom Sabina was bequeathed for life. Her daughters, Jane, Margaret and Elizabeth, claimed the issue of Sabina, as well as the mother, but the residuary devisees and distributees of the testator Archibald M'Kee, denied the right of the complainants.

The case was argued prior to December, 1808, before Judges Rutledge and James, who differing in opinion made no decree.

It was again argued before Judge Gaillard (sitting alone, under the new system,) who

\*15

decreed that the issue \*of the female slave Sabina did not pass under the will, but sunk into the residuum of Mr. A. M'Kee's estate, and ought to be divided amongst his children. (No copy of the decree was furnished, and the statement is made from notes taken on the hearing of the appeal.) From this decree the complainants appealed on the following grounds, viz.

1. That the bequest of Sabina, the mother of the slaves who are the object of this suit, was a vested legacy; and that whatever has grown out of it since it vested, belongs to those who are entitled to the legacy itself.

2. That no manifest and indubitable intention of the testator, that the future issue of Sabina should not follow her, can be inferred from the words of the will; and consequently, the intention which the decree supposes, is not sufficiently expressed to control the legal operation of the words.

3. That the supposed intention of the testator to include the future issue of Sabina, in the bequest of the residue of his estate, is inconsistent with the unqualified and unconditional bequest of Sabina to Mrs. M'Kee's daughters.

4. [Omitted in the brief.]

5. That a bequest of the residuum of an estate can comprehend only that portion of it which is not specifically bequeathed by the testator, and in esse at the time of making



the will or death of the testator, since the construction must be made as things were at one of those periods. And as the words in the will of Mr. McKee are in the present tense, the construction of that will must be made as things were at the making of it; and consequently, being then fixed and determined, cannot be altered and increased by any thing which was not then in esse, and which did not grow out of it.

6. That the maxim *expressio unius est exclusio alterius*, as forcibly applies to the residue of the estate, as to the bequest of Sabina; and as the testator expressed that residue to be what remained after the previous legacies should be taken off, every thing thus taken off, is necessarily excluded from the residue.

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\*7. That the decree is founded upon the principle that a testator may dispose of a future interest in a chattel, though no such disposition of the issue of Sabina is made by Mr. McKee in his will.

8. That the decree is not consistent with the case stated in the proceedings, and contrary to law and equity.

April, 1809.

The appeal was argued at Columbia by Mr. Grant for appellant, and Mr. Richardson for respondent.

Mr. Grant, for appellant.—This was a vested legacy.—See the following cases: 1 Atk. 511. 2 Atk. 437, *Green v. Elgin*, 4 Bacon 395. 3 Atk. 58. 1 Brown 298, *Monkhouse v. Holmes*. See also 2 Fonbl. 367. The rule is with the complainant; and the intention on the face of the will is not sufficiently plain to control the decided cases. It is only by implication that such intention is discoverable. As to the residue, the issue of Sabina, born after making the will, cannot pass under the residuary clause.

Mr. Richardson, for respondent.—The questions are: 1. Can a testator bequeath a future interest in a chattel? 2. If he can, what were the intentions of testator in this case? A testator may make such dispositions of the future increase. The law is clear and well settled. Then as to the intention, examine the words of the will fully, and they shew the intention sufficiently. Admit that the increase does not go under the bequest, or under the residuary clause, it does not follow that there is any difficulty: It will be undisposed property, and go to his legal representatives.

Mr. Grant, in reply.—The complainants do not claim under the express letter of the will, but under the principle that *partus sequitur ventrem*: And as the female slave Sabina, is bequeathed after the death of the wife, absolutely to the three daughters, the issue born in the meantime, (that is, during the

life of the mother,) must go over with Sabina, on the death of the mother or first legatee, to the three daughters.

The court, present Chancellors Rutledge, James, Thompson, Desaussure and Gaillard,

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were of opinion, \*—"that the words of the will, in this case, though obscurely drawn, furnish sufficient evidence that the testator intended that the issue and increase of the female slave Sabina, should not pass over to the legatees in remainder, and therefore ordered and adjudged that the decree of the circuit court should be affirmed."

#### 4 Desaus. 17

##### Case III.

WILLIAM L. THOMAS and Others v.  
LEMUEL BENTON.

(February, 1809.)

Cheraws—Heard before Chancellor Gaillard.

[Wills  $\S$  603, 865.]

Devise of real estate to A. and the lawful heirs of his body, is in this country a fee conditional at common law, and on his death without issue, the land reverts to the donor, and descends to his heirs. A bequest of slaves to B. and the heirs of his body, with directions that the slaves should remain on testator's plantation till B. married or came of age, and then to take his part, is a vested legacy in B. though he dies under age and unmarried, and is transmissible to his heirs. But the rents and profits from the death of the testator to the death of B. went to the heirs at law and distributees of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig.  $\S$  1353, 2197; Dec. Dig.  $\S$  603, 865.]

[Wills  $\S$  610.]

[A bequest of personal property to a person and the heirs of his body gives him the property absolutely.]

[Ed. Note.—For other cases, see Wills, Cent. Dig.  $\S$  1380; Dec. Dig.  $\S$  610.]

John Kimbrough, by his last will and testament, duly executed, devised and bequeathed to his grandson, John Augustus Benton, certain negro slaves, to him and the lawful begotten heirs of his body forever. Also, certain tracts of land, described in his said will. He also devised and bequeathed as follows: "I give unto my grandson, Lemuel Benton, certain negro slaves, (whom he names) together with all the increase of the said negroes, to him and the lawful begotten heirs of his body forever. Also, it is my will and desire, that the above mentioned negro slaves, given by me to my grandchildren, shall be and remain on the abovementioned plantations, under the directions of my executors hereafter mentioned, until such times as my grandchildren marry or come of age, and then to take their part.

The testator died leaving his said last will and testament in full force and virtue; and also leaving alive his widow Hannah, and



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his only child, the wife of Lemuel \*Benton the elder, (the defendant) who were his heirs at law, under the statute of 1791.

John Augustus Benton afterwards died, intestate and without issue, leaving alive his father and several brothers and sisters, who were complainants, and who claimed a part of the real estate.

The question made for the consideration of the court was, what estate the said John Augustus Benton took in the real estate so devised to him, and who were entitled to the same on his decease.

Chancellor Gaillard, who heard the cause, was of opinion, that the devisee took a fee conditional at common law in the said land; and that on his death without issue the same reverted to the donor and his heirs, and descended to Hannah Kimbrough, the widow, and to the only daughter of John Kimbrough, (wife of defendant) as his heirs at law.

June, 1810.

Afterwards two other questions were submitted to the court on the clauses in the will of John Kimbrough bequeathing certain slaves to Lemuel Benton, jun. and stating his desire that the slaves bequeathed to his grandchildren should remain on his plantation, till they married, or come of age, and then to take their parts. The questions were, whether the slaves bequeathed to Lemuel Benton, jun. vested in him, as he died under age and without issue? And next, who was entitled to the rents and income of the labor of the slaves, from the death of the testator to the death of Lemuel Benton, jun.

Chancellor James, who presided, stated, that the question on the first clause was, Did the negroes so bequeathed to the grandson, Lemuel Benton, vest in him in such a manner as to be transmissible to his heirs at law, under the act of 1791. On this question the judge stated, that it appears the said negro slaves did vest in interest though not in possession; and that whenever the words used in the will to bequeath personal property, are such, as in a case of freehold would create an estate tail, that according to a well known rule of law, such personal property must rest absolutely in the first taker.

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\*The question on the second clause is, Shall the product of the labor of the said slaves, whilst the said grandson lived, from the death of the testator, John Kimbrough, until the death of said grandson, go to the heirs at law of the said grandson, Lemuel Benton, or to Col. Lemuel Benton, the defendant, whose wife is heir at law to John Kimbrough, and also of the widow since dead. The product of the labor of the slaves appears not to have been disposed of by the will; but was left to accumulate until the grandson should marry or come of age: And this not being the case of a child, where the father would have been

considered bound to provide for him, but of a grandson, I am of opinion, upon the authority of the cases cited, 2 Atk. 330, and 3 Atk. 101, that the product of the labor of the said slaves must go to Col. Lemuel Benton, husband of the heir at law of John Kimbrough.

There was no appeal from this decree.

#### 4 Desaus. 19

##### CASE IV.

WILLIAM CATER v. THOMAS EVELEIGH  
and ANN His Wife.

(February, 1809.)

Camden—Heard by Chancellor Gaillard.

[*Husband and Wife* ⇐161.]

The husband acting as manager of a separate trust estate of his wife, and purchasing a saw gin for the use of the trust estate, of which it had the benefit, the trust estate is liable to pay for the saw gin; although the husband gave his own note for the gin, and the vendor, believing him the owner of the property, had sued the note, and pursued the husband to insolvency. The complainant was remediless at law.

[Ed. Note.—Cited in *Boggs v. Reid*, 3 Rich. 451, 458, 464; *Montgomery v. Eveleigh*, 1 McCord, Eq. 269; *Frazier's Trustees v. Center*, Id., 276; *Douglas v. Fraser*, 2 McCord, Eq. 112; *Henshaw v. Robertson*, Bailey, Eq. 316, 318; *Magwood & Patterson v. Johnston*, 1 Hill, Eq. 233; *Reid v. Lamar*, 1 Strobb. Eq. 37; *Welsh v. Davis*, 3 S. C. 116, 16 Am. Rep. 690; *Witsell v. Charleston*, 7 S. C. 98; *Shumate v. Harbin*, 35 S. C. 530, 15 S. E. 270.

For other cases, see *Husband and Wife*, Cent. Dig. § 636; Dec. Dig. ⇐161.]

This case arose in the circuit court of Camden, on the petition of Mr. Cater, to make the settled and separate estate of Ann, the wife of Thomas Eveleigh, liable for the payment of a debt contracted by Thomas Eveleigh, (who was the acting manager for the trust estate,) on account of the separate estate. The debt was contracted for the purchase of a saw gin, to get out the cotton crops of the trust estate. The price being below 100l. the case came on in the summary

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way by petition. \*But to this petition the defendants demurred, because, as they alleged, the petition contained no equity, and because, if there was any relief for the petitioner, the remedy was complete and adequate at law.

The presiding judge, Gaillard, delivered the following decree:

The application to the court is by petition, for payment out of Mrs. Eveleigh's trust estate of a note, given by Mr. Eveleigh for a saw gin, purchased for the use of a cotton plantation, the property of Mrs. Eveleigh, but which the complainant says he thought belonged to Mr. Eveleigh, he being in posses-

sion of it. Mr. Eveleigh being sued on the note, applied for the benefit of the insolvent debtor's act, and was opposed by the complainant, who alleged that he had not returned, in his schedule, all his property: but a jury finding that the property of which Mr. Eveleigh was in possession was not his own, but settled in trust for Mrs. Eveleigh, Mr. Eveleigh was discharged. As the gin was bought for the trust estate, as it belongs to it, and it has not been paid for, it is but just that the complainant's demand should be satisfied out of the estate, and it is ordered and decreed accordingly.

April, 1809.

An appeal was made from this decree, which was heard in the court of appeals, by Chancellors Rutledge, James, Thompson, Desaussure and Gaillard.

Mr. Richardson, the attorney general, argued for the appellant, that the trust estate ought not to be made liable to this demand; for admitting it to be established that the cotton saw gin had been purchased by Mr. Thos. Eveleigh, for the trust estate, the party had taken Mr. Eveleigh's private note in payment, and had sued upon it at law, and had taken his body under a ca. sa. from which he had been discharged, as an insolvent debtor, and the petitioner cannot after this come upon the trust estate. That the trust estate ought not to be made liable for the acts of the trustee, as this would be very dangerous; for the misconduct of the trustee might ruin the separate estate, if his acts were binding on it.

Mr. Blanding argued for the respondent, in support of the decree.

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\*The court of appeals unanimously affirmed the decree of the circuit court, dismissed the appeal, overruled the demurrer, and ordered the appellants to answer in the court below.

#### 4 Desaus. 21

Case V.

JOSEPH H. HOELL, and ANN His Wife, Administrator and Administratrix de Bonis Non of William Bonds, deceased, v. ABSOLOM BLANCHARD and WILLIAM LANGLEY, Securities, and JAMES CLARK, Administrator of Daniel Carpenter, Deceased.

(February, 1809.)

Camden.—Hear'd before Chancellor Gaillard.

[*Executors and Administrators* 527.]

The surety to an administration bond cannot be made liable for the defaults of one of the administrators, by another administrator, although claiming in a different right. The sureties to an administration bond not prima-

rily liable in a court of equity, as in general there is adequate remedy at law.

[Ed. Note.—Cited in *Teague v. Dendy*, 2 McCord, Eq. 209, 16 Am. Dec. 643; *McBee v. Crocker*, McMul. Eq. 488, 493.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2364, 2365; Dec. Dig. 527.]

The bill states that William Bonds, the first husband of Mrs. Hoell, died in 1804, possessed of a considerable personal estate. That Daniel Carpenter and the complainant, Ann, in August 1804, took upon themselves the administration of the said estate, and gave bond in the usual form to the ordinary, with the defendant Langley and Blanchard as surety. That at the time of the execution of the bond, the complainant Ann was extremely ill, and ignorant of what she was doing; and that she was induced by Carpenter to sign the bond, and submits that she ought not to be bound by that act. That Carpenter received the whole estate. That no part of it was received by her, although she had pursued the usual forms of administration, until the 2d May, 1806, when a settlement was had before the ordinary, between the complainants and Carpenter. It then appeared that the whole estate, amounting to £1116. Os. 3½d. was in his hands, one half of which, by order of the said court of ordinary, was paid over by him to the complainant Ann, as her share of the estates of her

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first husband, and of her \*son, who had died since his father's death. That at the same time the said Ann was discharged from the administration, which was then committed solely to Carpenter, who gave the defendant Blanchard as his security to the second administration. That in October, 1806, Carpenter died; and the complainants were appointed administrator and administratrix de bonis non of Wm. Bonds' estate, and thereby had become entitled to receive the remaining half of the said sum of money. The prayer of the bill is for an account and payment of the said sum of money by the administrator of Carpenter, and that Blanchard and Langley might be decreed by reason of the bond aforesaid to satisfy and make good any deficiency. The complainants filed with their bill two exhibits, one containing the petition to the ordinary for a sale of the perishable property of Wm. Bonds, dated 29th September, 1804, and the other, an account of those sales, dated 22d October, 1804, both of which were signed by the complainant Ann, as well as by Carpenter.

The defendants Blanchard and Langley separately demurred to the relief prayed against them.

[Langley, who is charged on the first bond only, assigns for causes of demurrer.]

1. That it appears from the bill itself that the complainant Ann is the principal in that bond, and the defendants merely securities.



2. That there is no breach of the condition of that bond set forth in the bill.

3. That if such breach had been well assigned in the bill, the remedy was plain and adequate at law by action on the bond. Blanchard assigns the same causes of demurrer as to the relief prayed against him on the first bond; and the second and third causes as to the relief prayed against him on the second bond.

The case was heard by Chancellor Gaillard who, delivered the following decree:

The causes of demurrer are,

1. That the complainant Ann Hoell signed the supposed bond to the ordinary as principal and the defendant as security merely.

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\*2. Because no breach is set forth.

3. Because there is adequate remedy at law.

The demurrers admit the facts stated by the complainants in the bill. It is true Mrs. Hoell states in the bill that she was ignorant of what she was doing at the time she signed the bond to the ordinary, but it appears from an exhibit filed with the bill, and which is to be considered as part of it, that subsequent to her giving the bond, she rendered an account to the ordinary: And it appears further by the bill itself, that in the year 1806, she came to a settlement of the estate of her intestate. William Bonds, with Daniel Carpenter, who had administered on it jointly with her, before the ordinary. At that time, it is stated there appeared to be in the hands of Carpenter £1116. Os. 3½d. one half of which was paid to Mrs. Hoell by the order of the ordinary as her part of her husband's estate. The administration of Mrs. Bonds (now Hoell) was then revoked, and a new administration taken out by Carpenter, with Blanchard as his security. The principal object of the bill is to recover the half of £1116. Os. 3½d. which remained in the hands of Carpenter when the other half of that sum was paid by the order of the ordinary to Mrs. Hoell. It is not said that when this settlement took place in 1806, Carpenter had wasted or not administered properly the assets of the estate which had come to his hands. On the contrary it appears that at that time Mrs. Hoell was satisfied with his conduct as administrator. If Carpenter acted improperly as administrator, he must have done so after taking out the second administration. The first administration having been revoked, the securities Langley and Blanchard cannot be liable under the first bond to the ordinary for the maladministration of the assets of Bonds' estate after the revocation. But admitting that Carpenter had acted improperly when joint administrator with Mrs. Hoell, and by doing so had made himself and his securities liable to the creditors of William Bonds, (if there are creditors) yet still under the circumstances dis-

closed by the bill, the court could not hold Langley and Blanchard liable to Mrs. Hoell in

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this suit. It will be contrary to the nature of the engagement of securities to do so.—Sureties to an administration bond undertake that the administrator shall administer the assets of the intestate faithfully and according to law, and if the administrator do not so administer them, the sureties become liable under the bond to creditors; but surely the relation between a principal and the surety is very different from the relation between a surety and the creditors of an estate. The principal is bound in reason, justice and equity to stand between his surety and the surety's responsibility in that character. In this case the principal endeavors to make liable to herself, and for her benefit, her securities Langley and Blanchard, who probably became such at her request; for as widow of the deceased she was entitled to the administration of her husband's estate. Upon the second bond, Blanchard may be liable. If Carpenter when he became sole administrator acted improperly, and his estate should not be sufficient to pay what may be due to the estate of Bonds, the complainant will have an opportunity of availing herself of her remedy at law. It appears to the court to be an adequate remedy.

It is therefore ordered, that the demurrer, as it relates to the first bond in which Langley and Blanchard were jointly security, be sustained on the first and third grounds made in the said demurrer—And that as far as it respects the second bond in which Mr. Blanchard was security, the same be sustained on the third ground made in the said demurrer, with costs.

Theodore Gaillard.

Richardson, for complainant—Blanding, for defendant.

April, 1809.

From this decree an appeal was made, and the cause was heard at Columbia before the court of appeals, present Chancellors Rutledge, James, Thompson, Desaussure and Gaillard.

Mr. Richardson, in support of the appeal, contended that the assumption made by the circuit court, that the acts of Mrs. Bonds

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as administratrix bound her, contrary to the allegation of the bill, was erroneous. For on demurrer the court must presume the allegations of the bill are true. The judge supported the third ground of demurrer, because there was a remedy at law. But that remedy is not adequate and complete. There would be a necessity for several suits at law to give a complete remedy, and the court of equity will give relief to prevent multiplicity of suits. See Mitford, 103, 104, 108 and if the court has jurisdiction as to part of the subject, it will act upon the whole. A perfect

breach of the administration bond has been assigned.

Mr. Blanding for the respondents argued, that it is not alleged in the bill that Blanchard or Langley induced Mrs. Bonds to sign the administration bonds. And if it were really true that Mrs. Bonds was deranged at the time she signed them, yet it was incumbent on her, when she recovered, to have ceased to act on the estate, (if she meant to decline the administration, to which she was entitled,) and to have given notice to her securities of her situation and determination. But instead of that she continued to act for several years, and left her securities Blanchard and Langley under the impression that she was competent and willing to act, and they liable only as her securities. But if the bond of the principal was bad, surely it was bad as to the securities, she could not be free and they bound.

The 2d cause of demurrer assigned was that no breach was set out. The judge who decided this case was satisfied with giving his opinion on two other grounds. But if the court of appeals should be of opinion that the demurrer should have been sustained on the 2d ground, it may sustain the decree on the 2d ground of the demurrer. The bill of complainant does not pretend that there was any breach of the first bond—and does not even make any regular allegation of a breach of the second bond.

There is complete and adequate remedy at law. The court will not support a bill against securities in an administration bond, till a right has been established against the principal or administrator.

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Let any party \*interested bring a suit against the administrator, and establish a debt against him at law, or in equity, and then a suit may be brought at law on the bond, against the sureties, who would then be made liable, not before.—

The court after the argument, affirmed the decree of the circuit court.

#### 4 Desaus. 26

##### Case VI.

LATTIMER and Others v. ROBERT ELGIN and Wife, and LEWIS GANTT.  
(February, 1809.)

Abbeville, Ninety-six District.—Present Chancellor Desaussure.

[*Life Estates* ⇨15.]

Tenant for life of personal estate, who made declarations that he would carry off the property in dispute, obliged to give security for its forthcoming.—The *lex loci* is to govern cases which arise abroad.—The issue of female slaves, do not, by the law of Maryland, go over to the remainder man, but becomes the property of the tenant for life.—A widow about to marry, settles her interests in her former husband's es-

tate, with the knowledge of her intended husband; it is valid.

[Ed. Note.—Cited in *Swan v. Ligan*, 1 McCord, Eq. 231; *Gardner v. Harden*, 2 McCord, Eq. 34; *Hinson v. Pickett*, 2 Hill, Eq. 358; *Napier v. Gildiere*, 7 Rich. Eq. 258.

For other cases, see *Life Estates*, Cent. Dig. § 34; Dec. Dig. ⇨15.]

[*Husband and Wife* ⇨8.]

[A widow gave certain property to her children, reserving a life estate, and afterwards remarried; and, such last husband having threatened to sell the property, the court compelled him to give security therefor to the children.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 29; Dec. Dig. ⇨8.]

The bill was filed in this case to obtain security for the forthcoming of certain negro slaves and their issue, who were in the possession of the defendants, and who were claimed by the complainants, after the determination of the life estate, which Mrs. Elgin had in them.

The cause came to a hearing, and the court, after hearing arguments of counsel, delivered the following decree:

The bill in this case charges, that Benjamin Lattimer, late of Maryland, died intestate, seized and possessed of a considerable estate in Maryland. That he left a widow and children, and that the said widow, Cagy Lattimer, being afterwards about to marry again, executed a deed of gift, dated the 18th of June 1785, by which she granted and transferred to her children, (the present complainants) all her right, title and claim, to the third part of her husband's estate, but reserved to herself the use thereof, until her death. That on or about the day of letters of administration of the estate of Benjamin Lattimer deceased, were granted

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to his widow Cagy, who \*took the personal estate into possession. That shortly after the widow intermarried, with the defendant, Robert Elgin; who by his marriage became entitled to the administration; and accordingly made a dividend, reserving to himself, as the thirds of Cagy his wife, the following property: Daniel a negro man, and Phebe a woman slave, who has since had increase, Lawrence, Sylvia and Anthony; Nell, another female slave who has since had issue, George, Frank and Sabra; and Daphne another female slave, who has since had increase, two children whose names are unknown. That the said R. Elgin to deprive the complainants of the said property, removed from the state of Maryland to this state, and brought with him the said property as his own absolute estate, and he has sold the negroes, Daniel, Daphne and her children to a certain Louis Gantt. That the said Cagy is aged and infirm, and at her death complainants will be entitled to the said property; but the complainants fear that the defendant Robert Elgin will waste the said property and wholly dispose thereof.



The bill prays a discovery of what the thirds of the property were, to which Cagy Elgin was entitled from the estate of her first husband Benjamin Lattimer, and an injunction to stay waste, and for a ne exeat to restrain Robert Elgin from leaving the state, with the property, as complainants allege he intends. This bill was supported by an affidavit, whereupon one of the chancellors issued an order for a ne exeat and injunction, to remain in force until the further order of the court.

The defendant Robert Elgin filed an answer, wherein he admitted the facts generally, and more particularly that the defendant retained as an equivalent for what he was entitled to in right of his wife, as her part of said estate, two negroes, Phebe and Nell, and a few other inconsiderable articles. But the answer denied that defendant retained any other negroes of the estate of the said Benjamin Lattimer, as part of his wife's property of said estate. The defendant denies that he removed from the state of Maryland to this state, with an intention to deprive complainants of said property or any

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\*part thereof. The answer admits that defendant sold to Louis Gantt, two negroes Daniel and Daphne, but denies that they were any part of the estate of Benjamin Lattimer; and a negro Frank to a Mr. Miller. That he has in his possession five prime negroes, viz. Lawrence, George, Sabra, Sylvia and Anthony, who together with Frank are the issue of Phebe and Nell, born after the division of said estate. That the said Cagy Elgin is old and infirm; but denies that after her death, the said complainants will be entitled to the said negroes, or any part thereof. That the said defendant never attempted to waste or dispose of the said property, so as to deprive the said complainants of the possession thereof.

A certified copy of the deed of gift, recorded on the 18th of June, 1785, by Cagy Lattimer, in Maryland, referred to by complainants, was produced by them, on the trial, and admitted by the defendant. It appears that Cagy Lattimer executed the same, in consideration of the natural affection which she bore her children, to whom she conveys her rights and interests in the estate of her late husband, reserving a life estate therein to herself. The inventory and appraisement filed by defendant, as an exhibit, appears to have been made by Cagy Lattimer, the widow, on the 12th of May 1785, in a very regular manner, and included the negroes, Jude, Phebe and child, Bett, Nell, Sylvia, Sabra, Sila and John. The distribution of the estate was made on the 26th of October 1789, as stated by the defendant in the answer, and not contradicted. It was proved at the hearing, by the witnesses who were sworn, that the defendant Elgin was informed by Cagy Lattimer, previous to the marriage,

that she intended to make a conveyance of the rights and interests which she had in her deceased husband's estate, to her children; and that he was satisfied therewith. Also that he hath since declared he would sell the negroes, and put the money in his pocket; and that the children might look for their relief where they could.—That the defendant Elgin is poor, and has very little property besides that in question. That in the settlement of the estate, the negroes were

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allotted to the heirs for their \*respective proportions; and that Phebe and Nell, were the two negroes of the estate allotted to Mrs. Elgin as her proportion. The interposition of the court to protect the rights of persons entitled to personal estate, on the death of an intermediate person, who has the enjoyment for life, from being squandered away, is a well established branch of its jurisdiction, and the system of equity would be very imperfect without it, for there is no remedy at law in such cases. It is analogous to the doctrine of waste, in relation to real estate, but it also rests on the general foundation of equity. See 2d. Fearn, 34, (where 2d Freeman, 206, is cited.) It is there clearly laid down, that upon a devise of goods to A. for life with remainder to B. that it was a good devise to B. and that he might exhibit his bill against A. to compel him to give security, that the goods should be forthcoming at his decease; and that it was the same, whether the goods or the use of the goods, were devised for life: So in 1 P. Wms. 1, in the case of Hyde v. Parrot, lord Somers decided the same point. The later cases have been satisfied with requiring an inventory to be signed by the devisee for life, to be deposited with the master in equity, which lord Thurlow observed was more equal justice; but he immediately adds, "There ought to be danger to require security;" thereby plainly agreeing, that in a case where there was danger, the court would require security.† And even in the case of Foley, cited and relied upon by the defendant's counsel, from Fearn, 42, (1. Bro. Ch. Cases 274.) the court admitted that the ultimate devisee of a chattel might come to the court to protect the property from destruction, by tenant for life; and Mr. Fearn, who was a great lawyer, lays it down expressly, that the court is well warranted to give protection in such cases.

The court considers the first taker, as a trustee for the benefit of those having subsequent interests. See 2 Fearn 46, 7, 8.

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Now in the case under consideration, \*the complainants have sworn, that there is danger of the property in dispute being squandered and put out of their reach; and they have supported their apprehensions, by

† See 2 Fearn, 35, 3 P. Wms. 336, 2 Atk. 321, and 1 Brown Chanc. Cases, 279.

proofs of the declarations of the defendant Elgin, that he would sell the property, pocket the money, and leave the children to seek their redress; and this declaration the witness swears was made, in relation to all the negroes indiscriminately. This alone would make out a reasonable case of danger, to induce the interposition of the court—And to this may be added, the defendant Elgin's having withdrawn the property from the natural tribunal of the parties, which was Maryland: For though he swears he did not remove with intent to defraud complainants, and I am satisfied with that, yet the facility of such removals, coupled with his subsequent declarations, furnish strong grounds for a reasonable apprehension, and consequently for the interference and protection of this court. But it has been argued that this is the case of a gift, from a parent to children, to take effect after her death, and that it is so harsh, indecorous, and improper, for children to demand security from their parent, that the court will not countenance it under such circumstances. It is true that this is a gift from a parent; and I hope I shall never see an instance in which the cupidity of children shall subdue their filial piety so far as to apply to any court for protection against the acts of the parent, who hath made a gift of property to them, reserving a life estate. There are cases in which it is indecorous to be apprehensive of wrongs, and to which it is dignified to submit, if they are inflicted. But in this case the parent has married a stranger, and thereby devolved her rights and authorities to him, and he is not entitled to that veneration and forbearance, especially when he actually threatens to waste the property in question. The deed is expressed to be in consideration of the natural love and affection of the donor to her children. This is a high consideration, and the rights under this deed are entitled to all the protection, given in cases of bequests.

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\*We come now to the consideration of the second question: What should be the security ordered to be given for the forthcoming of the property? This question depends upon the extent of the property to which the complainants will be entitled on the death of Mrs. Elgin. There is no doubt about the female slaves Phebe and Nell. It is proved and even admitted that they were the negroes allotted to Mrs. Elgin, and for their forthcoming, if living at the death of Mrs. Elgin, security must be given.

But the question most contested is, whether the negroes who are sworn to have been the issue of Phebe and Nell, born after the deed and after the division of the estate, are the property of the complainants under the deed, for whose forthcoming after the death of Mrs. Elgin, the defendant Robert Elgin should be bound to give security? It is con-

tended for complainants, that these negroes should go with their mothers, by operation of the deed; that it was evidently the intention of the mother, who was the donor, and that her intention should prevail at all events. And that this is conformable to the rule of law, which would give the issue to the remainder man. For defendants it was insisted, that the rule of law was in their favor; for in leases for years, of stock, the young ones proceeding from them, during the lease, belong absolutely to the lessee as profits arising and severed from the principal; and the text quoted from 3 Bacon 391, is to that effect: And the rule, it was argued, would be more forcible as applied to negro slaves, than to cattle or other stock; on the principle of humanity in keeping the parents and children together; and in giving an interest in the children to the intermediate tenant, who has the care of the females when pregnant, and their support after delivery, and the nurture of the young ones, long useless and always chargeable.

There is great force in this reasoning; but there are other considerations of great importance to be brought into view when a case arises, under the laws of this state—But this case does not belong to our law. It arose in Maryland, and must be decided by the law of that state.

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\*With respect to the intention of the donor, in this case, there is some force in the reasoning of the counsel for complainants, that it was probably the intention of the donor to give all her rights, including the increase, to her children, reserving only her life estate; and if this intention had been expressed, or if it resulted by any necessary implication, it would certainly have controlled the general law, whatever that may be. But it does not appear to be clearly expressed, or necessarily implied by any words in the deed. The rule of law must therefore be applied to this case. What that rule is in this state, is of no importance in this case, (and there is no necessity to give any decided opinion.)—For the parties were inhabitants of Maryland, and the deed was executed there. The law of Maryland must therefore govern this case, according to the well known maxim, that the *lex loci* of the parties and of the transaction must prevail. We are now therefore to inquire what that law is? The only light now before the court on that subject is, a report cited by the defendant's counsel of a case from Haywood's book of adjudged cases in North Carolina, in which the law of Maryland on this point is incidentally stated. The complainant's counsel, without furnishing any evidence of the law of Maryland, insists that this is not sufficient evidence of that law; but upon the whole I am satisfied with this evidence of that law, for Mr. Haywood, who has stated the law of Maryland, was a respectable



judge, and he informs us of the source of his knowledge. He informs us in page 235 of his book of reports, that it is the settled law of Maryland, that negro children, born of a mother given to A. for life, and after his decease to B. in the lifetime of A. do belong to A. unless the increase are also given over by express words. And that one of the most eminent lawyers in Maryland had given it as his opinion, that this was so clearly the settled law, that the question would not now bear an argument there. Taking this to be the law, it applies to and is conclusive of this case: for here is a life estate in Mrs. Elgin, and after her death, the negroes are to go over to her children; there are no ex-

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press words giving the increase, during the life estate, to her children, nor no words of necessary implication: consequently, by the law of Maryland, the increase goes to Mrs. Elgin as the tenant for life; and the complainants, having no title to them, cannot require security for their forthcoming.

It is therefore ordered and decreed, that the bill be dismissed as to all the negroes except Phebe and Nell. That with respect to those two negroes, the defendant, Robert Elgin do give bond with security to be approved by the commissioner in equity for their forthcoming and delivery to the complainants, if the negroes should be living at the death of Mrs. Elgin. That the bond be taken in the sum of eight hundred dollars. That the ne exeat be now dissolved; and that the security heretofore given by defendant under the injunction order of this court be discharged on Robert Elgin's complying with this decree; and that the defendant do pay the costs of this suit.—There was no appeal.

Yancey, for complainant—Calhoun, for defendant.

#### 4 Desaus. 33

JENNET PRATHER, by Her Next Friend, v.  
WILLIAM PRATHER.

(February, 1809.)

Laurens, Washington District.—Heard by Chancellor Desaussure.

[*Husband and Wife* ⚭283; *Parent and Child* ⚭2.]

This court has jurisdiction to give relief, and to allow alimony to wives, in cases of improper severity by husbands. Demurrer overruled, and the husband ordered to answer. And on the merits of the case, the court made an allowance of alimony, proportioned to the husband's fortune, to be paid the wife annually, till the husband would receive the wife home, and treat her kindly.—An infant child ordered to be left with the mother.—The other children to be under the care of the father.—The husband to give security.

[Ed. Note.—Cited in *Rhame v. Rhame*, 1 McCord, Eq. 205, 206, 16 Am. Dec. 597; *Smith v. Smith*, 50 S. C. 65, 27 S. E. 545; *Ex parte*

*Tillman*, 84 S. C. 562, 563, 66 S. E. 1049, 26 L. R. A. (N. S.) 781.

For other cases, see *Husband and Wife*, Cent. Dig. § 1063; Dec. Dig. ⚭283; *Parent and Child*, Cent. Dig. § 22; Dec. Dig. ⚭2.]

[*Ne Exeat* ⚭3.]

[The court will not ordinarily grant a ne exeat in a suit by a wife for alimony.]

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. § 3; Dec. Dig. ⚭3.]

The bill was filed in this case, by a wife, who lived separate from her husband, to recover alimony, on the ground of ill usage, and being turned away by her husband. The defendant demurred to the bill. The case came to a hearing, and the judge pronounced the following decree:

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\*This is a bill filed by Jennett Prather against her husband, alleging that she is his lawful wife, by whom he has three children living; and that she has demeaned herself as a virtuous, prudent wife, by whose industry and economy united with his, a comfortable property has been accumulated, sufficient for their decent support. That the said William Prather has lately, without any default or misbehavior on her part, used her extremely ill, and turned her out of doors, without any provision, so that she is absolutely dependant for subsistence on her relations. That the said William Prather hath since contracted a second pretended marriage with another woman, whom he hath taken home, and with whom he lives in open adultery. That the said William Prather debars the complainant of the sight of her children, and threatens her life, if she should be found in the company of her children: and that the children are very ill used by the adulteress, who lives with him. The bill also alleges that William Prather is about to remove from the state, with his property, and to leave the complainant destitute.—She prays a separate maintenance, and that the two sons of the complainant and defendant, may be taken from the defendant, and placed out apprentice, so that complainant may have access to them: and that the daughter may be taken from the custody of the father, and delivered to the care and custody of the mother: and that a ne exeat may issue against defendant.

This bill is supported by an affidavit of James Hannah, who swears that he verily believes William Prather is about to remove himself and property from the state, and that William Prather is worth property to the amount of \$2500. On this bill and affidavit, one of the judges of this court issued a ne exeat against William Prather, and ordered security to be taken in the sum of \$1000. To this bill the defendant had filed a general demurrer, alleging for cause, that this court has no jurisdiction in such case, and cannot interpose its authority to give any relief.—The demurrer has been argued, and I am now

to give the judgment of the court thereon. I have considered this case with all the atten-

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tion in my power. The de\*murrer being founded on the bill itself, necessarily admits the truth of the facts contained in the bill. This bill makes a very shocking case, outrageous to humanity, and disgraceful to civil society. The question then arises, is there no remedy for such enormous evils? and if there is, where is it to be had? The ecclesiastical courts are the tribunals to whom this delicate trust is committed, in the country from whence we have borrowed our jurisprudence; though in particular cases the court of equity has interposed to give relief, as shall be more particularly noticed hereafter. But there are no ecclesiastical courts in this country, which can give relief. It is equally clear, that the courts of law cannot give any relief. The nature and constitution of those courts, and their forms of proceeding, render it impossible for them to interfere in such cases. We are brought then to this conclusion, either that these gross injuries must pass without redress, or this court must interpose and give relief. It is shocking to think that such conduct, so inhuman in itself, so injurious to innocent and helpless women, and so mischievous to society, should pass unheeded and unchecked in a civilized country. It is the boast of our jurisprudence, that for every wrong there is a remedy, and for every injustice an adequate and salutary redress. But this would be a vain and empty boast, if for such a case as this there was no remedy. But it is said that however this may be lamented, this court has no power to interfere. Let us examine this as fully as the magnitude of the question deserves. It is said by defendant's counsel, that the jurisdiction in such cases is confined to the ecclesiastical courts, which alone have power to grant a divorce a mensa et thoro, or to proceed against the husband propter sæviti- am; and as incident thereto, possesses power to allow alimony to the wife: and that the court cannot interfere. And the counsel refers on the case of Ball v. Montgomery, 2 Vez. jun. 195. Lord Loughborough says, that he did not recollect that there were such cases as were cited to him from Vernon; and that it is contrary to the established doctrine that a married woman should be a plaintiff in a suit in equity for a separate main-

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\*tenance, and that he (lord Loughborough) considered it now to be the settled law, that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance: that it is always incidental to some other matter, that she becomes entitled to a separate maintenance. That if she applies to the court of equity upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that,

the chancellor will allow separate maintenance. And so in the ecclesiastical court, if it is necessary for a divorce a mensa et thoro propter sæviti- am. The counsel for defendant also relies on the cases therein cited of Head and Head, 3 Atk. 547, where lord Hardwicke is made to say, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless on an agreement between them, and even then unwillingly. See also 1 Fonbl. 103, also in the case of Alexander v. McCullough, decided by lord Thurlough, when the husband used the wife ill. Yet the chancellor refused to grant the wife any part of her own property without the consent of her husband. Cited in second Vez. jun. 192. These are great names undoubtedly, and the authority of these cases ought not to be shaken on slight grounds. But on the other hand, we find by the text of 1 Fonbl. 94, "That a wife may have a separate estate from her husband, as by agreement, or by decree for ill usage, or alimony." The writer of that text was a profound lawyer, who seldom lays down a position which is not supported by the authority of adjudged cases, or of acknowledged principles. Accordingly, we find by reference to the cases cited in support of the above position 1 vol. p. 104, 105, that there have been adjudged cases in England where the court of chancery has decreed alimony to the wife. Most of them indeed are cases decided by commissioners having express authority delegated to them, for that purpose, during the troubles; some of them are cases of agreement, and some of them are cases where proceedings have been had against the husband in the ecclesiastical courts, propter sæviti- am. But there are cases of decrees in equity in favor

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of the wife, without \*any of those circumstances, merely on the ground of ill usage or desertion of the wife by the husband, where there was no divorce, and no agreement to separate—1 Fonbl. 104, 5. 1 Chan. Rep. 24, Lasbrook v. Tyler. 2 Vern. 752, Williams v. Callar. 2 Atk. 96, Watkins v. Watkins. Thus it appears that lord Hardwicke and lord Loughborough, as the latter acknowledged, had forgotten these cases, when they asserted that there were no cases to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them. It might be sufficient for me to say, that as there have been cases on both sides of the question, even in England, where the refusal of the court of equity to interfere would not occasion a total failure of justice, I should feel myself at liberty to select those cases for my guide, which applied to the circumstances of this country, and would best promote the purposes of justice, which it cannot be denied would be done by the adoption in this case, of those instances of interference by the court of equity; but in fact the very words of lord Loughborough, cited by de-



fendant's counsel, from 2 Vez. jun. 195, shews that if the wife applies to the court of equity upon a supplicavit for security of the peace against her husband, and it is necessary she should live apart, as incidental to that, the chancellor will allow her a separate maintenance.—Now what is stated in complainant's bill? Ill usage, turning out of doors, threats against her life. And is not this ground for granting a supplicavit? It surely is, and though the bill does not directly apply for that remedy, it makes a case which requires it; and the court will grant a supplicavit, which is sometimes granted on information to the court of ill behavior. See 2 Com. 712. 2 Ventr. 344: and then as lord Loughborough says, as incident thereto, decree a separate maintenance, when the case is properly made out. I am not, however, left to the disagreeable necessity of deciding on these grounds alone. The subject has been discussed in this country, and the court of equity has decreed in two cases, that the wife should have a separate estate from her husband, in the case of ill usage, and a con-

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sequent separation or desertion \*by the husband, though no agreement for a separate maintenance and no divorce. And this, from the necessity of the case, and to redress an injury not otherwise remediable. I allude to several cases which were decided in this court some years since, expressly on the ground that no other tribunal could give redress, and that it would be unseemly and highly mischievous if this court did not interfere. It is true that in some of those cases the wife carried a considerable property before marriage: in this case it is not alleged that she had any property before marriage: only that by her prudence and economy she aided in acquiring and saving what has been made in the family: and the demurrer admits this allegation. It is certain that the case of a wife carrying a large property to her husband, strengthens the claim to a separate maintenance, in case of ill usage, and consequent separation. But it does not strike me that her not doing so, debars her of a claim. She acquires by her marriage, in return for the comforts she brings, the right to maintenance and support, and to a participation in the enjoyment of her husband's property, according to his degree and situation in life, while she demeans herself correctly; and this right she may exercise in an irregular, unsettled, vexatious manner, by running in debt for necessaries, upon his deserting her; which he would be compelled to pay. But this is a very uncertain method, and full of inconvenience and productive of constant litigation. Few will trust a woman under such circumstances, when they are sure of not being paid without suits, and the measure is entirely uncertain. I do therefore think that where a husband uses his wife ill,

and turns her off unprovided without just cause, she may, on the authority of the cases best applicable to our country, claim the protection of this court, and have relief by a separate maintenance. I am an enemy to innovation, unless well considered and founded on plain utility, and I should deprecate the assumption of unwarrantable powers. But I feel it would be my duty to give relief in all cases to which the powers of this court could be made to apply, when no other adequate relief can be had.

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\*I find in the enumeration of the sources of jurisdiction to this court, made even by the best common law writers, the following are stated: The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases, as in executory agreements. A court of equity will compel them to be carried into strict execution, (unless where it is improper or impossible) instead of giving damages for nonperformance. So too in questions that may be tried at law in a great multiplicity of actions. A court of equity assumes a jurisdiction to prevent the expense and vexation of endless litigation and suits. Now if the court of equity has concurrent jurisdiction with the courts of law, merely because it can give more ample or complete relief with less litigation, surely it follows that it will be justifiable to interfere where the courts of law can give no relief at all, as is acknowledged in the case under consideration. And the act of assembly itself, which declares that "Suits in equity shall not be sustained in any case where plain and adequate relief can be had at common law," does very clearly import that suits in equity may be sustained in all cases where such remedy cannot be had at law; and upon that point there is no difference of opinion. Unless this court interferes, the woman is remediless. With respect to the children, I do not feel myself at liberty to take them out of the care and custody of the father. He is the natural guardian, invested by God and the law of the country, with reasonable power over them. Unless therefore his paternal power has been monstrously and cruelly abused, this court would be very cautious of interfering in the exercise of it. It will be time enough for the court to provide a remedy when such a case occurs.

No allegations of extreme cruelty to the children are made in the bill under consideration—But the mother has her rights also. She has a right to the comfort of her children's society occasionally; and the court will protect her in the enjoyment of it. In order to give effect to the principles herein expressed, I do hereby authorize the com-

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plainant's solicitor to amend his bill by \*adding a prochem amie, and by adding a prayer

for a supplicavit; upon which, and the bill being supported by an affidavit, the court awards a supplicavit, commanding the sheriff to take surety of the peace from the defendant William Prather towards his wife in \$1,000. And it is ordered and decreed, that the demurrer filed by the defendant be overruled, and that the defendant be directed to answer over fully to the complainant's bill. And that with respect to the children, the complainant Jennet Prather be permitted by the husband to have access to her children at all reasonable times, without peril to herself; and that the children be permitted to visit her occasionally.

With respect to the ne exeat, the defendant's counsel has shown some grounds to doubt the power of the court of granting it in this case. The bulk of the cases do certainly say that the court will not grant it, unless complainant shews the debts demanded against defendant to be certain, and not on a contingency. And more explicitly that on a suit in the ecclesiastical court, by the wife for alimony, before decree, this court cannot grant a writ of ne exeat regno against the husband. 2 Comyns 655, 657. 1 Atk. 521. 1 Vesey, jun. 94. *ibid.* 49. Yet in speaking of the process of this court, an able writer says, that "For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ, as the writ of ne exeat, &c." Mitford 46—And in its origin it was applied to many cases besides debt—See Comyns 655. And it was once granted from compassion to a wife who sued for alimony in the spiritual court—Comyns 656. 2 Atk. 210. Upon the whole, I think the weight of authority is against the writ in such cases; and if the application were now making to me *de novo* for the writ, I have doubts if I should feel myself authorized to grant it. But the order has been made by proper authority, and the application is to rescind it; which application is made by a man who admits by his demurrer that he has used his wife cruelly without cause, and turned her

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out of doors without provision, and has taken home to his house a worthless woman, who usurps the place of the legitimate wife, and abuses her children; and that he threatens the life of his wife, and is about to remove himself and property into foreign parts. Under these circumstances I will not sanction the defendant's evasion of justice, by rescinding the order for the ne exeat. If the defendant wishes to be released from the restraint of the ne exeat, let him give good security in a bond to the complainant in \$1,000, to abide by and comply with the ultimate decree of the court; and then the writ of ne exeat shall be discharged.

The defendant then put in the following answer:

The defendant's answer admits his marriage with the said Jennet Prather, and that during the time of their living together as man and wife, she bore five children, their names Ruth, John, Charles, Margaret and Ann. Whether they are the fruits of their union is rendered uncertain by particular acts of complainant's incontinence with defendant's own knowledge; and states that in consequence of surprising her one night in bed with her paramour, he had, during the latter part of the time they lived together, deserted her bed.

Defendant states that her conduct, instead of being dutiful, affectionate and careful, was the reverse, abusing him, sometimes assaulting him, becoming unfaithful to his bed, and wantonly wasting his property. That for some instances of this conduct he admits he may have chastised her, but for this he has been tried, convicted, sentenced and punished, in a court of law.

Defendant denies that he turned complainant out of doors penniless and dependent on the compassion of her friends, but states that wishing on account of her improper conduct to live apart from her, he proposed a separation and division of property; this she refused. He then proposed making a sufficient deposit in the state bank, and securing the interest to her for life for a support: This also was rejected. He lastly proposed articles of separation, which were agreed to. His property then and on that account was appraised, and amounted by said appraisement to \$1,740, of which the one fifth

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\*(amounting to \$348) was allotted to her, a part of which she chose to receive in a bed and other articles, the rest in notes. (An exhibit of these articles of separation and this division of property making part of the answer is shown therewith and marked A.) Complainant then went to Georgia, and after the notes became due, returned and collected some: As to the rest she gave up the notes to the makers and took others payable to herself in lieu of them.

Defendant states that complainant lives with Jacob Miller, and continually harrasses him with suits for maintenance before magistrates, from whose decisions in such small sums there is no appeal.

Defendant to that part of the bill reciting a second marriage demurs, because if true, living the former wife, it would be felony.

Defendant acknowledges that having heard complainant intended stealing her children, and also on account of the lessons of disobedience she inculcated when with them, he forbade her seeing them, but denies threatening her life if found with them.

Defendant's property, according to the abovementioned appraisement, amounted to \$1,740, from which deducting the one fifth delivered to complainant, there remains a balance of \$1,392, with which to maintain



her children and answer the expenses of the suits she is continually instituting against him.

Defendant admits as true such matter contained in the bill as is not answered, confessed, avoided, or traversed, in his answer, and prays that the bill may be dismissed and his costs granted him.

June, 1809.

The cause was heard before Judge Thompson; who after hearing the evidence and the counsel, delivered the following decree:

This bill was filed by the complainant Jennet Prather, against her husband William Prather, for the purpose of compelling him to allow a certain sum of money sufficient for support during their living in a state of separation. It appears from the testimony adduced on this occasion, that the parties had

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been married in due form of law, and had lived together as man and wife for ten or twelve years without any apparent discord, until the defendant had by his dissolute conduct excited the jealousies of his wife, and caused her extreme distress and wretchedness, to which she sometimes gave vent by complaint and scolding. These irritations, accompanied by his preference of another woman, induced him on several occasions to use severity towards her, and ultimately led to a final separation.

The court is here relieved from the necessity of making any observations relative to its jurisdiction in a case of this kind, inasmuch as a demurrer upon that subject had previously been overruled, and an answer substituted, which placed it for trial on its intrinsic merits alone. The court cannot but admit that it feels itself exonerated from some difficulties on that occasion, on account of the novelty of suits of that kind in this country. This being then the statement of the case, it remains only to be inquired, whether from the circumstances of the parties, and the evidence introduced, the complainant be entitled to recovery. James Hanna, who was brought forward as a witness in behalf of the complainant, swears that William Prather, the defendant, told the witness he had dismissed his wife, and that she should never live with him again. This testimony is confirmed by Mr. John McKelvey, who testifies to the same fact. It further appears from the testimony of Mrs. Rodgers, that he refused suffering Mrs. Prather to see her children, swearing that she should never come to his house for that purpose. It is further deposed by Mr. McKelvey, that he saw stripes as if of a switch on her; that she said that her husband had whipt her, which he acknowledged he had done, and assigned as a cause therefor, that she had spoiled a run of whiskey, the duties of making which he sometimes assigned to her. It has been further proved, that he told his wife of the

licentious habits he was involved in, and the more to exasperate her, told her of his lewd intercourse with other women. There have been a number of witnesses introduced with respect to the character and conduct of the

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complainant, all of whom, as well those in her favor as those on the behalf of the defendant, concur in saying that she is a woman who has always conducted herself well, that she is a prudent, discreet, virtuous woman, and it has been testified that the defendant owned her to be such by several declarations, wherein he has said, that he had no fault under heavens to find with her but her tongue. With this view of the case it is impossible but the court must conceive that the complainant is entitled to part of the prayer of her bill, that is to say, that part which relates to her alimony. With respect to that part of the prayer relating to compelling defendant to surrender up to the complainant her infant daughter, the court is apprised that it is treading new and dangerous grounds, but feels a consolation in the reflection that if it errs, there is a tribunal wherein the error can be redressed.

The court therefore orders and decrees, that the defendant to surrender to the complainant the infant female prayed for in the bill. It is further ordered and decreed, that the complainant do recover of the defendant the sum of one hundred dollars per annum, during the term that they shall live separate and apart, or until he shall agree to cohabit with her, and treat her as becomes a man to treat his wife. The said sum of one hundred dollars per annum to be vested in a trustee for the benefit and support of the complainant, and that the defendant do pay the costs of this suit. It is further ordered that the defendant do give sufficient security to perform this decree, upon doing which, the writ of ne exeat to be dissolved.

#### 4 Desau. 44

##### Case VIII.

ROLAND TANKERSLEY v. ANDERSON,  
CARUTH, Executors of Robert Maxwell,  
TARRANT and Others.

(February, 1809.)

Laurens, Washington District.—Heard by Chancellor Desaussure.

[Attorney and Client  101; Guaranty  100.]

Sureties and guarantees may enforce mortgages or other counter securities given to indemnify them, as soon as they are endangered, and before they have actually paid the original

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debt.—And they are not liable in damages for the detention of the property in goal till sold.—They would be liable for any irregularities or impropriety in conducting the sale, if any damages resulted—not otherwise. As soon as the sureties made sale of the property mortgaged



to them, they were bound to apply the proceeds to pay off the debt—and not doing so, they are liable for the accruing interest, expenses and costs. An attorney at law has no right to give up the security of his client, unless he receives actual payment, or is specially authorized to do so.

[Ed. Note.—Cited in *Beasley v. Newell*, 40 S. C. 22, 18 S. E. 224; *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 489, 38 S. E. 160, 629.

For other cases, see *Attorney and Client*, Cent. Dig. § 210; Dec. Dig. ⚡101; *Guaranty*, Cent. Dig. § 112; Dec. Dig. ⚡100.]

[*Attorney and Client* ⚡99.]

[An attorney into whose hands a demand is put for collection has no authority to surrender such demand, upon the undertaking of another person, especially if the security was not strengthened thereby.]

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 196; Dec. Dig. ⚡99.]

[*Guaranty* ⚡100.]

[Where a guarantor has been sued upon the guaranty, he need not wait for judgment before proceeding against the principal for indemnity.]

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 112; Dec. Dig. ⚡100.]

[*Mortgages* ⚡512.]

[Where a sheriff, by the direction of the creditor, sold a large amount of property in one lot, when a small parcel thereof would have paid the debt, yet the property was purchased in behalf of the debtor, whereby a loss was prevented, the court refused to disturb the sale.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1515; Dec. Dig. ⚡512.]

In this case Robert Maxwell and Larkin Tarrant gave a letter of credit, some time in the year 1792, to Roland Tankersley and Terry Tarrant, for £150, under which they obtained credit from John Cunningham, merchant of Charleston, for goods to the amount of £135 and gave their note for that sum, together with the letter of credit, to Mr. Cunningham.

In February, 1796, the complainant Tankersley gave to Maxwell and L. Tarrant a mortgage of eight negroes, for the purpose of indemnifying them from the effects of the letter of credit.

Robert Maxwell died in November, 1797, and Mary Maxwell, his widow, and general Robert Anderson administered on his estate; and the widow afterwards intermarried with Adam Caruth.

Suits having been brought by Mr. Cunningham against the guarantees, Adam Caruth, some time in August, seized the negroes under the mortgage, and detained them five weeks in goal, and then returned them to the complainant. But the loss of their labor at a critical time, it was alleged had produced the loss of his crop, to the amount of \$1,000.

In December, 1804, Larkin Tarrant died, and his widow and his son Thomas qualified as executors on his will. In February, 1805, Adam Caruth and Thomas Tarrant again seized the negroes of the complainant under the mortgage abovementioned, and detained them at work at their plantations for four

weeks, and then set them up for sale in one lot. The sale of the negroes in one lot was proved to have been unfavorable to procuring the full value; and was done contrary to the solicitations of the debtor and his agent, James Tarrant, who solicited that they might be sold separately. James Tarrant,

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\*however, bought them in for \$1,800, which he thinks was about the value; and he holds them for Tankersley, except three since sold to pay off the debt.

On the day of sale, and before the sale, the complainant tendered to the said Adam Caruth and Thomas Tarrant, the abovementioned original letter of credit, with a receipt in full by Mr. John Taylor, as attorney at law for said John Cunningham, with the costs which had accrued. But the debt had not been paid to Mr. Cunningham, and Mr. Taylor had no special authority or direction to release the guarantees and give up the letter of credit.

The guarantees had not paid any part of the debt to Cunningham when they seized and sold the negroes; but they were sued for the debt.

The complainant required that the mortgage should be given up and cancelled; that the sale of the negroes should be rescinded, and that the negroes should be returned with a reasonable profit for their labor.

The defendants insisted that the real debtors not having paid the debt to Mr. Cunningham, and the guarantees being sued for the debt, they were endangered, and at liberty to indemnify themselves under the mortgage. That Tankersley had no landed property of his own, and lived near the frontier, and it was apprehended he would remove out of the state, with the mortgaged negroes; he having sold one of them, and mortgaged others to other persons. The detention of the slaves without sale in August was at the request of the complainant, who wished to have an opportunity to make a private sale, but refused to sell them separately. The slaves were returned to complainant in August, 1804, at his earnest request, and on his promises to pay the debt in a few days. But he not complying with his promises, the slaves were seized a second time and sold. That the purchaser, James Tarrant, was a relation and friend of the complainant, and purchased the negroes in and for the benefit of the complainant; and afterwards settled the debt by selling to defendants Caruth and Thomas Tarrant three of the negroes at a full price,

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and a small balance \*in cash. The defendants admitted that they had not paid the money over to Cunningham, but they stated that they were prevented by the threats of a suit in equity, which has actually taken place.

They stated that they had rejected the

tender of the letter of credit, because they knew that the release would not discharge them from the guarantee, as the attorney at law had no authority to grant such release, and deliver up the letter of credit without the payment of the money.

James Tarrant admitted that no money was paid to Mr. John Taylor to induce him to deliver up the letter of credit, with a receipt endorsed; but that he had given his assumption of the debt, as the inducement to such release of the guarantees. And that he held the negroes which he had purchased in, except three sold at private sale, and delivered to Caruth to pay off the debt to Cunningham. He was examined as a witness by consent of both parties, and stated that he had purchased the negroes at the sale under the mortgage, at the request of Tankersley, and for his benefit. And he sold three of them, with the consent of Tankersley, to pay off the debt, to the guarantee. He thought \$1800. at which he bought them, to be about the fair value. They would have gone for less unless he had interfered, and bid them up.

It was agreed on both sides that the mortgage by Tankersley to Maxwell and Tarrant, though absolute on its face, was intended merely as an indemnity to them.

After the argument of the case Chancellor Desaussure delivered the following decree:

I have considered the circumstances of this case and the arguments of the counsel, as maturely as I am able, in so short a time, and I now proceed to give my opinion.

The first question in this case is, whether Robert Maxwell and Larkin Tarrant, or their representatives, had a right to enforce the mortgage of the negroes given by Tankersley before they had paid the money to J. Cunningham, or before judgment against them.

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It would be very hard on securities if they were bound to wait until the creditor had actually obtained judgment against them, or compelled them to pay the money before they could have recourse to their principal. He might waste his effects before their eyes, and have nothing left to reimburse them after they have been forced to pay the debt; perhaps at an enormous loss by forced sales of their property, at an unpropitious time. In this case a mortgage was given, which though absolute on its face, it is agreed by both parties, was given expressly to protect and indemnify them against the effects of the guarantee they had given to Cunningham by their letter of credit in favor of Tankersley. The moment therefore suit was brought against them by Cunningham, I consider them endangered and damaged, and at liberty to protect themselves and raise the money by the sale of the mortgaged property, to pay Cunningham; which was the object of the mortgage. Tankersley was bound in conscience and equity to have paid the debt to

Cunningham, and thereby to have prevented his friendly securities being injured, or even endangered by suits for his debts. Failing in the performance of what conscience and equity required him to do, the court cannot listen to his complaint, that the securities have enforced the mortgage given by him for the very purpose of protecting them, in case of his failure, and its consequences to them. It is expressly sworn by the defendants, that several suits were brought against them by Cunningham, on account of the letter of credit, and judgments have ultimately been obtained against them. The property was of a perishable nature, and might be lost; and the transaction had been drawn out to a great length, and both the guarantees were dead, and no steps taken by Tankersley (but one small payment) to settle the debt. I am therefore of opinion that the representatives of Robert Maxwell, and Larkin Tarrant, had a right to enforce the mortgage, and bring the negroes to sale when they did, to raise money enough to pay the debt, costs and all reasonable expenses.

The next question made by the counsel is, whether the tender of the original letter of

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credit, by James Tarrant, the agent of Tankersley, together with maj. John Taylor's receipt for the assumption of James Tarrant in full of the debt to John Cunningham, ought not to have prevented the enforcement of the mortgage. This question depends upon the authority of maj. Taylor to give up the letter of credit, on James Tarrant's giving his assumption of the debt to John Cunningham—And in my opinion nothing is clearer than that he had no such power, and that his act was a nullity; and that the estate of Maxwell and Larkin Tarrant would have remained bound, though the letter of credit had been delivered up under those circumstances. It has been solemnly settled in various adjudged cases in this country, that if an attorney transcends his powers, and does an act out of the course of his professional authority by which his employer may be injured, the act is void. Some of them are cases of fraud, others not. In this case no man has imputed, or will impute fraud to major Taylor—he acted from beneficent motives; but as the paper was placed in his hands as an attorney at law, to collect the money, he transcended his powers, when he undertook to release Maxwell and Larkin Tarrant's liability to John Cunningham, and to deliver up the letter of credit, which was the evidence of that liability, upon James Tarrant giving his bond to pay the debt in one and two years. No doubt major Taylor deemed James Tarrant adequate to the debt, and was willing to risk his own responsibility on that event—but still he changed the security, and cannot be said to have strengthened it, (even if he did not actually weaken it,) which might eventuate to the prejudice



of his credit. The client had a right to reject and annul this act of his, and this power, left the estates of Maxwell and Larkin Tarrant still bound, and dependant on Cunningham's will—And he has since manifested his determination by bringing a suit subsequent to the tender, and recovering the money from the representatives of Maxwell and Larkin Tarrant. I am therefore of opinion that the representatives of Maxwell and Tarrant, were not bound to accept the tender;

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but were at liberty not\*withstanding the same, to proceed and sell the negroes to raise the money to pay Cunningham.

The next ground taken by counsel was that the conduct of the defendants, Caruth and Thomas Tarrant (for they properly excluded all other defendants from any censure) indicated a settled design to oppress and injure Tankersley, by the seizure of his negroes, by the detention of them, by working them, and finally by selling them all together in one lot, instead of selling them in detail, when the sale of a few would have paid the debt and costs: and that by such conduct they have materially injured and damaged the complainant, for which he is entitled to a remedy. It is my duty to examine these allegations connected with the proofs. I see no reason to censure Caruth and Thomas Tarrant for the seizure of the negroes at either time. They were in discharge of their duty to the estates they represented, which were endangered by complainant's delays in paying the debt, guaranteed by Maxwell and Larkin Tarrant. The confinement in goal of the negroes, was in consequence of the lawful seizure; and if Tankersley suffered any damage in his crop, it was *damnum absque injuria*. The working of the negroes, (on their plantations) when seized a second time, was irregular; but it saved the complainant goal fees, and no actual injury resulted from it. With respect to the sale of all the seven negroes, in one lot, I do confess it appears to me to have been highly improper. I am unwilling to attribute improper motives to any man, but I cannot shut my eyes to the strong circumstances which mark this part of the case. It was certain if a fair sale was made that the negroes would be more than sufficient to pay the debt: yet all are put up for sale. It was probable that the sale of the negroes, separately, would produce a better price: and James Tarrant the agent of Tankersley, who has acted throughout the whole of this business humanely and honorably, solicited the sale of them separately. Yet advantage was taken of a declaration of Tankersley made long before, that the negroes should be sold altogether, and it was insisted they should be sold altogether. The sheriff should

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have \*known his duty better; he was not

bound to obey such orders—all this occurred too when it was believed no one was present, who could give a good price for these negroes, so put up for sale. If in this case the conduct of the defendants, Caruth and Thomas Tarrant, had produced its natural effect, the sale of these negroes at a very low price, and they had gone into their hands, or the hands of strangers, to the prejudice of Tankersley, I should have sent this case to a jury, to have enquired into the damages sustained, and doubtless ample justice would have been obtained in such a case. But the active and humane conduct of James Tarrant, has prevented the necessity of this measure. He stirred up friends, who enabled him to bid boldly for the negroes, and to offer a fair price. They were knocked down to him at what he deemed the full value. Besides he bought them in for Tankersley; and then sold three of them at full value, to Caruth and Thomas Tarrant, to pay the debt to Cunningham, and the remainder he acknowledges are Tankersley's property, though held by him to work out other debts of his. No injury has therefore resulted to Tankersley, and I do not see any ground to send the case to a jury to enquire the quantum of damage. I believe I should do him an injury, in expense and trouble, by directing such an issue; I will not therefore do it.

It is further contended by the complainant's counsel, that Tankersley was not liable for any accumulation of the debt and costs and expenses incurred subsequent to the sale of his negroes. And I have not the least doubt on that point. The defendants, Caruth and Thomas Tarrant, were bound on their purchasing the negroes to have paid the debt to Cunningham, or to James Tarrant, to have enabled him to do it, and settle the matter forever. But under pretence of respect to this court, in which Tankersley commenced a suit in November, 1805, (nine months after the sale, and after they should have settled with Cunningham) they make no payment, and keep the negroes; and now contend they are at liberty to insist on Tankersley's paying all the accumulated interest, costs and

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expenses, since the sale. If defend\*ants, Caruth and Thomas Tarrant, had felt as much respect for justice, as they pretended for this court, they would not have acted in this manner. If they were conscious of having done right, they had nothing to fear, and should have paid the money and stopped these expenses: If wrong, they should not have added this step to the other wrong. I cannot therefore allow them one cent for interest, costs, or expenses, incurred since the sale.

It is therefore ordered and decreed, that the defendants Caruth and Thomas Tarrant, who alone took any active part in these transactions, do account before the commissioner in equity for the amount of the sums



of money which they agreed to give for the three negroes they purchased of James Tarrant, the agent of Tankersley, and the cash paid by James Tarrant. And that in that account they have credit for the debt really and bona fide due by Tankersley to Cunningham, at the time of the sale in March, 1805. Also such expenses as were actually paid for the seizing and detention of the said negroes, for goalers and sheriffs' fees. Also one counsel fee for the defence of said causes. And that if there be any balance due by the said defendants on the purchase of the said negroes after allowing these credits, they pay over the same to the complainant—and that defendants do deliver up the mortgage to said Tankersley. It is also ordered and decreed, that as the necessity of coming into this court arose almost entirely from the defendants, Caruth and Thomas Tarrant, unnecessarily setting up for sale so many negroes in a lot more than sufficient to pay the debt, and from their withholding the payment of the debt to Cunningham after the sale,—they pay all the costs of this suit out of their own private estates.

There was no appeal from this decree.

Farrow and Saxon, for complainant. And Shaw, for defendant.

#### 4 Desaus. \*53

\*Case IX.

STARLING TUCKER v. GEORGE GORDON, JOHN F. GRIMKE, DAVID OLYPHANT, and WM. TENANT.

(February, 1809.)

Union, Pinckney District.—Heard by Chancellor Desaussure.

[*Vendor and Purchaser* ⚡334.]

A creditor of an estate, who had a judgment, was proceeding to enforce it.—He agreed through an agent by letter, with a third person, that he should become the purchaser at a fixed price. This was done, and the purchaser paid the money to the creditor; but he was afterwards evicted by another claimant. The creditor was apprized of the outstanding title on which the eviction took place, at the time he authorized the agreement for the sale, but did not communicate it to the purchaser; who, however, received some information of the claim from others. The purchaser is entitled to recover back from the creditor the purchase money and interest, though he took the sheriff's title without warranty.

[Ed. Note.—Cited in *Snelgrove v. Snelgrove*, 4 Desaus. 282.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 969; Dec. Dig. ⚡334.]

The bill was filed in this case to obtain relief under the following circumstances: Judge Grimke held a judgment by assignment against the estate of James Olyphant, deceased, of which George Gordon was administrator. A tract of land of 300 acres, was levied on by W. Tenant, sheriff of Ninety-

Six district, under an execution issued out to enforce the said judgment.

Gordon, as the agent of Judge Grimke, agreed with the complainant, who was desirous to purchase the land, that he should have it at £100 but that the land must be put up to sale, under the judgment and execution; at which he should bid the land in. And Gordon, by the authority of Judge Grimke, wrote to the sheriff, that such an agreement was made for the sale of the land to complainant for £100 but that it was the judge's wish the land should be sold under the execution, and the private bargain could then be carried into effect. The land was accordingly put up for sale in February, 1798, under the judgment and execution, and complainant became the purchaser at the nominal price of £60 but conformably to the private agreement gave his bond to Judge Grimke, conditioned for the payment of £100 which has since been fully paid off. The complainant objected to receiving the sher-

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iff's title without warranty. But the \*sheriff said he never gave a warranty in his titles. And he produced the letter of Gordon, the acknowledged agent of Judge Grimke, stating the private agreement; and expressed his opinion that complainant would be safe under that. It was proved that the complainant had heard, before he purchased the land, that one Bell had set up some claim to the land, but was assured that Bell had no real title, and that he might safely become the purchaser; more especially as he would be entitled to be reimbursed his money if he should even be ejected.

Bell afterwards instituted a suit against the complainant for the land, and obtained a verdict establishing his title to the same in the year 1800.

The complainant gave notice of such suit to Judge Grimke and Gordon, and required them to support the title; but they did not take any steps for that purpose. Bell's title was founded on a purchase made by him from James Olyphant. He paid part of the purchase money, and took a receipt for the same expressive of the object of the payment, and he had possession of the land. The conveyances were not delivered to him, but were reserved till the payment of the balance. It appeared from a written memorandum in the hand writing of Judge Grimke, which was in evidence, that he was apprized of the sale of the land by Olyphant to Bell: But as he had not paid the balance of the purchase money, and the titles had not been actually delivered to him, he did not think he had a legal title to the land; but the verdict of the jury established his title as above stated.

The complainant demanded reimbursement of the money he had paid for the land, and the expenses he had incurred in defending

the title; but this being refused, he brought suit at law against Gordon, which was finally decided against him; and he then filed his bill in this court for relief, against the present defendants.

The cause came to a hearing before Chancellor Desaussure, and was fully argued by Mr. Farrow, for complainant, and Mr. Gist, for defendant.

After the argument, the court delivered the following decree:

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\*I have considered this case, together with the arguments of counsel, and I have had great difficulty in making up my judgment upon some points of the case. It appears clearly that Mr. Gordon, the agent of Judge Grimke, had a communication with Mr. Tucker, the complainant, relative to the sale of the land in question, and that an agreement was made between them, that Tucker should buy it for £100 and pay part cash, and give his bond for the remainder: That in order to get a title, the land should be sold by the sheriff, under the execution, and that let it be bid in by Tucker at whatever price it might, the above agreement was to be carried into execution. The letters produced in evidence, shew that a private agreement had been made with Tucker, for the sale of the land. Tucker bought in the land for less than £100 at the sheriff's sale; yet he paid £70 down and gave his bond payable to Judge Grimke for £30. The circumstance of his taking sheriff's titles, does not repel the allegation, that there was a private agreement, for that was done because neither the administrators of James Olyphant, nor the holders of an execution against his estate, could make a legal title to the land, and the letters refer to a sale by the sheriff, as the means of getting a title. Nor does Tucker's taking the sheriff's title without warranty evince that by the private agreement he was not to have a warranty; for the sheriff wisely refused to give a warranty which he was not bound officially to give. The reluctance of Tucker to receive the sheriff's title, without a warranty, carried so far as to demand back his money, shews that he was under an impression that he was to have a warranty; and the very circumstance of an out-standing claim on the land, which it was proved was known to both parties, must have made him more desirous to have a warranty, especially as he was giving a full price for the land, and more than any body else would then give, as the weight of testimony seems to establish. But he was persuaded by Mr. Wright and Mr. Tenant, not to hesitate, as doubtless Judge Grimke and his agent Mr. Gordon, would support him in his title, and reimburse

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him in case of the loss of the land. \*They do not appear to have given this opinion, mala fide, but as they seemed to have honestly thought it would be just between man and

man, and which they presumed would be done. Tucker was at length induced to take the sheriff's title without warranty, though reluctantly, and evidently under an impression that he would be protected in the title by the defendants, Judge Grimke and Mr. Gordon his agent. What were the real and exact terms of the private agreement for the sale of the land, relative to a warranty from them, the complainant has not been able to make out by legal proof. But it is contended, that as Judge Grimke in his letter, and Gordon in his, mentioned that they had sold the land to Tucker, and as the price agreed to be paid and actually paid, was the full value of the land, that this contained an implied agreement, that the party so selling and receiving the benefit of the purchase money, should give a warranty, and reimburse the buyer in case of loss of the land sold. It does not appear to me, that I should be justified to go so far as to say that the expression, I sell, or have sold, carries with it the force of an implied agreement to warrant the title; especially as the statute of frauds requires contracts, relative to lands, to be in writing, and of course all the essential part of the contract; more especially in a case where the party appears to have agreed to receive sheriff's titles, which are generally known to have no clause of warranty; and he has not furnished any legal proof, that there was any express stipulation, that the defendant Judge Grimke, or his agent Gordon, would super-add any engagement to support the title. The court would always lay hold of slight circumstances of consent or contract coming in the shape of legal proofs, to oblige the party selling to warrant, for it is the justice of the case, that he should warrant when he receives a full price for the property. It is however contended, that independently of any contract, there arises an equity for the complainant to be reimbursed the money paid and the interest, upon the failure of the consideration on which the money was paid. In this case it does appear that the consideration has

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failed, \*and we must now enquire if there is such an equity in this case in favor of the complainant as this court can enforce, and decree him reimbursement of the purchase money. The complainant's counsel produced several cases which lay down the principles very clearly, 1 Fonbl. 361, where it is said, that as a covenant without a consideration is null, it is the same thing if the cause or consideration happen to cease; so that in all reciprocal contracts, there is a warranty in equity, though not in law: and from the following words of the text of Fonbl. it is evident that the writer of that text meant covenants relative to lands as well as goods: and in the notes of Fonbl. to the above text, there are many cases mentioned in which courts of equity appear to have recognized the failure of the consideration as the subject



of relief. By an anonymous case 2 Ch. Ca. 19, Finch, lord chancellor relieved from the payment of the purchase money, the purchaser being evicted. The vendor had covenanted only for himself, and all claiming under him; and the eviction was by one claiming by a title paramount to the vendors. This is a case in point, and relates to land; but its authority has been greatly questioned by subsequent reasonings and adjudications, which declared the principle dangerous and tending to unsettle and enlarge men's contracts beyond their meaning, and even by making new contracts for them. See the notes in 1 Fonbl. 365, 6, &c. See also Douglas 655, case of Bree v. Hubbock, where it is settled at law, that the assignor of a mortgage was not liable in an action for money had and received, when the mortgage totally failed, the assignor not having covenanted for the goodness of the title, but only that neither he nor his testator had incumbered the estate, and it being incumbent on the assignee to look to the goodness of it.

I have examined the case cited from Peak 229, (which is very strong) 2 Term Reports 367, 9. 2 P. Wms. 219, which all go to establish the principle, that where the consideration fails the party suffering is entitled to reimbursement; and the cases cited by defendants' counsel; and I have weighed them

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with great anxiety. The \*result in my mind is, that the principle reasonably qualified to guard against abuses is a sound one, and that reimbursement ought to be given to the party suffering by the failure of the consideration by him who received the money for the object which has failed, unless there has been a positive contract limiting the responsibility. And this appears to me to be applicable as well to cases relating to land as to personal estates; for the argument drawn by counsel from the statute of frauds does not apply; for it is not a question whether a parol agreement relative to land shall be enforced contrary to the statute; but whether in a case where an agreement relative to lands has been executed, and the condition fails by the eviction of the land, the party losing it is not entitled on equitable principles to reimbursement from him who received his money; it is clear of the statute in my opinion; and I do think the equity is with the complainant on the general principle; and that this court might safely give the relief prayed. But it is alleged that in this case the complainant had notice of an outstanding claim on the land, and was warned of it and bought with his eyes open, and at his own risk, and that therefore he is not now entitled to reimbursement. Two credible witnesses swore that they informed complainant of the outstanding claim, not as a light rumor, but as a certain thing. I think therefore that he should have been more cautious of buying, or if he did he should have protected himself by a special

contract, to guard against the probability of loss. But on the other hand it is contended for complainant that the defendant, Judge Grimke, knew that Olyphant had sold the land to Bell, and did not give information of it to Tucker previous to the sale, and that he was bound to do so on all equitable principles; and I am clearly of opinion that he was bound to have disclosed that fact, for though he might think it immaterial, because Olyphant had never given titles for the land to Bell, but reserved them till the whole purchase money was paid, yet he should have communicated the fact to Tucker, that he might have judged for himself, and decided whether under the circumstances he would go on with the purchase.

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\*Upon the whole, after the maturest judgment I have been able to form on this case, I am of opinion that the defendant, Judge Grimke, is not entitled in conscience and equity to keep the money received from the complainant on a consideration which has failed, especially as he knew there was a doubt as to the title to the land which he directed to be sold, and did not communicate it to Tucker, who might on his part disregard information of an outstanding claim, when the defendant, a gentleman of legal learning and high character, thought so little of it as not to think it worth while to communicate it to him, which he assuredly would have done if he had deemed it important. As to Gordon, he was a mere agent, and has done nothing to make himself liable. As to Tenant and Olyphant, there is no shadow of claim against them. It is therefore ordered and decreed, that the bill be dismissed as to the defendants Tenant, Olyphant, and Gordon, with costs of suit. That defendant, Judge Grimke, do pay the sum of money received by him from Tucker from the sale of the land with interest for the same. As to the cost of suit, as the complainant's case has been sustained with great difficulty and doubt by the court, and he is not wholly clear of censure for purchasing after the information he received, I think the complainant and defendant Judge Grimke, should each pay his own cost, and it is so decreed accordingly.

From this decree there was an appeal, by the defendant Judge Grimke, on the merits of the case; and from the complainant Tucker, on the question of costs.

November, 1809.

The appeal was fully argued by Mr. Gist and Col. Blanding for the appellant, Judge Grimke, and by Mr. Farrow for the respondent Col. Tucker.

The court of appeals, present Chancellors James, Thompson, Desaussure, and Gaillard, made the following decree:

"After a full investigation and consideration of the decree pronounced below, in this



case, it is ordered and adjudged, that the same be affirmed; except as to the costs expended by the respondent, Starling Tucker, in the court of equity, which shall be paid by the appellant J. F. Grinke."

#### 4 Desaus. \*60

\*Camden.—Heard by Chancellor James.

BARTON HARRIS, Appellant, v. GILBERT DINKINS, JOSEPH BROWN, JOHN R. CARTER, and Wives, Respondents.

(June, 1809.)

[*Executors and Administrators* ⚡297.]

Receipts given by heirs and distributees of an estate, to an administrator, for their shares of the estate, shall not be presumed or construed to extend to their interests in the real estate, unless distinctly expressed; especially where the money received is greatly inadequate to their shares.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1201; Dec. Dig. ⚡297.]

[*Evidence* ⚡441.]

Parol evidence not admissible to extend the meaning and operation of such receipts, by stating that it was the intention of the parties to release their interests in the real estate, particularly where the parol evidence offered is dubious and uncertain.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1842; Dec. Dig. ⚡441.]

Gilbert Dinkins, Joseph Brown and John R. Carter, who had married daughters of John Harris, deceased, filed their bill against Barton Harris, son of the said John Harris, who has possessed himself of his father's real estate, and has also administered on his father's personal estate, for an account of the rents and profits of the real estate, and for a partition and division thereof among the complainants, and the said Barton Harris.

The bill charged that John Harris was seized and possessed of a real and personal estate, and no will having been produced and established, the children of the said John Harris, were entitled to equal shares of said estate under and by virtue of the act for abolishing the rights of primogeniture, enacted in February, 1791.

That John Harris, besides two tracts of land of which he had the legal title, had contracted with John Abbot, for another tract of land, and paid him part of the consideration money for the same; and John Abbot dying soon after, his son and heir, Henry Abbot, executed a bond on 26th July, 1790, by which he bound himself to make titles to the said John Harris. That Barton Harris hath since the death of his father John obtained conveyance of the said land from the said Henry Abbot to himself, and in his own name, to the

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exclusion \*of his sisters; and he refuses to account to them for the rents and profits of

said real estate, and to divide the said estate according to law.

The defendant in his answer insisted that he had settled with the complainants for their respective shares in the real and personal estate of their father, John Harris, deceased; and that he was not liable to their demand.

At the hearing of the cause, the defendant produced and relied upon certain receipts given him by the complainants respectively for their several shares in the said estate, which are more particularly noticed in the decree.

The complainants insisted that these receipts related only to the personal estate. The defendant then offered parol evidence to prove that though these receipts did not express to be in full for the share of the complainants in the real estate, yet it was intended to be so; and that if the receipts were defective in expressing the real estate, the omission was by mistake, and that the complainants had repeatedly made declarations to other persons that they had sold their shares in the real estate to the defendant, and that the receipts were intended to comprehend the same. The admission of this parol evidence was objected to as contrary to the statute of frauds; such evidence relating to their interests in real estate, and to an alleged release of their rights therein.

The judge permitted the evidence to be given, without prejudice, but afterwards decided that the same was not admissible, and could not be used in the cause.

It appeared at the hearing that the defendant had settled fully with J. R. Carter and his wife, for their share of the real and personal estate, and their names were struck out of the bill with their consent.

After the hearing Judge James delivered the following decree:

In the investigation of the question arising out of the receipts alleged to have been given by the complainants in full for all their claims and interest in the real, as well as the personal estate, the court will consider first, whether sufficient appears upon the face of them to carry both real and personal estate? And

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secondly, if they are \*not sufficient for that purpose, whether parol evidence can be admitted to supply parts of them which were intended to be inserted as is alleged, but were mistaken or misapprehended by the drawers of them.

1st point. As to the construction. And as the receipt from Gilbert Dinkins was stated by defendant's counsel to be the most full and complete, we will first consider that. It is as follows: "Received 14th March, 1794, from Barton Harris, administrator of the estate of John Harris, his note of hand, for four like-ly cows and calves, which when paid, will be in full for my claim against the said estate,

as heir and son-in-law to the said John Harris, deceased, and all other demands whatever, except a pair of side lines, borrowed by me, of Mr. Hooper, for the use of the estate."

The most comprehensive words in it, are, "will be in full for my claim against the estate, and all other demands whatever." Now if these words were to be taken in the strict legal sense, unconnected with other words, there could be no doubt as contended by defendant's counsel but that they would carry the real estate also. The words "in full of the estate," signifying all that the releasor could possibly grant or was entitled to. But there are other words in the release, which must defeat their operation in the extent contended for; these are, "Received from Barton Harris," &c. as administrator of the estate; it is plain that Barton Harris the releasee, had no power over the lands to do any legal and efficient act respecting them. Therefore the receipt must be confined to the extent of his powers as administrator, and in a strict legal sense cannot be construed to include the real estate. The court, however, thinks the receipt from Joseph Brown more full and comprehensive, than the one from Gilbert Dinkins. The words are "Received, September 3d, 1798, Barton Harris twenty-five pounds sterling, it being in full for my share of the estate of John Harris, deceased, which I became entitled to in consequence of my marriage with Sarah Harris. Witness my hand and seal. Joseph Brown."

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\*Here it is to be observed that the release is not taken from the defendant as administrator, and that it is "in full of his share of the estate of John Harris, deceased, to which he became entitled in right of his wife." In a strict legal sense, therefore, this receipt would seem to include the real estate. But there are two circumstances which induce the court to think that the lands were not in the contemplation of the parties at the time of making the release. The first is to be collected from the face of the receipt, and, indeed, is applicable to both of them. It is the great inadequacy of the price contained in them. The second arises from matter extraneous, and is the meaning generally annexed to the word estate in common parlance. Inadequacy of price has not, indeed, been considered in equity, as a sufficient ground to set aside a contract, which otherwise has been fairly made; but where a contract is uncertain as to its extent, and may include one or the other of two subjects, there inadequacy of price is a strong ground to conclude that men of common sense would ever intend to part from the whole of their rights to both where the price was grossly inadequate. The lands in question contain 450 acres, and were, as the evidence states, never worth less than seven shillings per acre, and are now said to be worth ten dollars per

acre. Then it appears evident that the price contained in the receipts can bear no proportion to the real value of the lands and personalty both, at any given period. Those prices, however, do appear to be proportioned to the personalty alone, which each complainant was entitled to, and therefore it may be reasonably concluded that the receipts were intended to extend no further. The other circumstance weighing somewhat with the court, arises from the use of the word estate, in common parlance; and this, it is pretty well known, is not fixed and technical, but may mean real or personal estate, or both together. These instruments were not drawn by legal men, and since, if they were to be extended to both real and personal estate, it would produce a gross inequality in the distribution of the property, it appears to be most equitable to confine

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their \*construction to one or the other. There is another reason why it should be confined to personal estate: The powers vested in the releasee, by law as administrator, relate to the personalty, and it is not to be presumed that he was acting beyond the authority which was vested in him. In this point of view, whether the capacity in which he acted be expressed in the body of the receipt or not, it can make little difference, the presumption still is that he acted as administrator. As to the form of these receipts, the court will observe, that although no exact form of words would have been necessary to carry the real estate, yet it appears the receipts want substance. Had they been made to defendant as heir, or contained the words real and personal estate, then there would have been little doubt.

Next as to the second question—whether parol evidence can be admitted to supply parts of these receipts which were mistaken or misapprehended by the drawers of them? On this ground the court is of opinion, that, in certain cases where the object is not to add to or vary the contract, such evidence might be admitted, but if the evidence is to prove a mistake in the drawers, to avoid that perjury which the statute is so careful to prevent, it ought to be the highest nature of the case would admit of, and confined to the drawers themselves or some other persons present when the instructions were given. It ought not to rest upon the vague declaration of the parties concerning the agreement that is to be made, or has made in writing; nor does it seem that it should depend upon the vague recollection of witnesses, without some memorandum in writing. For to admit evidence so uncertain would be to encourage that perjury which the statute would guard so carefully against. Mr. Horan, one of the drawers, does indeed state, "that he was under an impression, that the claim to the real estate was included; but he also states, that he has no particular rec-



ollection of the understanding between the parties." This evidence therefore is not conclusive, and Mr. Bay, who drew the other instrument, has not been examined, although it appears to be essential. For these reasons

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\*therefore the court is of opinion, that the parol evidence now offered should not be admitted, as tending to vary the contract, and not such as is admitted by law. The court likewise thinks that defendant should be considered as a trustee for the complainants of the Abbot tract, and that complainants are still entitled to their shares respectively of the other lands, notwithstanding the receipt. Therefore upon the complainant's paying up the defendant one half the monies laid out by him in paying for the Abbot tract with interest, let him make them titles to their respective portions of the same in right of their wives, and also for the other lands; and let him pay up their proportions of the rents and profits of the whole lands—and also let it be referred to the commissioners to report the sums to be paid by each respectively, and to approve of said titles.

W. JAMES.

#### 4 Desaus. 65

##### Case XI.

Camden.—Heard by Chancellor James, and afterwards by Chancellor Desaussure.

W. & H. LENOIR v. RICHARD WINN, H. HUNTER, Administrators of Thomas Baker & Co., Securities for Each Other in the Administration.

(June, 1809.)

[*Executors and Administrators* ⇨506.]

An executor or administrator omitting to plead, but allowing judgment by default, this is not such an unqualified admission of assets, as to make him irrevocably chargeable. This court will give him an opportunity of shewing the fact, and will decide accordingly.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2169–2177; Dec. Dig. ⇨506.]

[*Executors and Administrators* ⇨269.]

The state taking a particular security, a mortgage, does not lose its general priority in cases to which it is entitled by law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 941; Dec. Dig. ⇨269.]

[*Executors and Administrators* ⇨265.]

An administrator paying debts out of their legal order or proportion, is liable to creditors; and he is not allowed to retain for debts due to himself more than his proportion.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1013; Dec. Dig. ⇨265.]

[*Executors and Administrators* ⇨104, 125.]

Executors and administrators are not liable for each other's acts, unless there be connivance or gross negligence—executors and administrators are bound to pay interest on monies of the

estate received and not applied in due time to the payment of the debts of the estate.

[Ed. Note.—Cited in *Johnson's Adm'rs v. Johnson's Ex'rs*, 2 Hill, Eq. 293, 29 Am. Dec. 72; *O'Neill v. Herbert*, Dud. Eq. 33; *Gates v. Whetstone*, 8 S. C. 246, 28 Am. Rep. 284.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 424, 522; Dec. Dig. ⇨104, 125.]

[*Subrogation* ⇨31.]

Administrator having neglected to pay a judgment debt due by his intestate, and having paid inferior debts, the surety in the bond hav-

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ing \*been obliged to pay it off, he is entitled to be paid by the administrator out of his own estate, as a judgment creditor; and in such case, the surety is not chargeable with laches, because he did not insist on the principal being urged.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. § 83; Dec. Dig. ⇨31.]

[*Appeal and Error* ⇨1178.]

The court of appeals will grant leave to complainant to amend his bill, in order to let in the whole merits of the case; and will send the case down to be re-examined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604–4620; Dec. Dig. ⇨1178.]

[*Executors and Administrators* ⇨453.]

[It seems that judgment against an administrator is conclusive evidence of assets only when rendered upon a simple contract debt, where there are also specialty debts.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1903½; Dec. Dig. ⇨453.]

This case was argued, and the following decree was made thereon, by Judge James:

This case comes before the court on exceptions to the commissioner's report, made both by the complainants and the defendant, Richard Winn, and as the report and exceptions are very brief, for a right understanding of them, it will be necessary to make a short statement of the case:

The bill sets forth that in August 1783, Thomas Lenoir, the father of complainants, became security to a bond, in which Thomas Baker was principal, which was made to John C. Smith, and conditioned for 563*l*. 6*s*. 6*d*. That in June, 1789, Thomas Baker died, and the defendants, Richard Winn and Henry Hunter, administered upon his estate; that in January, 1790, they made a sale of his personal property to the amount of £752. 3*s*. and became themselves the principal purchasers; that afterwards John C. Smith, sued the said administrators upon the bond, and obtained judgment and sued out his execution; that several tracts of land were sold under said execution to the amount of £353. That John C. Smith assigned the said bond to W. and T. Somersall, and that a judgment has been obtained against the executors of Thomas Lenoir, deceased, upon the same, and execution pressed against his estate.

Bill further states that Richard Winn and Henry Hunter have rendered no account of



their administration of the estate of Thomas Baker, and have wasted the same, and that Henry Hunter has removed out of the state to the river Mississippi.

Complainants pray that the said Richard Winn and Henry Hunter, may be compelled to make a discovery of what sums belonging

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to the estate of Thomas Baker \*came into their hands to be administered, and that they may be directed to pay to them the balance, if any remain, out of the estate of the said Thomas Baker, as far as it will go, and the residue out of their own estate.

The defendant, Richard Winn, states in his answer that he believes complainant's father did enter into the said bond to John C. Smith, as security, and Thomas Baker as principal. He admits that he and Henry Hunter administered upon the estate of Thomas Baker, and sold property to the amount of £752. 9 s. and that he collected two other debts to the amount of £54. 19s. 9d. making in the whole £807. 8s. 9d. In his exhibit A, he makes a statement of the bonds and notes taken for the property of Thomas Baker, sold by the administrators, and states that he placed those papers in the hands of an attorney, Mr. Stark, to be sued, but he believes no part of them have been recovered by him. That the bond of Minor and John Winn, conditioned for £100. 11s. has been paid him by discount, with Minor Winn as the attorney of Man, Brown and Foltz. He admits that he purchased at the sale of his intestate's estate to the amount of £242. 2s. but that Thomas Baker was indebted on a bond to Waring, Winn and Hampton, conditioned for £132. 16s. which bond was the sole property of defendant, and that defendant ought to be allowed the whole discount made with Minor Winn on the bond of Man, Brown and Foltz, and be also allowed to retain for the whole of his own debt. That Thomas Baker was indebted to the loan office by bond and mortgage in the penalty of £500.; that the lands mortgaged sold for only \$745, and defendant states that he is advised, that debts due to private persons, must be postponed to this debt due to the state, and that he is entitled to retain money in his hands to meet the said debt; that the bond of Roach to John C. Smith has been paid; that Henry Hunter purchased at the sale of his intestate's estate to the amount of £172. 14s. and that he has absconded from the state, and that defendant ought not to be made liable for this debt, as not having it in his power to prevent his purchasing at the sale, or to stop him from going away.

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Defendant admits that \*John C. Smith sued the administrators upon the said bond of Thomas Baker, and proceeded to execution as stated in the bill, but submits that he has nothing in his hands to satisfy the said debt. He admits that he hath not made reg-

ular returns to the ordinary, but that he hath now filed a full account, with his answer, by which it appears he hath not wasted the estate of Thomas Baker, and therefore, that he ought not to be liable for the deficiencies of the same out of his own estate.

Upon the statement of accounts in this case, the commissioner has charged the defendant with £807. 8s. 9d. amount of sales of the estate of Thomas Baker, and monies collected by the defendant, and has given him credit for the full amount of the debt and interest on the debt to the loan office, and for the average only on the bond of Thomas Baker to Waring, Winn and Hampton, and to Man, Brown and Foltz. Upon the balance he has charged defendant with interest from Sept. 1801 to June 1809.

To this report the complainants and defendant have filed the following exceptions, which the court will take up in the order that they occur:

First exception of complainants.—“Because the commissioner has not allowed a priority to complainant's demand.”

It appears that this exception is intended to be extended no further than to a claim of priority against the debts of private persons, for in the third exception the claim of priority as it regards the state is particularly mentioned; and here it does not appear that the complainants have stated any legal ground in their bill by which they are entitled to a priority, and the court will not travel out of it to search for one. It was indeed stated in argument, that John C. Smith had obtained a judgment on the bond of Thomas Baker in his lifetime, and that he afterwards renewed it by sci. fa. against the administrators; but if complainants wished to have the advantage of this judgment, it ought to have been stated in their bill, and an opportunity afforded the defendant to have pleaded or answered to it; without this, there is no knowing what the answer would

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have been. As the matter now stands, it appears that judgment was obtained upon a bond, against the administrators of an intestate, who owed other bonds; the latter bonds are, therefore, upon an equal footing with the former one, and this exception must be overruled.

Second exception.—“Because the admission in the answer that judgment was had against the defendant, is an admission of assets to the amount of that judgment.”

The judgment in this case appears to have been obtained in Charleston, against defendants residing in Fairfield district, after a return of two nihilis upon a sci. fa.; and the defendants, from the nature of the case, could have no notice of it till the execution was sued out and levied upon the property of the deceased. Whether such a proceeding be regular or not, under the laws of this

state, the court has great doubt: but it will not hesitate to say, that it would be inequitable to compel a defendant to pay out of his own pocket, for default of pleading in such a case. However, after looking into the books of practice, the better opinion seems to be, "that in case an action is brought upon a simple contract, or the like, and there be debts due to others upon bonds and specialties unsatisfied, in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate."—See Shepherd's Touchstone.

Now it would appear from this authority, that an executor or administrator, is only bound down to such strictness in pleading where there are debts of an inferior and superior degree; but in the present case the debts are all of the same degree by specialty, and from the death of the intestate were to be paid in the same order. The rule must have been grounded upon the advantage that creditors of an inferior degree would obtain in some cases by having judgment not subject to such a plea, but here the plea can make no difference, nor the judgment give any advantage further than to bring forward the property to a sale, and to push the other specialties. For these reasons, therefore, let this exception be over-ruled.

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\*Third exception.—"That the debt to the state being secured by mortgage, the state had chosen its own security, and could not resort to the personal estate in preference to the other demands."

On this exception the court has a strong leaning in favor of it, for the reason therein stated; but the act of assembly appears to be imperative: Therefore, without being able to give any other reason for it, the court considers itself as bound to say *ita lex scripta est*, and to overrule the exception.

Fourth exception.—This depends upon the same principle with the last, and must be over-ruled.

Next, as to defendant's exceptions.

First exception.—"Because the defendant ought to have been allowed the whole amount of the debt to Man, Brown and Foltz."

Defendant has discounted this debt with Minor Winn, in the manner stated in the answer; but if he had ever paid it out of his own pocket, as there were debts of equal degree, all he could have claimed from creditors would have been the average. This exception is therefore over-ruled.

Second exception.—"Because the commissioner ought to have allowed defendant to have retained his own debt to the whole amount of the bond, and not in average."

The act of assembly, Pub. Laws, p. 202, relied upon by complainant's counsel, seems to

be very clear upon this point, that the administrator cannot retain the whole of his debt, but only in average and proportion with the other creditors; therefore, let the second exception of defendant be over-ruled.

Third exception.—"Because he ought not to have been made liable for the property purchased by Hunter."

While the authority of the cases of *Bague v. Blacklock*, and *Howell and wife v. administrator of Carpenter*, continue to influence this court, it will never decree upon an administration bond which has been brought only incidentally before it on a bill for a discovery filed against the administrator; on the bond there is a remedy at common law; on the discovery the redress is in equity. In

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\*equity then, the administrators can only be recognized in their official capacity, and acting as such; at law, they are obligors and co-securities in a bond, and, no doubt will be both equally liable. But, to make them liable here, there ought to have been shown some privity between them, or some connivance of the one at the illegal acts of the other. But no privity can exist, otherwise an action would lie against one at the suit of the other, and that is not pretended, nor has any connivance been proved. Each had it in his power to sell; to bid at the sale (though perhaps not strictly legal) and to take the property purchased into his possession. There then was no connivance necessary on the part of the one to enable the other to do acts which he had it in his power to do without his assistance.—2 Bro. 117.

Neither has it been attempted to prove that the defendant before the court, connived at the absconding of the other, and his taking away the property. The contrary is sworn to in the answer. For these reasons, and upon the authority of the case of *Chamneys v. Brown*, (Barnes' notes of cases, 440) and the authorities there cited, the court is of opinion that the defendant, Richard Winn, should not be made liable for the acts of his coadministrator, Henry Hunter, at least under the present form of action. Therefore, let the third exception of defendant be sustained.

Fourth exception.—"He ought not to be made liable for the interest."

It has been the practice of the court of equity in all such cases as the present to allow interest; and the defendant has not shewn any good reason in his answer why he should be entitled to any extraordinary favor of the court. Therefore let this fourth exception be over-ruled, and let the defendant be decreed to account with the commissioner upon the principles above stated.

W. D. James.

From this decree an appeal was made, and at the sitting of the court of appeals, at Columbia, in Nov. 1809, the general tenor of the



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decretal order was ap\*proved by the court; but it appearing to the court, from the statements of both parties, that there were important facts, material to the justice of the case, which were not stated by the bill, nor answered by the defendants, for which reason the judge sitting in the circuit court had not felt himself at liberty to admit proof of such facts, it was therefore ordered, that the cause be sent down to the court below for trial, without prejudice to either party, and that the complainant have leave to amend his bill, on payment of the costs of amendment.

In pursuance of the leave granted by the court for that purpose, the complainants amended their bill, by stating the material facts, which had been omitted, in the original bill. The amended bill not being answered, an order to take the bill, *pro confesso*, was granted previous to the court in February 1810, at which term the defendant, Winn, obtained leave to set aside the said order, on condition that he should answer on or before the sitting of the court in June 1810. At the sitting of the court at Camden, the cause came to a hearing before Chancellor Desaussure, on the report of the commissioner and exceptions thereto; which were as follows:

I have examined the accounts in this case, and find that the defendants have received of the personal estate of Thomas Baker, sundry large sums, which, after deducting the debt due the public, and interest, and also the payment made by them on the judgment in favor of John C. Smith, amount with interest thereon to 15th February, 1808, to eleven hundred and twenty-eight pounds, twelve shillings and eleven pence. That on the said 15th February, 1808, this honorable court fixed the balance due on the judgment in favor of J. C. Smith against the defendant's intestate, including interest to that day, at one thousand and seventy-five pounds, thirteen shillings and seven pence; on the said last mentioned sum of £1075 13s. 7d. I have calculated interest to this day, and report the amount of principal and interest to be five thousand three hundred and sixty-three dollars, seventeen cents.

B. Bineham, Com.

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\*To this report the following exceptions were filed by the defendant's counsel:

First.—Because the commissioner had not allowed the defendant, Gen. Winn, the payment made to bond creditors; and also, the sum retained on the bond due to himself.

Second.—Because the commissioner made the said Gen. R. Winn, liable for monies received by his co-administrator, Hunter, which never came into his hands.

Third.—Because the commissioner allowed interest on the sum reported to be due to the complainants.

The foregoing exceptions were over-ruled by the commissioner; and were brought up for the consideration of the court. After argument, chancellor Desaussure pronounced the following decree:

This case came on upon the commissioner's report, and exceptions thereto. In the argument of this case, the counsel took a much wider range than the questions made by the report and exceptions; and it was contended, that Gen. Winn, the principal acting administrator, did not know at the time of Baker's death, that the debt of J. C. Smith, was the proper debt of Baker alone, to which Mr. Lenoir was only security; and that there has been great laches in the Lenoirs in their not pursuing their claim for redress, during which Gen. Winn had applied the assets of the estate to pay other bond creditors, and especially some bond debts due to himself. And it was further contended, that Lenoir only being security for Baker, his representatives, even if they had paid the debt, could not recover as judgment creditors, on the ground of judgment having been obtained against Baker by the original creditor, but could recover only as simple contract creditors for money laid out and expended. And that though the original creditor might have called Gen. Winn, as administrator of Baker, to account for the misapplication of the funds of Baker, the security could not, at least not to the same extent and with the same effect as the creditor might have done. Before we consider the commissioner's report, and the exceptions to it, it is proper

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to examine and decide upon these questions made by the counsel. On examining the answer of Gen. Winn, it appears that he does admit that the debt of John C. Smith was the proper debt of Baker alone. It is true he does not state when he came to that knowledge; but he does not allege that he had made an appropriation of the assets of Mr. Baker before he came to the knowledge of that fact, which he certainly would have done, if the fact would have warranted his doing so. But if the fact had been so, it would not have made any difference in this case, for it was a judgment debt which the administrator was bound to notice, and he could not legally or justly apply any part of the assets of the estate of Baker, to the payment of bond debts, or any other of inferior degree, until this judgment debt was totally paid off; nor does there appear to have been any blameable laches on the part of the representatives of the security, Mr. Lenoir. It is alleged that if they had insisted on the principal pursuing his demand against Baker's estate more vigorously, the security might have been relieved, if their remonstrances had not been attended to. This is true, but it does not follow that because the security did not seek relief from the debt by insisting on the creditor's pur-



suing the principal debtor with rigor, that the security loses his claim to be protected and re-imbursed, if he should ultimately be made liable to pay the debt. It would be a very harsh doctrine, and comes with a very ill grace from the principal, whose estate has been favored. But it is insisted that the security is not entitled to take the high ground of the original creditor, who had the bond and judgment, and must come in as a mere simple contract creditor. In many cases, if this doctrine prevailed, the greatest injustice would be done, and securities would be wholly ruined by their kindness to, and confidence in their principal, for whom they had consented to be bound. In this particular case the innocent and helpless children of Mr. Lenoir, the security, would be deeply injured by such a doctrine. It is indeed true, that this is the doctrine at law; the narrow rules and modes of proceeding in that court, prevent the judges there from giving the re-

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lief which they would be inclined \*to do. Hence the necessity of the interposition of this court, which being entrusted with larger powers and wider range of authority, is bound to exercise it to prevent so great an injustice as would result from the narrow legal doctrine. And this court has long exercised this power, to promote the purposes of justice, and has gone much further than this case. In *Burrows and Brown v. M'Whann*, administrator of Carnes, [1 De-saus, 409, 1 Am. Dec. 677,] decided in 1794, the court laid down the rule in the broadest extent. *Burrows, Brown and Carnes*, were securities for Banks in a large bond to Warrington, on which judgment had been obtained against them all. Banks was utterly insolvent; *Burrows and Brown* paid large sums on the debt; *Carnes* paid nothing and died leaving a good deal of property, but not enough to pay all his debts. *M'Whann*, to whom *Carnes* was indebted on bond as security for Banks, administered on *Carnes'* estate; and finding that *Burrows and Brown* had paid off almost all the debt to Warrington, he paid off the small balance on the judgment, in order to get satisfaction entered by the creditor on the judgment; then he retained the remaining funds of *Carnes*, to pay himself the bond debt due him. *Burrows and Brown* filed their bill to set up the judgment at law, notwithstanding the satisfaction entered on it, and to compel the administrator of *Carnes* to pay his proportion of the debt, before he should be allowed to retain what was due to him on his bond, and the court on full consideration gave the relief prayed for. This case is much stronger than the one now before the court, inas-

much as the relief was given to securities against a cosecurity, and not merely against a principal; and to give the relief it was necessary to revive a judgment on which satisfaction had been regularly entered, in order to let in the securities to the benefit of that judgment, and secure them a priority under its protecting wing. I feel myself bound then by the principles of equity, and by the decided cases, to give the relief demanded, and to support the claim of the complainants in this case. I must, therefore, confirm the commissioner's report, and agree with him in overruling the first exception made by the defendant's counsel.

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\*The second exception is more embarrassing. In many cases the law makes co-administrators liable for the acts of each other as well as for their joint acts; and if I saw any ground to believe that Gen. Winn, the co-administrator of *Hunter*, had acted improperly in this transaction, I should make him liable. But there is no proof that he has acted in that manner. The sale was made under the authority of the court. *Hunter*, the co-administrator, purchased at the sale, and soon afterwards and before the money was due he went off the state and carried off the property with him. There is no evidence to induce the belief that Gen. Winn was privy to this improper conduct of his co-administrator, and the court will not presume it. The interval between *Hunter's* purchase and his going off, seems to have been so short, that it would not be reasonable to impute laches to Gen. Winn in not having collected the money due by *Hunter* to the estate, especially as his co-administrator had as much right to keep the money in his own hands, for the use of the estate, as Gen. Winn, I feel myself, therefore, bound to support the second exception.

We come now to the consideration of the third exception, which relates to the allowance of interest to be paid by Gen. Winn on the assets received by him, and applicable to the purposes of the estate. Upon this question, I have no doubt Gen. Winn should have applied the assets, as soon as possible, to the payment of the debt to the public, and to the debt of *J. C. Smith*; not having done so, he had the use of them, and he is bound in conscience to pay interest thereon. The commissioner's opinion, overruling the third exception, is therefore confirmed.

Let it, therefore, be referred back to the commissioner, to state the accounts conformably to the principles of this decree.

Henry Wm. Desaussure.

Blanding for complainant. Nott for defendant.

## 4 Desaus. \*77

\*Case XII.

Laurens, Washington district.—Heard before Chancellor Thompson.

JOHN HUTCHINSON v. ROBERT HUTCHINSON.

(June, 1809.)

[*Limitation of Actions* ⇐12.]

The statute of limitations is not allowed to run in favor of a man who was employed to act as agent, but purchased for himself:—He is considered a trustee; and his employer shall be entitled to the benefit of the purchase.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 44; Dec. Dig. ⇐12.]

[*Frauds, Statute of* ⇐129.]

A defendant acknowledging in his answer, the contract relating to land, and the same being part executed, the case is thereby taken out of the operation of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 289; Dec. Dig. ⇐129.]

[*Principal and Agent* ⇐69.]

[An agent, employed by A. and B. to purchase land, made the purchase, and took a conveyance to himself, and afterwards obtained from A. his interest in the land. *Held*, that B. did not, by neglecting to pay his share of the purchase money at the stipulated time, forfeit his right to a conveyance from the agent.]

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 140; Dec. Dig. ⇐69.]

[*Specific Performance* ⇐41.]

[Where the answer to a bill for specific performance of a parol contract concerning land admitted the contract and a part performance thereof, it was *held* that the contract was not within the statute of frauds.]

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 120; Dec. Dig. ⇐41.]

The complainant filed his bill to recover from the defendant one half the amount of sales of a tract of land, which he had authorised the defendant to purchase on his behalf. But defendant had purchased the land in his own name, and refused to convey the land to the complainant, or to let him into any participation in the purchase. The defendant afterwards sold the land to a third person at a very advanced price, and received the money, and refused to account for the same.

The bill prayed for an account to be let into the benefit of said bargain.

The defendant in his answer admitted that he was employed by the complainant to purchase the land on his behalf, and that he did so, but took the title in his own name; and on his return home, proposed that it should be a joint purchase, which the complainant agreed to. But complainant not having for a considerable time raised his moiety of the purchase money, the defendant was obliged to raise the whole at great inconvenience to himself. That the complainant afterwards settled with him for a moiety; but he, defendant, had meanwhile sold and conveyed the land to another person. The defendant also pleaded the statute of

frauds: and the statute of limitations: and also demurred, because there was no affidavit annexed to the bill of complainant; that the memorandum in writing, mentioned and relied upon in the bill, relative to the said agreement, is not in the custody or power of the complainant.

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\*The cause came to a hearing before Chancellor Thompson, who delivered the following decree:

This bill was filed, for the purpose of recovering from the defendant one moiety of nine hundred dollars. The circumstances which led to this case were the following:—About the year 1800 or 1801, the complainant, John Hutchinson, together with one Samuel Stedman, employed the defendant, Robert Hutchinson, as their agent, to go to the state of Virginia, and purchase from a man of the name of Giass, a tract of land lying in Laurens district. That the said Robert Hutchinson accordingly went and made the purchase, but instead of taking the titles in the name of the complainant, which he ought to have done, he took them in his own name, for the avowed purpose, agreeable to his own declarations, to facilitate the division; entertaining no intention, thereby, to hold the said land, and exclude his brother, the complainant, from a participation therein. The complainant made frequent applications for a division to defendant, after he had become a tenant in common with him, by purchasing and assuming upon himself the interest which Stedman had in the purchase: but Robert Hutchinson, although he did not pretend to deny that John Hutchinson had a right to one half of the land, avoided by procrastination and equivocation making the division, until finally he sold the land to one Nicholls for the sum of nine hundred dollars.

The defendant contends first,—That John Hutchinson has no right to enforce a compliance of the contract from Robert Hutchinson, he himself not having performed the part incumbent on him to perform, viz. the payment of his proportion of the purchase money. The court is of opinion that this point cannot in any wise affect this case; but if it did, it has been sufficiently proven that John Hutchinson has paid and tendered the full amount thereof.

Secondly.—It is contended that the statute of limitations should prevail in this case: but it being evidently proven to the court, that Robert Hutchinson in the whole of this transaction, acted as trustee for John Hutchinson, the statute cannot prevail.

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\*Thirdly and lastly.—It is contended that this being a contract relative to lands, it is utterly null and void, without some memorandum in writing. To this point it is answered that defendant acknowledges the contract in his answer, and further that there



has been partial performance thereof, which takes the case wholly out of the statute. The court is therefore of opinion, that the complainant has supported his claim, and is entitled to the redress he requires. It is therefore ordered and decreed that the complainant recover of the defendant one half of the amount for which the defendant sold the land to Nicholls, with interest thereon from the time the money has been received, deducting therefrom such arrears as may appear to the commissioner to be due from the complainant to defendant for his half of the original purchase money; and that defendant pay the costs of this suit.

W. THOMPSON.

\_\_\_\_\_ for complainant. Farrow for defendant.

There was no appeal from this decree.

#### 4 Desaus. 79

##### Case XIII.

Abbeville.—Heard by Chancellor Thompson.  
HARRIET DEVALL, by Her Next Friend, v.  
MICHAEL DEVALL and Others.

(June, 1809.)

[*Husband and Wife* ⚭283.]

A wife ill used, beaten and driven from home by her husband, is entitled to the protection of the court, and will be allowed alimony, or the income of a settled property, for her maintenance until her husband receives her home and treats her kindly.

[Ed. Note.—Cited in *Rhame v. Rhame*, 1 McCord, Eq. 206, 16 Am. Dec. 597.

For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⚭283.]

[*Ne Exeat* ⚭12.]

Ne exeat granted, shall be continued until the property is secured.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. § 14; Dec. Dig. ⚭12.]

[*Husband and Wife* ⚭288.]

The court will not regard very slight evidence of impropriety of conduct in the wife, so as to withhold its protection from her. Marriage settlement supported.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1077; Dec. Dig. ⚭288.]

[*Contracts* ⚭259.]

[Where a person is competent to contract in law, a court of equity will not regard him as incompetent.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1153; Dec. Dig. ⚭259.]

The bill was filed to obtain alimony, and protection in the enjoyment of a settled estate, from a husband who was alleged to have ill-used his wife.

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\*The case was heard by Judge Thompson. After hearing the evidence and the counsel, the judge pronounced the following decree:

This bill was instituted for the purpose of recovering alimony from the defendant, Mi-

chael Devall, upon the suggestion of his having ill-treated, abused and driven from his house, the complainant Harriet Devall. It appears that a treaty of marriage had been entered into between the parties; that a marriage settlement which has been recited in the bill, had been duly executed, and the marriage solemnized. It further appears that they lived together in great harmony for some time, that afterwards altercations took place, which finally led to a separation. In order to form an opinion on this case, it is necessary to advert to the testimony which has been introduced relative to the conduct of the complainant, as that forms a very essential ingredient. The witnesses who have testified to that fact, concur in saying that she uniformly acted with propriety and attention towards Michael Devall, so far as they knew; and in fact it was admitted by the defendant in several conversations, that she was kind and affectionate, and that they could live happily and contentedly, were it not for the interference of his children by a former marriage. The next subject for the enquiry of the court, is the extent of the abuse which Mrs. Devall received from her husband; for the purpose of ascertaining whether she was compelled or had sufficient justification for leaving the house; and on this point we must have reference to the testimony of Miss Lucy Parsons: She says, that on Christmas day, the defendant sent for the witness, that a disturbance arose between him and his wife; that Michael Devall used vile and abusive language to her, struck her with a cane, brandished a sword over her head, and threatened to take her life. It appears by the evidence of Mr. Brown, that he went with Mrs. Devall, when she returned home to regain the possession of the house; and when she demanded it, Jacob M. Devall stood in the door with a pistol in his hand, and said, if she came in to the house he would shoot her. She was

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therefore, \*obliged to leave the place and return to her brother's. Jacob M. Devall, at that time, and his father afterwards, asserted that he had ordered him so to do. It was further proved, that the defendant made frequent declarations, that the complainant should not live with him. The defendant's counsel endeavored to support their defence, by proving that complainant had acted incontinently, and forfeited her right to recover in this case, if she ever had any. To establish this fact, they introduced an elderly woman. She states, that after her return from the mountains, where she had gone to see her children, she fell in company with the complainant, at the house of her brother, (they being total strangers) that they entered into conversation, relative to the courtship, marriage, &c. between the complainant and defendant; and that the complainant immediately unbosomed herself to



the witness, by telling her the whole of the transactions; and also informing her, that Michael Devall's property was the only inducement to her marrying him. She further states, for the purpose of creating a suspicion of incontinence, that Mrs. Devall complained of being sick, and retired to her bed. That a man of the name of Farrow entered the room, and that he staid there some short time, and upon the witness going to the door to carry some water, she saw him sitting on a trunk and leaning on the bed, in which Mrs. Devall was lying. This appears to be the principal fact, to establish a belief of her infidelity towards her husband. Although the character of this witness was not impeached, the court from her demeanor and other circumstances, cannot avoid entertaining very strong doubts with respect to her veracity. That a woman of the sense and understanding of the complainant, should, to a total stranger, incautiously, make a confidant of a woman, of the appearance and ignorance of the witness, is to the court improbable and incredible; and that, at the eve too, of instituting a suit, wherein she must have known, her every word and action would be used against her. But admitting the facts to be as the witness has sworn, it raises no presumption, that

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the complainant was engaged in a meretricious intercourse, for there are few persons so abandoned and lost to every sense of shame, as to commit an act of that kind, in open day light, in a house where other persons were in the next adjoining rooms, and who might, at any moment, become witnesses of their lewdness. Great reliance was placed by the counsel of the defendant on the influence her conduct would have, relative to her endeavoring to procure from the defendant his papers. It appears from the witnesses, that he took a small box, containing his most valuable papers, and put it into his pocket. He being in a state of intoxication, she was advised by one of the witnesses then present, to endeavor to obtain them from him. She did so, and it seems some scuffling ensued, and he said she struck him; but neither of the witnesses saw it, and say that if she did, it must have been very slightly. She afterwards again endeavored to obtain the papers, but was repulsed. It appears from the evidence that her only object was the procurement of the papers, and I do presume that no person will entertain a doubt but it was an act of prudence for her so to do, from an intoxicated husband, who might easily lose or mislay them, so that the court does not think her conduct in this affair sufficient to justify, or even excuse the severity used to her afterwards. After the occurrence of this transaction, the defendant on account thereof, obtained a warrant against her; and her sole object in going from home, which gave rise to the

idea of her having eloped, was to procure security to the aforesaid warrant, which she was advised to do by one of the witnesses. In fact, there is not the least manifestation of any intention to elope apparent to the court from any of the testimony. The contrary evidently appearing from her importuning her sister to stay and take care of the house, until her return, which was immediately on her procuring the requisite security. Although the court could furnish abundant reasons for entertaining the cause, and decreeing alimony, it is deemed unnecessary so to do, inasmuch as the defendants by their answer have admitted the jurisdiction of the court. All the law, therefore,

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introduced relative thereto, is considered by the court as unnecessary to be replied to. The counsel for the defendant further contend, that the trust deed should be set aside on account of deceptive acts being used to obtain it: also, on account of the incapacity of Michael Devall to make his own contracts; and lastly for want of reciprocity. As to the first exception, there has not been a particle of testimony to support it. It appears clearly to the court, that the contract was entered into at the express solicitation of the defendant; that in fact, he proposed to make over all his property, the acceptance of which offer was rejected by complainant. As to the second objection, the whole of the witnesses concur in saying, that although he is not a man of very good capacity, he is competent to make his own contracts, and is careful of his interest; and the court cannot raise an equitable incapacity, where there is a legal capacity. As to the third point, the court is clearly of opinion that it cannot prevail. All marriages, almost, are entered into on one of two considerations, that is love or interest; and the court is induced to believe the latter is the foundation of most of them. If the complainant in this case chose to marry a very aged man, and if she has made a sacrifice of herself on the altar of interest, it is not for this court to say she had not a right so to do. If, on the other hand, the defendant chose to dispose of a part of his property, for which he had little or no use, and which he kept only for the use and advantage of those, who might not have thanked him for it, to a person to take care of him in his days of imbecility, and one who would sooth his cares at the close of life, he also had a right to do so, nor will the court interfere to prevent him. The court, therefore, cannot see that there is any want of reciprocity in this contract, on the part of the defendant; but as both parties were capable in law to contract, and actually have contracted, the court will compel them to a performance thereof.

It is therefore ordered and decreed, that the trust estate be vested in a trustee or trustees, for the benefit of the complainant; and

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that the profits, emoluments or interests arising therefrom, be appropriated to her maintenance, until the said Michael Devall shall consent to co-habit with her, and treat her as becomes a man to treat his wife. It is further ordered, that one half the costs in this case, be paid by the said Michael Devall; the other half to be paid out of the trust estate. This decree in no wise affecting any interest, which third persons may have in the property, included in the trust deed. And it is also further decreed, that the writ of ne exeat and subsequent proceedings thereon, be continued, until the trustee herein referred to, shall take the trust property into his possession, and that they then be dissolved.

From this decree an appeal was made on the following grounds:

First.—That the court over-ruled a motion to strike out the prochein ami, on the ground of his insolvency, which was abandoned at the hearing.

Second.—Because the court refused to let the defendant into evidence of the lewd conduct of the complainant before marriage, as presumptive evidence of her subsequent incontinence.

Third.—That from the circumstances of the case complainant was not entitled to alimony.

Fourth.—That alimony can only be decreed as an incident to some other proceeding, which the court said could only be taken advantage of on demurrer.

Fifth.—That there was no proof of hazard as to the property, and a positive denial in the answer by Jane Devall and Jacob M. Devall, of any threat or intention to interfere with it, yet the court ordered that the writ of ne exeat and proceedings thereon should be continued.

The appeal was heard by Chancellors James, Thompson, Desaussure and Gaillard, and after argument the decree of the circuit court was affirmed.

Bowie for appellant, Goodwin for respondent.

#### 4 Desaus. \*85

\*Case XIV.

Cheraw.—Tried before Chancellor James.

JOHN GEER and SARAH, His Wife, v. the Executors of SAMUEL WINDS,  
Deceased.

(February, 1810.)

[Wills 489.]

The name of one of the children of the testator being omitted in his will by mistake, the court permitted proofs of the mistake, and rectified it.

[Ed. Note.—Cited in Rosborough v. Hemphill, 5 Rich. Eq. 106.

For other cases, see Wills, Cent. Dig. § 1041; Dec. Dig. 489.]

[Partition 94.]

The return of Commissioners in the division of lands, on writ of partition, will be supported by the court, unless shewn clearly to be erroneous and unjust.

[Ed. Note.—Cited in Aldrich v. Aldrich, 75 S. C. 373, 55 S. E. 887, 117 Am. St. Rep. 909.

For other cases, see Partition, Cent. Dig. § 299; Dec. Dig. 94.]

In this case the only question made for the consideration of the court, was, whether the name of Sarah, the complainant, was not omitted by mistake, in the will of the testator, Samuel Winds, as a general legatee with the other legatees therein named; and whether the defect could be supplied by parol evidence. The judge was of opinion, that the proofs offered were sufficient to establish the fact, that the name of Sarah, the complainant, was omitted by mistake, and that the defect could be rectified, upon parol evidence; whereupon the following decretal order was made:

"The bill and answers being read in this case, the court is of opinion that the name of the said Sarah, was omitted in the will of the said Samuel by mistake. It is therefore ordered, that the defendants (executors of Winds) do account with the commissioners for the personal estate of the said testator; as also the rents and profits of the real estate, and that the said complainants do recover their share thereof; and also, their costs in this behalf expended."

There was no appeal from this decree.

Afterwards a writ of partition, for dividing the real estate, was issued to the commissioners. On the return of the partition, made by the commissioners of a tract of land on the river, it was moved to be confirmed. This motion was opposed by Mr. Witherpoon, on the ground that the division was unequal and unjust.

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\*Chancellor Desaussure, before whom the motion to confirm the partition was made, was of opinion that it should be confirmed. He stated that the partition of lands by the commissioners, residing on the spot, and possessing local knowledge of the property, was instituted for the benefit of the citizens. It was a species of domestic tribunal, similar in some degree to arbitration; and that their acts ought to be supported, unless shewn clearly to be erroneous and unjust. That the division made by the commissioners in the present case did not appear to be so erroneous as to induce the court to set it aside. Several witnesses certainly had stated that they thought it an unequal division; but one of them said, he did not know that a better division could be made, and some of these witnesses acknowledge themselves incompetent judges; none of them were acting under the obligation of an oath, in their examination of the land; nor was their attention



drawn thereto particularly by any duty. Whereas the commissioners were men of the highest character for general integrity, and they had a particular knowledge of the land in question. They were acting under the sanction of an oath, and made very particular examination of the land; and Mr. Chapman swore he believed as fair a division was made as could be done.

Let the return of the commissioners be confirmed.

#### 4 Desaus. 86

##### Case XV.

Cheraw.—Heard by Chancellor James.

JAMES HOUSE and Wife, v. LAVINIA FALCONER, WM. FALCONER and Others, Infants, Children of the Late Wm. Falconer.

(June, 1810.)

[Partition ⚡34.]

The court will not confirm the return of commissioners for the partition of lands, unless minor heirs are made parties to the proceedings by guardian. Commissioners afterwards recommending the sale of lands, the court confirmed the return and directed a sale on credit, with good security.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 88; Dec. Dig. ⚡34.]

Infants to have six months after coming of age to shew cause against decree.

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\*This was an application for writ of partition to divide the real and personal estate of the late William Falconer, who died intestate, in the month of June, 1805, and whose widow married the complainant, James House. The widow and her second husband claimed one third of the real and personal estate of the deceased, under the act of February, 1791. Chancellor Gaillard had allowed the writ at a former court, and had confirmed the return under it so far as regarded the personal estate; but had refused to confirm the return as to the real estate, because the infants had not been brought regularly before the court by bill. A bill was therefore regularly filed, and the infants were made defendants, and their uncle, Erasmus Powe, was assigned them as their guardian ad litem. The commissioners under the writ of partition, recommending a sale of the lands of the estate, Judge James now presiding in the court, ordered that the return should be confirmed and that the lands should be sold, on a credit of two, three and four years; the purchasers to give bond and such security as the commissioners shall approve. The infants to have six months after coming of age to shew cause against the said decree.

#### 4 Desaus. 87

##### Case XVI.

Cheraw District.—Heard before Chancellor James.

JOHN HUGHISSON, v. D. MANDEVILLE and AARON SNOWDEN.

(February, 1810.)

[Vendor and Purchaser ⚡220.]

A purchaser for valuable consideration, without notice of an equitable title, is protected in this court—especially after long possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 465; Dec. Dig. ⚡220.]

[Equity ⚡345.]

The defendant denying the fraud and notice of the equitable title, his answer shall prevail, unless contradicted by strong and positive testimony.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715-724; Dec. Dig. ⚡345.]

[Vendor and Purchaser ⚡228.]

[Notice of a claim by a third person will not affect a purchaser for valuable consideration, if the title purchased appears to be valid, and there is no good reason to suppose the adverse claim well founded.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 495; Dec. Dig. ⚡228.]

The complainant filed his bill to establish his title to a tract of land, which his father had agreed to purchase from John Dyer, and had paid part of the purchase money, and

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taken and held possession of the land \*until his death; but he had not obtained regular conveyances for the same, but merely a bond to make titles. The complainant's father died in 1781, intestate, and the complainant was his heir at law, but very young. That the widow of his father occupied the land, and obtained titles to herself from the vendor, John Dyer, and gave him up his bond to make titles. That she intermarried with Aaron Snowden in 1788, who entered into a combination with D. Mandeville, the defendant, to defraud complainant of his right in the land; and the said Aaron obtained from the vendor, John Dyer, for a very small consideration, conveyances for the same; and he afterwards conveyed the said land to the defendant, Mandeville, and delivered him the possession of the same. But the said Mandeville was informed before he made said purchase, of the complainant's rights, and of all the circumstances. That complainant being young and ignorant, and supposing no injustice was intended him, submitted to these transactions during the life of his mother, which happened about two years before he filed his bill. The bill prays for an account of the rents and profits, and for the possession to be delivered to him.



Aaron Snowden putting in no answer, the bill was taken pro confesso as to him.

The defendant Mandeville, in his answer, admitted the purchase of the land in question, from Aaron Snowden, for valuable consideration; but there being an execution against Snowden, he agreed to receive the sheriff's title, on a sale made under said judgment, at a fixed price, and claims under said purchase; and denies any notice or knowledge of the complainant's rights or claims. And defendant states, that he has been in possession of said land for many years, without any disturbance or notice from said complainant. Defendant relies upon his possession and the statute of limitations.

The cause was heard by Chancellor James, who after stating the case, delivered the following decree:

In this case the statement made by the bill of complaint, that Aaron Snowden and Mandeville entered into a scheme to defraud

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complainant of his right to the \*lands in question, has been positively denied in the answer of the defendant Mandeville, and therefore, as no evidence has been offered to support this charge of gross fraud, the answer must be allowed its usual weight, and the defendant Mandeville must be acquitted of this charge. The ground principally insisted on by the complainant's counsel, was that Mandeville became a purchaser at sheriff's sale, with notice of the complainant's claim, and therefore, that he must still be considered as a trustee for him. This conclusion is founded upon a supposition, that the claim of the complainant is a good one, of which we shall see more hereafter; but, admitting at present that such claim has been made out to the satisfaction of the court, let us examine the question of notice as brought home to Mandeville. For this purpose, the evidence of Mrs. Frazier, the sister of complainant, and of William L. Thomas, the sheriff of Marlborough county at the time of the sale, has been chiefly relied upon. Mrs. Frazier states, that Mandeville, at the time she was fifteen years of age, lived in the sandhills, near her mother; planted lands in the swamp not far off, and that he frequently staid at their house before he made the purchase; and that her mother often told him of the situation of the lands, and that the right was in her children. That she told him so at least twice, in the summer before he took possession of it. She also states, that she heard her mother tell Mandeville, that if he bought the land he would buy a lawsuit; but cannot be clear as to the time when the last conversation took place, whether before or after the sale. She thinks the first conversation was in the summer prior to the sale.

Witness states she is now thirty years of age. William L. Thomas was sheriff of Marlborough, and had advertised the land; but before he sold, he heard from captain John James how Snowden had got possession of it, and would not proceed in the business. He thinks he told Mandeville, that the transaction on the part of Snowden, was fraudulent; and his reason for thinking he told Mandeville so, was because he was the only person who then wished to purchase;

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but he is not positive \*that he told Mandeville so. That the sale took place by his deputy, in June, 1788: and he signed titles to Mandeville some time after. That the subject of Snowden's fraud, was a matter much spoken of, and of general notoriety. The witnesses on the part of the complainant also generally deposed, that the place went by the name of Hughson's place: But one of them, Frances Bridges, stated that it was called Hughson's, until the marriage of his widow with Snowden, and afterwards Snowden's land.

The whole of this evidence, so far as it goes to establish the notice, has been contradicted by the answer, in which Mandeville positively denies, that he ever was cautioned against making the purchase, or paying for it, &c. Now the evidence of Mrs. Frazier, and of the sheriff, Mr. Thomas, not being positive, and that of the defendant being so, it would appear from the rule commonly adopted in equity, that the answer must be considered good, unless contradicted by two witnesses, or the evidence of one with circumstances corroborating it. But the evidence of Mrs. Frazier is very vague. To shew this, it will only be necessary to resort to another part of Thomas's testimony, which states, that Mandeville lived at Cashway ferry, sixteen miles below Mrs. Hughson's, until the fall of 1785. Now, if Mrs. Frazier was, as she says, fifteen years old at the time of the conversations which she mentions were held in the summer, before the purchase, between her mother and Mandeville, and is now thirty-one years of age, those conversations must have taken place in 1784, and not in 1788, before the sale was made, as she would have us believe; but here is a difference of four years, which shews, that although she may be actuated by a sincere intention to speak the truth, that yet her recollection upon the subject must be exceedingly vague, and insufficient for this court to rely upon so far as to overthrow a positive answer. But, say the complainant's counsel, if this evidence is insufficient to prove a positive notice, yet it was enough to put a prudent man on his guard,—and upon enquiry; therefore, upon the authority cited

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from \*1st Atkins, 430, and others, it must be

construed a good notice. Let us here examine, whether, if the defendant had been put upon such enquiry, it is probable he would have acted in any other manner than he has done at present; and here is the proper place to consider the nature of the claim of the complainant, when compared with that of Snowden. The claim of the complainant as heir at law of his father, as stated by Mr. Terrall, arose from the purchase of the land made by his father from Dyer, the part payment for the same, and possession of and for seven years, accompanied with a bond from Dyer to make titles, which has either been destroyed or lost: had the defendant, therefore, even had the chance to have met with this witness, he would have been a very imprudent man to have made the purchase upon the strength of such a title as he has stated. It is evidently defective. Again, had the defendant been informed of the deed from Dyer to the mother, or if it had ever been shewn him, he would have found a solitary instrument unaccompanied by any grant or other papers, to make out a claim of title: and besides never recorded; whereas, if he had examined Snowden's title, he would have found it deduced in a regular chain from Benjamin Rogers, the grantee in 1743, to Dyer, and from Dyer to Snowden, and the last deed by him regularly recorded. What then, would a prudent man have done? The probability is, he would have acted as Mandeville has done. The inference, therefore, is, that if the present defendant had, even by the conversation stated and upon the general notoriety, been put upon the enquiry, it could have had no other effect, than to induce him, as a prudent man, to prefer the title of Snowden; therefore, such an enquiry could have been of no use. So much for the complainant's ground of notice to the defendant of the fraudulent conduct of Snowden.

But the defendant relies upon his long possession and the laches of the complainant, and very properly so: Although this court may not determine that an equitable title is strictly barred by the act of limitations, in the same manner as a legal estate, yet it will

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always act \*upon the spirit of that law; and if a complainant has slept over his rights it will not grant him relief. The complainant in this case is now nearly thirty-four years of age, the defendant has been in possession under the sheriff's title, and improving the lands ever since June 1798, almost fourteen years; and the bill in this case was never filed until the 21st July last. Now there being no fraud nor any trust proved, it appears to be high time the defendant's claim should be at rest. Therefore, for all these reasons, let the complainant's bill be dismissed with costs, as to the defendant Mandeville.

W. D. JAMES.

## 4 Desaus. 92

## Case XVII.

Columbia.—Heard by Chancellor James.

JAMES KNOX et al. v. STEPHEN PICKET et al.

(February, 1810.)

[*Executors and Administrators* ⇨125.]

One administrator is not liable for the acts of another, which are distinct from his own, and not concurred in by him.

[Ed. Note.—Cited in *Massey v. Cureton*, Cheves, Eq. 185; *Gates v. Whetstone*, 8 S. C. 246, 28 Am. Rep. 284.

For other cases, see *Executors and Administrators*, Cent. Dig. § 522; Dec. Dig. ⇨125.]

[*Executors and Administrators* ⇨537.]

This court can judge of a case arising on administration bond, which comes incidentally before it, without sending it to law—and a reference to the commissioner could ascertain how far each administrator was liable on devastavit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2485; Dec. Dig. ⇨537.]

[*Husband and Wife* ⇨18, 101.]

The husband is liable for debts of the wife, whether arising by contract, or misfeasance, as by a devastavit—and his estate shall pay for the devastavit, without touching her settled estate. The husband's estate, however, is liable for the devastavit committed by her before the marriage, only so far as the property he got by her will indemnify it; and his estate is liable for devastavits after the marriage, only so far as he actually received the money or funds. After that the separate property of the wife becomes liable.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 120, 377; Dec. Dig. ⇨18, 101.]

[*Costs* ⇨96.]

Administrator is liable for costs incurred by his neglect; but not for costs necessarily incurred in defence of the estate.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 437, 438; Dec. Dig. ⇨96.]

In this case the following questions arose for the decision of the court:

First.—Whether the defendants being co-administrators, are liable for the defalcations of each other? and whether, in such case, if the administration bond comes incidentally before the court, it will not decide upon it, without directing a suit at law?

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Upon the first \*branch of this question, the court is of opinion, that the acts of one administrator may be so distinct and separate from those of another, that it may not be equitable to charge them jointly; and that they ought not to be so charged, unless for some joint act. And upon the second branch of the question, the court cannot see why (to do complete equity) they might not as well decide upon an administration bond, coming incidentally before them, as upon any other deed, on which they are in the habits of thus deciding; nor why, even upon such bonds, though joint, it may not be referred to the



master to ascertain how far, each administrator separately, has been guilty of a devastavit.

Second.—Whether the executors of Reuben Starke, who intermarried with the defendant, Mrs. Picket, (after the death of her first husband, Knox) be liable for her acts as administratrix, before the said marriage?

It would appear that the husband is liable by law for the debts of the wife, whether such arise by contract, or her misfeasance, such as on a devastavit: but how far the executors may be liable, is a question which will depend upon circumstances. In this case there was a settlement of part of the wife's fortune, and the other part went to the husband: Then there will arise a third question: Whether, if the executors are liable, her own property under the settlement should not be first chargeable? I am of opinion that it should not. The very intention of the settlement must have been to guard that property from the claims and the debts of the husband; and it does not appear to be material whether those debts should be of his own contracting, or whether they arose in consequence of his marriage with her. The marriage is considered in law as a good consideration to make him so liable, and he ought to have been aware that there might be such debts before he made the settlement, and either not have entered into it, or made provision thereby (which was not done) for his indemnification, out of the settled property.

I am, however, of opinion, that the property of the husband is not liable any further,

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than the defalcation \*which may have taken place before the marriage, for which the fortune which came by her, may be an indemnification; nor further, during the marriage, than the sums actually received by him; and that afterwards the separate property of the wife will eventually be liable. In this case I can see no distinction between the property which came by the wife unsettled, and the property which was his own. As soon as the marriage took place and he had reduced the first into possession, it became just as much his own as the last.

Fourth.—Whether the administrators of Dr. Knox are liable for costs incurred by their own neglect, and whether they are not entitled to credit for them, where it became necessary to defend the suits? It is very plain that the administrators must be liable for costs incurred by their neglect; and it is but equitable where it became necessary to defend suits, that the complainants should there be chargeable.

Therefore, let it be referred to the commissioner to report what sums are due to the complainants upon the above principles.

W. D. JAMES.

There was no appeal from this decree.

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Case XVIII.

Georgetown.—Heard by Chancellor James.

ANONYMOUS.

(June, 1810.)

[*Husband and Wife* ⚭298.]

A wife is not entitled to alimony, out of the fortune of the husband who leaves his bed and board, unless she makes out a clear case of ill usage by the husband, and of correct conduct on her part. But the parties having lived very unhappily together, and the husband having offered to allow the wife one half the nett income of the settled estate, which she brought in marriage (which was subject to his disposal) and not offering to receive her back, the court bound him by his offer, though he afterwards retracted it; and though he had contracted considerable debts for which he was liable. Some domestics of the trust estate allowed to her. The father to have the nurture and education of the child,—but the mother to have access to it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1093; Dec. Dig. ⚭298.]

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\*This was a bill filed by a wife against her husband to recover alimony, or some allowance to support her in living apart from her husband, on the ground of ill usage. The wife had carried in marriage a considerable fortune, and a settlement had been made, which secured the estates to the issue of the marriage, but which gave the disposal of the income to the husband, during their joint lives, for the benefit of both, and to the survivor during life.

The bill charged ill usage, gross neglect, and suffering the complainant to be in want of the comforts and necessities of life, and prayed for relief. The defendant denied the charges.

The cause came on and was heard by chancellor James, who, after the argument, delivered the following decree:

In whatever points of view the present case is considered, whether as relating to the respectability of the parties litigant, or the example it is to offer to the community, it is of the utmost importance.

It is important to the parties litigant, not in a pecuniary point of view alone, but also as it affects their peace and reputation; and to the community, in shewing how necessary it is for married persons to control their tempers, and to guard against every cause of offence to each other, though such cause may appear to the one offering it not well founded, or of little importance. This case, is also one of difficulty in the decision; but as to this I rejoice, that if I should err, my errors are subject to the revision of a court of appeals.

The questions which appear proper for my decision are, first,—Whether the plaintiff is entitled to alimony on account of her good conduct as a wife. Second,—If her conduct should be such as not to entitle her to alimo-



ny out of the private estate of the husband, whether she is not entitled to it out of the trust estate, and by the offer if not agreement of the defendant. To excuse her departure from the bed and board of her husband, as stated in the answer, and not contradicted by the evidence, the wife has alleged that de-

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fendant suffered her to want \*the necessities of life, and that he used her ill. We will proceed to examine how these allegations are supported by proofs. The witnesses which she relies upon to prove the want of necessities, are two: Mrs. Eliza White and Mrs. Croft. Mrs. White deposes, "That the complainant before her marriage with defendant, and whilst deponent resided with her (about two years) lived in the greatest comfort, and was abundantly supplied with the necessities and luxuries of life: and during her residence with complainant and defendant, after their marriage, which was about eighteen months, she was provided for very abundantly until she left them. That deponent afterwards paid several visits, and sometimes staid two or three months upon a visit. On these occasions she found complainant scarcely provided for, and sometimes nearly destitute of the necessities of life. That the defendant often left the complainant, and would stay away three or four months at a time, leaving her so scantily provided for, that she was obliged to sell trifling articles, in order to supply herself with necessities." Mrs. Croft has deposed, "that she often visited the house of complainant while she was a widow, and she lived very happily and in a comfortable stile. That since the intermarriage of complainant and defendant, she has frequently visited the house of defendant, and sometimes in his absence. That she has witnessed a want of those articles necessary for the comfort and convenience of a family in their situation; but cannot specify the articles wanted. That she has known complainant before her separation, refused credit in Georgetown; but does not know whether her not obtaining the articles she wished, arose from an order of defendant, or because they were not to be obtained in the store."

To contradict the evidence of these two witnesses, and to shew that complainant never wanted the comforts and necessities of life, defendant has in his answer denied the allegations to that effect in the bill, and has supported his answer by the testimony of Mrs. Charlotte A. Allston, Mrs. Marvin, Mr. Sessions, who was the overseer on the plan-

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tation, Mr. John Keith, Mr. Benjamin Huger, Dr. Blyth and Dr. Allston. Defendant in his answer states, "that he doth particularly deny it to be true, that he at any time, left the complainant unprovided with the necessities of life, as in bill alleged; on the contrary, he doth affirm, that his house was well provided, not only with the necessities, but with most of the usual luxuries of life." Mrs.

Charlotte A. Allston deposes, "That in her visits to defendant's house, she always witnessed the greatest abundance of all that could contribute to the comfort and support of a family; and that the stile of living of complainant, during the life of her first husband, and during her widowhood, was not preferable to that of her living when she resided with defendant." Dr. Allston has deposed to the same effect. Mrs. Marvin has sworn, "That she is well acquainted with the complainant, but has little or no acquaintance with the defendant; that she visited their house sometime in the year 1802 or 1803, and that she observed the greatest abundance of every kind of comfort, proper for a family, such as that of the defendant's." Mr. Sessions, the overseer, "Served defendant three years, from 1800 till 1803, after the separation of his wife the complainant from him; and lived on the place when Mrs. Eliza White (then Miss Allston) was present there. That as overseer he had the care of the live stock and poultry, which was as abundant as in most plantations; that these were killed and used in the absence of defendant equally as when he was present." The witness, Mr. Keith, and his family, by invitations visited defendant and family. He states, "that they staid five or six days, and defendant's living appeared to be equal to his fortune." Mr. Benjamin Huger deposed much to the same effect, "that defendant's stile of living was equal to his fortune." Dr. Blyth has sworn, "That he knew defendant for many years when he was a bachelor, when married to his first and when married to his second wife: That in all these situations he lived well; that he lived as well as his neighbors. And that there was no great difference between the stile of living of complainant, when she was a widow and when she was the wife of

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defendant." Besides these several witnesses, Mr. Samuel Smith and Mr. Savage Smith, merchants, were examined, who proved, "That complainant was permitted by her husband, the defendant, to take up goods in Georgetown, and that he gave her an unlimited credit there: so much so, that Savage Smith as a friend told him, if he continued to contract such heavy debts he would be ruined."

Such is the testimony offered by complainant to shew the want of the necessities of life: and such that of the defendant to rebut the charge. In weighing the evidence, the court cannot have a doubt, nor hesitate to pronounce, that the testimony of these witnesses of complainant, however respectable, must fall to the ground, when oppugned by the answer, and by the testimony of nine other witnesses; eight of whom are at least as respectable as the witness for complainant. It was said by the counsel for complainant, that the evidence of these two witnesses was positive. But the answer and testimony of Mrs. Allston, Dr. Allston, Mrs. Marvin, Mr.

Sessions and Dr. Blyth are equally positive. But further to excuse her departure from her husband, the complainant has alleged his ill treatment of her. Upon this treatment, her claim to alimony out of his private estate must be principally founded. To prove this, she relies upon the evidence of the same two ladies, Mrs. White and Mrs. Croft; for the testimony of Mrs. Cross, her other witness, states nothing of bad treatment. Mrs. White has sworn, "That the conduct of defendant towards complainant was total inattention and indifference. That witness hath often heard them quarrelling, but without hearing any distinct words or conversation, though deponent hath discovered in their conduct towards each other, the visible effect of their private quarrels, after such had taken place. That in the opinion of deponent, the jeering and ridicule by defendant of the complainant, was of the most provoking and offensive kind, and calculated to wound her feelings, disgust her, and alienate her affections from him. That the defendant informed her, he had purchased a plantation

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to the \*southward, which he was then planting; that this place would afford him a good pretext for leaving complainant for a length of time, as it would otherwise appear strange that he should leave her for so long a time; that she was a virago and he could not live with her; but that he would visit her at stated periods, see that she was provided for, and if her conduct to him was still disagreeable he would stay away longer and longer at a time." Witness also states, (as before mentioned) "That defendant often left the complainant, and would stay away three or four months at a time." Mrs. Croft deposes, "That she thinks defendant was very frequently absent from his family, and that she does not think that defendant was very affectionate to his wife. That she has heard them quarrelling at night after they had been in bed, though she could not distinctly hear their words: and that she has been at defendant's when the complainant was very sick, and his treatment of her on such occasions was not affectionate and tender." To contradict this testimony of ill treatment, defendant has offered the evidence of Mr. Benjamin Huger, Dr. Blyth, Mrs. Charlotte A. Allston and Mr. John Keith. Mr. Huger states, "That defendant is not of a bad or violent temper." Dr. Blyth believes "defendant to be a good natured man;" and states "That he and his first wife lived happily together: no married people more so." Mrs. Allston deposes, "That she has known defendant for many years, and always found him a humane and amiable man; and that he lived happy and tranquil with his first wife." Mr. Keith has sworn, "That he has been acquainted with defendant twenty years, and always considered him a good tempered, benevolent man. That he was a relation of defendant's first wife, and was intimate with

her brother, who esteemed and respected the defendant while his sister was alive, and continued to do so, after her death, as long as he lived." In considering the evidence, as to ill treatment offered by defendant to complainant, the court is of opinion, that it falls short of the severity of the ecclesiastical court, which must be translated severity or

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cruelty. It is a pity, that Mrs. \*White and Mrs. Croft had not descended to particulars so as to shew in what the "inattention, indifference and the want of affection in defendant" consisted. As the matter stands, their thoughts and opinions are stated, or their reports of quarrels imperfectly heard. But if the court were to rely upon these, it is believed it would be the first time that a court of justice has received the thoughts and opinions and the want of hearing of witnesses as conclusive evidence. Both of them state the frequent absences of the husband from home, as ill treatment: but defendant has in some measure accounted for this, by stating the number and distance of his plantations from each other, and his disposition to visit his sick friends. But from the latter part of the conversation which Mrs. White states she had with defendant, respecting the temper of his wife, and his observations to Miss Colcock upon the same subject, and from the first and last letters from complainant to defendant, dated respectively the 20th October, 1799, and 26th December, 1802, it is much to be suspected that complainant herself drove defendant from home to seek refuge from her bickerings. Of the contents of these two letters, particularly the first, my duty compels me to say, that I cannot draw a conclusion the least favorable. Both parties, as in most such cases, were no doubt in some respects blameable: Yet, taking the testimony of complainant's two witnesses in its utmost latitude, I cannot see that severity or cruelty, for which it would seem that an ecclesiastical court in England, would grant a divorce, a mensa and thora: nor does there appear to me any agreement to live separate between them, except in their own obstinate determination.† Nor, to bring the case nearer home, is the treatment, though somewhat neglectful, equal to that stated in the case of *Jelineau v. Jelineau* decided in this court.†† In that case, the defendant refused to send away the woman who was the bone of contention between them. At dinner one day he took away the plate from complainant when she was going to help herself to something to eat,

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\*and said, when he and his servant had dined she might. He grudged her the bread she ate, and said "grass was good enough for her. That he was going to a magistrate to get a divorce, and would buy a horse-whip and whip her well before she went away." In

† *Head v. Head*, 3 Atk. 547.

†† See 2 *Desaus. Equ. Rep.* 45.



the present case, whatever the warmth of some of the counsel may have suggested without a tittle of evidence, there was no such improper and brutal conduct of defendant, as in the case quoted: and none such being proved, none such shall be presumed. I shall not comment upon the evidence offered by defendant upon this point; it is full and clear, and will speak for itself. I have before said, that the complainant has offered the above evidence adduced by her, to excuse her departure from the bed and board of her husband; that abrupt departure required some good excuses, and those offered do not appear sufficient or satisfactory. Had there been such a want of necessities as is pretended, and such severity or cruelty as the law looks for before alimony is granted, it would not have been refused; but as the case stands, I cannot think myself warranted in granting it out of the private fortune of the husband.

It now remains for me to consider whether complainant is entitled to maintenance out of the trust estate; and by the offers if not agreement of the husband? The trust estate came from the complainant;—the whole of it belonged to her previous to the marriage. By the marriage settlement, "the rents and profits of it were to inure to the defendant and complainant during their joint lives, he to be entitled to take the same." ‡Now, although the husband is entitled to the perception of these profits during their joint lives, yet it is conjointly with the wife, and her right, though legally vested in him; yet in an equitable and moral point of view, and so far as her maintenance is concerned, it appears to be mutual and unextinguished. The defendant too, appears to have been conscious of this, and in his first answer filed in this case, it seems he fixed the amount, making an offer of a maintenance of £300; supposed to be the one half the income of this trust es-

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\*tate. It is true, that in his amended answer, he has retracted this offer, on account of the number of debts she has contracted on his account; but if he has suffered her to contract such debts, it is his own fault;—he is bound by law to pay them;—this court will not interfere, nor will it suffer him to retract an offer, when he was equitably bound, and which he has once fairly made by his answer. ‡‡ Indeed, had he in his answer unequivocally made her the offer to return to him, perhaps, on the authority of the cases cited, this court must have refused to grant her any thing; but it appears from defendant's declarations to Miss Colcock, that it is not his intention to take his wife back. For these reasons, the court considers the complainant

entitled to receive the one half of the profits of the trust estate; but not retrospectively. Therefore, let the defendant account now and hereafter, annually with the commissioner, and pay over to him for the use of the complainant,† one half of the nett profits of the trust estate, including any and all proceeds of the last year's crop, not actually paid away: deducting from all future calculations the hire of the negroes she now has in her possession, unless the same should be delivered up to defendant; but that she be at liberty to retain any two of said negro slaves to wait upon her. Let the defendant have the nurture and education of the child under his own control; but let the complainant have reasonable access to her. And let the costs of this suit be paid out of the income of the trust estate, to be borne equally by complainant and defendant.

† This was meant only during the separation, as in *Head v. Head*.

#### 4 Desaus. 102

##### Case XIX.

Camden.—Heard by Chancellor Desaussure.

Executors of PHILIP HAWKINS, v. THOMAS SUMTER, and Others.

(June, 1810.)

[*Equity* ⇄ 361.]

An answer to a bill of discovery, having denied the equity of the bill, it was moved to dismiss the bill—but the answer having disclosed certain facts material to the justice of the case, and which it is doubtful whether they could have attained at law, the motion was refused.

[Ed. Note.—For other cases, see *Equity, Cent. Dig. § 757; Dec. Dig. ⇄ 361.*]

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\*[*Witnesses* ⇄ 298.]

The security of a sheriff who has committed defaults, is not at liberty to withhold the books of the sheriff which have fallen into his hands, on the ground that the disclosure may subject him to suits.—The court will compel the production of them.

[Ed. Note.—For other cases, see *Witnesses, Cent. Dig. § 1039; Dec. Dig. ⇄ 298.*]

This case came on upon a motion to dismiss the bill, upon the answer coming in and denying all the equity of the complainant's bill.

It was contended on the argument by Mr. Richardson and Mr. Nott, for the defendant, that the answer having denied the equity of the bill, and having disclosed no facts, which were unattainable by the complainant from other sources, the bill should be dismissed; that even if the facts charged in the bill were admitted, yet the remedy at law was complete, for suits at law might be brought for the land by the heirs of Sanders, or the creditors might sell them under their execution. And that in the controversy which would arise, the present defendants would have to

‡ See *Ball v. Montgomery* 4th Bro. 339. 2 *Veaz. jr.* 197, 1 *Fonbl.* 95.

‡‡ *Head v. Head*, ib. 551; *Bullock v. Menzies*, 4th *Veaz. jr.* 798.



shew the regularity of the judgment, execution, levy and sale under which they claimed, or the sheriff's title could not be supported.

That if the court should decree in favor of the complainants, the heirs of Sanders might also bring suits for the land, and harass the defendants.

For the complainants, it was contended by Mr. Blanding, that the case is of original equitable jurisdiction, founded on a charge of fraud, not indeed of defendants themselves, but a legal fraud, practised by the agent of the principal defendant.

That the original entry in the sheriff's book (under which the defendants claim) shews a sale only of two tracts of land; and that a subsequent entry was made some time after the sale, having comprehended five tracts.

That in a trial at law, the defendants shewing the sheriff's title and the last entry in his books, would make out a legal title and succeed.

That the answers of Gen. Sumter and Thos. Sumter, jun. furnish facts material to the justice of this case; for Gen. Sumter states in his answer, that according to his recollection of the transaction, all the lands owned by Sanders at the High Hills, were advertised

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ed for \*sale and sold. But, in fact, as appears by the second entry of the sale, two of the tracts are seated in the swamp.

That in Mr. Thomas Sumter's (jun.) answer, he states, that Mr. Davis, the sheriff, hesitated to make titles to the lands, (the title to which is now disputed) till the agent of Gen. Sumpter, who had purchased the land at sheriff's sale, had made an affidavit of the terms of sale: upon which affidavit, taken ex parte, the sheriff made titles to more lands than he had at first entered and sold.

That though defendants were not concerned in these transactions, yet, as they admit Horan to have been their agent, and as his affidavit procured conveyances for more land than the sheriff had at first entered and sold, his acts would affect them.

That there would be a difficulty at law in using the testimony of these copy entries in sheriff's books, which alone were within the control of the complainant.

That the remedy would be more complete in this court, which could take into view all the circumstances, and could decree an account for rents and profits which was prayed by the bill.

To this it was replied for the defendant, that there was a plain and adequate remedy at law, and where that is the case, this court has no jurisdiction, even in cases of fraud, accident and trust.

That the defendants denied the equity of the bill,—and that as to the facts disclosed by the answers, they did not give jurisdiction: For as to Horan's testimony, complain-

ants could have proved him to be the agent of Gen. Sumter, and compelled him in a trial at law, to disclose what defendants have done by their answer. That as to the first entry, being for sale of lands at the High Hills, that does not exclude the swamp; for the term High Hills of Santee, includes by usage a large tract of country, comprehending much swamp as well as high land. That as to the levy and sale by the sheriff, it is a question of mere legal title, triable at law. That it would be dangerous to shake sheriff's

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titles, on account \*of irregularity of levies or sales, and would injure purchasers. That there was no privity between these parties, for complainants are only creditors of Sanders; which debt may be paid off, and the heirs of Sanders may come and recover against defendants also. That the demand for an account of rents and profits cannot give jurisdiction, or all land causes might be brought into this court. Besides, damages could be recovered at law.

The Chancellor delivered the following opinion:

I have considered this case with attention. It is by no means clear of difficulties. There is no doubt but where a bill is a mere bill of discovery, and the defendant makes no discovery, and denies the equity of the bill, that usually, if there be no other sufficient ground to rest the case upon, the court will dismiss the bill. And the court will more readily do so, if it should appear that there is plain and adequate remedy at law. The questions then are:

First.—Are there no such disclosures made by the defendant's answer, connected with the merits of the case, as should entitle the complainants to go on and try their case in this court?

Second.—Whether it appears that the complainant has plain and adequate remedy at law in this case?

Upon a careful attention to the answers, it appears to me, that they do disclose facts intimately connected with the merits of this case; and which complainants might not have been able to have otherwise obtained. These are, that Mr. Horan was the agent of Gen. Sumter in the purchase at the sheriff's sale; and that the sheriff declined making titles for all the tracts of land for which the defendants claimed titles to be made, until Horan made an affidavit that all the lands of Sanders' estate were included in the sale. And it is material to remark, that this affidavit and consequent conveyances of the lands, were in direct contradiction to the sheriff's own original entry of sales, wherein he had put down only two tracts of land as sold. And it is also material to remark, that the conveyances were not made by the sheriff for several years after the sale in 1795.

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\*The original entry of the sheriff, and his

subsequent alteration, and the time of making the conveyances, appear in the copy of this transaction delivered to his successor, which is made on exhibit. But whether the complainant could at law, get at the original book of entry, so as to make it evidence, and whether he could obtain testimony of the important facts disclosed in the answer, I cannot be certain. I cannot, therefore, say that it appears there would be a plain and adequate remedy at law for the complainant. Indeed, it is difficult to perceive how he could institute a suit at law, which would bring out the merits of this case. For he could not bring trespass, as the legal title is not in him: Nor could he easily induce a sheriff to levy and sell the lands in question, under this judgment. Upon such an application, the reasonable answer would be, the lands appear to have been sold by my predecessor, or he has made titles to them: you must obtain the judgment or decree of a competent court setting aside the sale, before I can resell. And if a sheriff would now resell, it would still leave the question as to the regularity and validity of the first sale where it is. As to the objection, that Sanders' heirs might afterwards bring suit for this land, there is no danger from that source. If this court should, upon a full hearing, decree that the conveyances made by the sheriff should be set aside, and a new sale made, this would protect the defendants from any claims by Sanders' heirs. And as to the objection that the defendants are entitled to the protection of the statute of limitations, the going fully into this case will not deprive them of the benefit of the statute, if it should appear upon a full hearing, that they are entitled to it. Upon the whole, it does not appear to me that it would be furthering the purposes of justice to dismiss this bill at this stage of the cause. What the issue of this case may be at a full hearing, I cannot foresee. But it seems to me that the complainant could not have full and adequate remedy at law. The motion to dismiss the bill is therefore refused.

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\*Afterwards a motion was made for a rule upon Wm. Mayrant, to shew cause why an attachment should not be issued against him, for not obeying the exigency of a subpoena writ, requiring his attendance as a witness in this case, and to produce the books of the late sheriff, William Ransom Davis, the production of which was necessary to the justice of this case. The books were alleged to have come into his hands after Davis's death; but he was not the administrator or executor of

Davis. This motion was opposed. It was argued as follows:

Blanding for complainant.—He admitted (for argument's sake) that Mr. Mayrant having been security to the sheriff, he may lawfully detain the books, but insists that he is bound to obey the exigency of the writ of subpoena duces tecum. Quotes Peake, 187; case of lord Melville, in the house of lords, 188: in the case of Powell, Hopton & Co. v. W. Laing, an attachment was ordered against Wm. Mayrant by judge Brevard; but it was refused by judge Wilds in the case of commissioners of the treasury v. Isham Moore. In the first case, the action was against a person indifferent as to Mayrant, in the last it was against his co-security. If Davis was alive, the court would oblige him to produce his sheriff's books. His security Mayrant has no higher right to keep and conceal them.

Hooker for defendant.—The witness is not obliged to shew any thing which will subject him to a prosecution, or to a civil suit. Mayrant's not being the successor or administrator of Davis, the sheriff, is not a proof that he is illegally possessed of the books. If he were illegally possessed of them, and should produce them, it might subject him to an action for such illegal possession. The sheriff himself is bound, officially, to produce his books; but Mayrant is not bound unless it be shewn that he holds them illegally.

Deas for complainant.—If Mayrant says he is interested, the court would enquire what is his interest. The bill charges an interlineation in the books—this can be made to appear only by the production of the original books.

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\*The court ordered the rule to shew cause. Mr. Mayrant made a return to the rule, and shewed for cause, that he was one of the securities of Mr. Davis, for the faithful discharge of the duties of his office; and he believed the books if produced, would furnish evidence against him, in suits to be brought on the said bond: and, therefore, he claimed the privilege (if the said books were in his possession) of not producing them.

Chancellor James, before whom the return was made, being of opinion that Mr. Mayrant was bound to produce the book, ordered an attachment to be issued.

From this decree an appeal was made, on the ground that the cause shewn was sufficient to excuse him.

April, 1814.

The court of appeals dismissed the appeal.



## 4 Desaus. 108

## Case XX.

Camden.—Heard by Chancellor Desaussure.

WILLIAM NIXON v. F. RICHARDSON.

(June, 1810.)

[*Ne Exeat* ⇐3.]

The court rescinded an order for a *ne exeat* made by the commissioner, and discharged the bond taken under the order. The demand of the creditor was a simple note of hand, and purely legal; and he could have had bail at law.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. § 5; Dec. Dig. ⇐3.]

It was moved on the part of the defendant to set aside an order of the commissioner granting a *ne exeat*, in this case, on the ground that the demand of the complainant was purely a legal one, and that the writ was improperly issued.

After argument, the Chancellor delivered the following judgment:

This is an application to set aside an order of the commissioner, granting a *ne exeat* in a case which was brought before him, and to discharge the security taken under that order.

The circumstances made by the bill, are as follow: The defendant, Richardson, gave his note of hand for a certain sum of money

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to John Shackelford, dated the 8d \*day of May, 1808, payable on the 1st day of November 1808. This note, J. Shackelford transferred to the complainant, W. Nixon, for valuable consideration. That on non payment of the note of hand, Wm. Nixon caused a suit to be instituted in Sumter district, for the recovery of the money; and believing Richardson to be a man of property, the defendant did not think it necessary to hold him to bail. That after the commencement of the suit at law, it was discovered that Richardson was about to depart the state, and to carry off his property with him. That the plaintiff, Nixon, could not then procure bail at law, without discontinuing his suit regularly before a judge, and beginning a suit *de novo*, on which he could obtain an order for bail by a proper affidavit of the debt, and that such discontinuance could not then be regularly made, because of the absence of the judges, who were then engaged on the circuits.

Under these circumstances, the commissioner, on bill filed and affidavit made, granted the *ne exeat*.

It was argued in support of the motion, to set aside the order, that this was a mere legal demand; that the party had the power at law to have held to bail, and that if he neglected to do so, he could not afterwards set up his own neglect, to give jurisdiction to the court of equity, and that the necessity of resorting to this court did not exist; for

that by due diligence the party might have discontinued his suit, and recommenced it, and by an affidavit of the debt, have obtained an order for bail in due season.

On the part of the complainant it was insisted, that the party was entitled to the aid of this court, to obtain a security for his debt, on the case made by the bill; and that there would be a defect of justice if this court did not interpose. And this was likened to the case where a party indebted is about to remove with his property, before the debt falls due, when no suit can be instituted at law, and this court interposes to enable the creditor to obtain a security.

I have considered this case, and would willingly support the order made by the com-

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missioner, if I felt \*myself at liberty to do so. But I find it distinctly stated in all the cases, that the demand must be of an equitable nature. Where the demand is at law, the court refuses to grant a *ne exeat*, because the plaintiff has bail there, or might have had it. This is plainly a mere legal demand, and the party might have had bail. If he neglected to avail himself of this right, it was his own fault. It is not like the case of a legal debt, not yet due, on which no suit at law could be instituted. Besides, it does not appear but that the party might, by due diligence, have discontinued his suit at law, and renewed it on an affidavit, on which he could have held the party to bail. The judge of the common law court, though not on the spot, was within the district, and could have been resorted to in a very short space of time.

I do not, therefore, think that I can sanction this order for a *ne exeat*.

Let the order be rescinded, and the recognizance or bond taken under it, be discharged.

From this decree there was an appeal; which was afterwards heard at Columbia. Present Chancellors James, Thompson, Desaussure and Gaillard.

The appeal was argued and the decree affirmed.

Mr. Levy, for defendant—in support of the motion to dissolve the *ne exeat*.

Mr. Deas and Mr. Blanding, for complainant.

## 4 Desaus. 110

## Case XXI.

Camden.—Heard before Chancellor Desaussure.

R. HARRISON et al. v. LONG, Executor of Hubbard Rees.

(June, 1810.)

[*Principal and Agent* ⇐81.]

Commissions allowed to an agent, employed to transact business and make sales of prop-

erty, though there was no stipulation in the agreement for commissions.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 197; Dec. Dig. ⚡81.]

[Brokers ⚡29; Costs ⚡99; Principal and Agent ⚡67.]

The agent receiving money, and not applying it to the purposes specified in the agreement, under which he acted, within a reasonable time, is chargeable with interest. Costs to be paid by the agent.

[Ed. Note.—Cited in *Barr v. Haseldon*, 10 Rich. Eq. 62.

For other cases, see Brokers, Cent. Dig. § 22; Dec. Dig. § 29; Costs, Cent. Dig. § 391; Dec. Dig. ⚡99; Principal and Agent, Cent. Dig. § 127; Dec. Dig. ⚡67.]

[Evidence ⚡183.]

[The burning of the dwelling house of a party in possession of a contract raises such a presumption of its loss as to let in parol evidence of its contents.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 633; Dec. Dig. ⚡183.]

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\*The following report of the commissioner was submitted at the hearing of this cause:

In pursuance of the order of reference in this case, the commissioner has proceeded to an examination of the matters so referred, and from the evidence before him, reports the following facts:

First.—That upon charging the defendant with the several sums received by his testator, on sales of Holzendorf's and M'Coy's property, and deducting therefrom his own payment of £250, on Smith's execution amount of Yeadon's judgment and sheriff's fees incurred, there appears to be a balance in defendant's hands, including interest up to this date, of £159. 3s. 3d. applicable to complainant's demand.

Secondly.—That the complainant's demand, with interest thereon up to this date, amounts to £566. 18s. 10d. from which the foregoing sum being deducted, there remains a balance of £407. 15s. 7d. unprovided for.

B. Bineham, Com.

The defendant's counsel filed the following exceptions to the above report:

First.—Because no commissions or credit has been allowed for labor and services in the resale of the property of J. Holzendorf.

Secondly.—(Omitted.)

Thirdly.—Because there is allowed to the complainant, interest upon the balance of monies received by Hubbard Rees.

The court, after argument, pronounced the following decree:

This case comes on upon the commissioner's report and exceptions thereto, which bring the precise questions in dispute before the court. The commissioner reports in a very clear and distinct manner the transactions of Mr. Rees, and makes a statement founded upon the agreement of the parties and the evidence furnished, by which it appears that there is in the hands of the executor, Mr. Long, the sum of £159. 3s. 3d.

including interest, applicable to the reimbursement of Mr. Harrison \*and Mr. Peay under the agreement; and that there remains a balance of £407. 15s. 7d. which ought to be paid by the executor of Rees, provided the funds or estate of Holzendorf, in his hands, can be made available for so much, which is uncertain.

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The exceptions do not controvert the principles or the statement of the commissioner's report, but in these particulars: First,—That no commissions or credits have been allowed for labor and services, in the resale of the property of Jno. Holzendorf. Next,—That interest has been allowed to the complainants upon the balance of monies received by Hubbard Rees. These exceptions the commissioner over-ruled.

Before the counsel for the defendant argued these exceptions, he made a question which I am bound to notice. That is, whether the agreement between Mr. Rees and Mr. Harrison and Peay, was so regularly proved as to enable the court to make any decree on that foundation? Upon this question I have no doubt. It was admitted that the dwelling houses of Mr. Harrison and Mr. Peay have been burnt. The presumption of the loss of papers arising from that misfortune, lets in the complainants to parol evidence, of the existence and terms of the agreement; and Gen. Canty's recollection, has enabled him to state with great exactness, the execution and the terms of the agreement.

I proceed now to the consideration of the exceptions. It does not appear that the agreement contained any provision respecting the allowance of a commission to Mr. Rees for labor and service, in the resale of the property of Holzendorf; and it is contended by the complainant's counsel, that the absence of an express stipulation for commissions, negatives the claim on general principles; but I am not of this opinion. It might be a mere omission; and at any rate, the agreement contains nothing which forbids the claim. The question then is, whether the claim for commissions is a reasonable and equitable one on general principles? and I can have no doubt that it is, as far as the labor and services are to operate beneficially

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for complainants. Mr. Rees \*must have had much trouble and difficulty in the resale of the lands, and deserves a commission therefor; especially from the complainants, who would otherwise have been sufferers to a much greater extent than they have been. The first exception of defendant is therefore supported; and it must be referred back to the commissioner to make a statement, wherein he shall allow to the defendant the usual commission in such transactions, on so much of the sales of the lands, as after paying off the judgments and reimbursing Mr. Rees,



shall be applicable to the reimbursement of the complainants.

We come now to the next exception: I am of opinion the commissioner did right in allowing interest on the balance of money received by Mr. Rees. Mr. Rees was bound to apply the proceeds of the sales of the lands and other monies of Holzendorf's which came to his hands, to the different objects stated in the agreement, as fast as he received the money; if he did not, he had the use and benefit of it, and according to the plainest principles of equity, is bound to pay interest thereon;—I concur, therefore, with the commissioner in over-ruling this exception. The balance, therefore, in the hands of Mr. Long, the executor of Hubbard Rees, is directed to be paid with interest, on or before the first of January 1811; the interest to be continued till paid.

As to the costs, I think that as the necessity of coming into this court arose from the neglect of Mr. Rees, in not keeping and rendering exact accounts of his transactions under the agreement, his estate ought to be made liable for them. Let the costs, therefore, be paid by the executor out of Mr. Rees' estate.

HENRY WM. DESAUSURE.

Mr. Ellison, Mr. Deas and Mr. Blanding for complainants. Mr. Richardson for Defendant.

There was no appeal from this decree.

#### 4 Desaus. \*114

\*Case XXII.

Columbia.—Heard by Chancellor Desausure.

JOHN KEITH, Administrator of Young, v. W. and B. PURVIS.

(June, 1810.)

[Execution  $\hookrightarrow$  291.]

A creditor enforcing his judgment at law, and selling land of his debtor, agrees with the agent of the debtor, who was acting under precise instructions, that if the agent would not bid up the land at the sale, he, the creditor, would buy it in, and give the debtor time to come in and pay the debt and redeem the land. The creditor represented this arrangement to third persons, who attended at the sale, prepared to purchase the property at its value, and prevented their bidding. He then bought in the land at one third of its value; and a short time after sold the land,—gave credit on the judgment, for the amount he had bid in the land, and pressed the debtor for the balance of the debt. The debtor is entitled to relief; and the creditor was decreed to pay the value which third persons were ready to have paid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 834; Dec. Dig.  $\hookrightarrow$  291.]

[Principal and Agent  $\hookrightarrow$  148.]

An agent acting under precise instructions, is not at liberty to depart from them. If he does, it is subject to the negation of his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 537; Dec. Dig.  $\hookrightarrow$  148.]

[Execution  $\hookrightarrow$  295.]

[Where the creditor at a sheriff's sale gave the impression that if he bid in the property the debtor should be allowed to redeem within reasonable time, whereby other bids were prevented, and the creditor purchased at an inadequate price, the debtor was allowed to redeem after a considerable lapse of time, though no fraud was intended by the creditor; and it seems the right to redeem would continue for the same time as in case of a mortgage.]

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 849; Dec. Dig.  $\hookrightarrow$  295.]

[Frauds, Statute of  $\hookrightarrow$  137.]

[Cited in Cox v. Cox, 5 Rich. Eq. 369, to the point that where a creditor, at a sheriff's sale, prevented other persons from bidding by a parol agreement with the debtor to allow him to redeem, and thereby obtained the property at an inadequate price, he was not allowed to set up the statute of frauds against the claim to redemption.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 301; Dec. Dig.  $\hookrightarrow$  137.]

This was a bill filed to have relief in a case, under the following circumstances:

Mr. Young, in his lifetime, purchased a tract of land and the buildings thereon, situated near Columbia, for £1,700 sterling, and gave bond for the same. Mr. Young died, and Mr. Keith administered on his estate. Some payments were made, but a large balance remained due. The defendants who held the bond, obtained judgment thereon, and urged the payment by execution. Mr. Keith wrote to his agent in Columbia, requesting some indulgence and time to raise the money; and if he could not obtain it, then to bid in the land at the sale, and to pay the ten per cent. required by law, for which he would place funds at his disposal.

The indulgence was refused, and the land was put up to sale under the execution. The agent of Mr. Keith was informed, that the payment of the 10 per cent. would not be sufficient to protect his bidding in the land to another sale day, but that the creditor could put up the land for sale immediately again,

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and so on, toties quoties, till \*the whole debt was paid. This induced him to agree not to bid the land in as he had been directed; but to permit the creditors (the defendants) to become the purchasers, on their assurance that they would give Mr. Keith some time to come in and redeem the land, by paying off the debt: and they accordingly became the purchasers at \$1,000. It was proved that several persons attended the sale with a view to purchase the property; and one of them swore he went prepared to bid as high as \$3,000 for the property, and to purchase it at that price. But he and others, who attended the sale with a view to purchase, were prevented by one of the defendant's declaring that an agreement was made with the agent of Mr. Keith, by which they were allowed to buy in the property; and that they were to give time to Mr. Keith to redeem the land.

The defendants not long after their purchase, sold the land to a third person for a valuable consideration, and gave credit to Young's estate for \$1,000, the amount of the sum for which they had bid in the land; and demanded the payment of the balance of the debt.

The bill was filed by Mr. Keith to obtain relief.

After hearing the evidence, and the arguments of counsel, Chancellor Desaussure delivered the following decree:

I have considered this case and the testimony adduced, with great attention; and I have no doubts where the justice of the case lies.

It appears, from the pleadings and the evidence, that the defendant having a judgment at law against the complainant, ordered a sale of the property in question adjacent to Columbia. At the sale several gentlemen of property and character attended with a view to purchase. One of them states, that he was determined to bid as high as \$2,000; and another that he was directed by a friend to bid as high as \$3,000. Both were competent judges, and swore that it was their settled purpose to go to those several amounts. One of the defendants, however, by representations made to these persons, discouraged, and most unquestionably prevented their bid-

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ding at all. The \*property was then bid off by one of the defendants at \$1,000.

Upon this plain statement there can be no doubt that the defendants deprived the complainants of the benefit which would have arisen from a fair sale, at which there would have been a competition among purchasers, able and willing to buy. And justice pronounces that the creditor acting such a part, is bound to make good the difference, which arises most palpably from his interference.

But, it is alleged in excuse of the defendants, that they did not intend a fraud, but meant merely to get a command of the property, and then to indulge the complainant for a reasonable time, to come in and redeem the property by paying the debt; and that in fact, the agent of the complainant had come into this arrangement with them.

Let us examine these excuses: It is said no fraud was intended. The presumption is very much against the defendants; and though their character ought to, and does in my mind, protect them from the imputation of a deliberate fraud, yet I must observe their conduct produced as mischievous effects to the complainants, as if it had been founded in deep design and fraud. They prevented persons from bidding, who were willing to bid \$3,000; and they bid the property in themselves at \$1,000; and then, after a short time, shut the door to the complainant, and prevented his getting more credit on the judgment than the \$1,000, at which they bought the property. Surely this was unwar-

rantable; and though not founded in fraud, the injured complainant is entitled to redress.

The next excuse is of no greater value. The defendants may really have intended, and I am quite willing to believe did intend, no more by discouraging and preventing other bidders, and buying in the property themselves very low, than to get such a command of the property, as would operate upon the complainant to come forward and redeem the property, by paying off the debt. But does this object warrant a creditor to take away

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\*from a debtor the chance of a fair sale and a full price, which, generally speaking, may be expected, and which, in this case it is proved, wealthy men were willing and stood prepared to give for the property? Certainly not. His intention and object may have been what it would, but the means taken were improper, and did produce a direct mischief and loss to the debtor, which this court is bound to remedy.

But it is said, that the agent of Mr. Keith, the administrator of Young, consented to the arrangement, and that this agreement took away all ground of complaint from the principal.

Let us look into the facts, and then judge of this excuse. Mr. Keith had written to his agent to endeavor to obtain from the creditors a postponement of the sale, in the hope of being able to raise money to meet the demand before the next sale day; but if he could not, then to bid at the sale, and buy in the property.

The agent could not obtain the postponement, but one of the Messrs. Purvis', the defendants, told him that he would bid in the land, and give Mr. Keith a reasonable time to redeem by paying the debt. Mr. John Taylor, who stood ready to give \$2,000, but thought it worth much more, (for he thought the land alone worth \$2,000 and the buildings worth \$3,000) acting a friendly part, advised the agent to come into this arrangement, thinking the time given important, and the agent pressed by circumstances, it seems, did yield to the proposition, and the land was set up for sale, and bid in by Mr. Purvis for \$1,000, without any bidding on the part of the agent, or of the gentlemen who intended to have purchased; they being prevented by the representations of defendants, and the sudden arrangement made at the moment of the sale. Two questions were made upon this statement of facts:

First,—Had the agent any right to enter into such agreement?

Second,—If he had, what was the effect of it?

I am clearly of opinion, that he had no right to do so. He was not a general agent.

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He acted under precise instructions, to obtain a postponement or to bid in the property, even if obliged to pay ten per cent. on



the sales. He could not obtain a postponement and he did not bid at the sale, but entered into an arrangement not to bid, but to permit the defendant to buy in the land, and to let in his principal to redeem it in a reasonable time. And the use which defendant made of this arrangement, was to discourage and prevent third persons from bidding. Though the agent meant well; he departed from his instructions, and his act was not obligatory on his principal. If indeed, his principal had afterwards sanctioned it, it would have been valid. But he did not sanction it; for in a letter which defendants have themselves introduced as evidence, he expresses his astonishment at it.

The agreement not being binding on Mr. Keith leaves the case upon the first naked ground, that the judgment creditors discouraged and prevented other competent persons from bidding, as they swear they intended, by which means they got an opportunity to bid in for \$1,000, a property which was worth from 3,000 to 3,500 dollars; and which these very persons had sold to Mr. Young for £1,700 sterling.

It was urged that the agent of Mr. Keith, could not have obeyed his instructions, for he was not furnished with funds to pay the ten per cent. if he had bid in the land, and could not raise them; and therefore, he acted for the best. It would be sufficient to answer, that wherever an agent acts contrary to his orders, though with the best intentions, he acts subject to the affirmation or negation of his principal. And the person who transacts with him, and who knows the instructions, as these defendants did, (for it is in proof that the letter of Mr. Keith, was produced and read to Mr. Purvis) does it also subject to the will of the principal. But, in fact, it has not been proved that the ten per cent. had been demanded by the advertisement of sale: and though the agent is said to have declared that he had not money to pay the ten per cent. and could not raise it, Mr. Keith states in his letter,

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which defendant made evidence also, \*that he had placed funds at the command of his agent. But admit he had no funds, the unauthorized arrangement made, which was announced to the people at the sale, prevented them from bidding and deprived his principal of the benefit of a fair sale, and left him at the mercy of a rigid creditor; and the judgment creditors having drawn the agent into these terms, with a full knowledge that it was contrary to the instructions, must bear all the ill consequences.

Second.—But if it should be conceded that the agreement was binding on Mr. Keith, another question arises, what was the effect of it, and how has it been complied with?

The agreement in a few words was, that if Mr. Keith's agent would not bid at the sales, and if other persons attending with a view to purchase, did not bid, Mr. Purvis would

buy in the property, and would let in Mr. Keith to redeem by paying the money. One of the witnesses swore, the money was to be paid by the middle of May—the defendants in their answer say in a reasonable time.

It is contended for the present defendants, that Mr. Keith had by this agreement a short time to come in and avail himself of the benefits of it, and that upon his not doing so, Mr. Purvis had a right to consider it at an end; to keep the land at the sum of \$1,000 for which he bid it in, and to proceed to enforce his judgment for the balance of the debt.

For the complainant, Mr. Keith, it is insisted, that the defendant Purvis by consenting to give a reasonable time to redeem, had changed the transaction altogether, and had converted the business into a mortgage; and Mr. Keith could come in and redeem at any time until the Purvis's foreclosed the equity of redemption.

The decided cases have been examined, and I am strongly inclined to think that this case comes properly in that class which determines that the debtor has an indefinite time to redeem. The agreement contained

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in it \*ab origine, the principle of redemption.† Indeed, it was the only stipulation entered into for Mr. Keith; and I do think the creditor was not at liberty, at so short a time after the sale, to consider the agreement and the permission to redeem, at an end, and to keep the land at so low a price, and to press the debtor for the balance.

What is a mortgage? It is a conveyance of property, with a condition that such conveyance shall be void, if the debtor pays certain sums of money by a given day; to which the law attaches another principle, to wit, that the debtor may come in and redeem the property, within any reasonable time after the day of payment stipulated; which time is extended to twenty years, unless the creditor previously forecloses the equity of redemption by legal process; whereupon the court gives a day to the creditor, to come in and redeem the property by paying the debt. What was the agreement here? That if the debtor would not bid in the property, and if third persons would not bid, but allow the creditor to bid off the property at his own price, he would give time to redeem. To this agreement the law attaches all the rights of a mortgage; and Mr. Keith had a right to come in and redeem, not to a limited day, but within what the courts should deem a reasonable time.

Mr. Purvis not having done this, but having, as he says in his answer, sold the land, he has cut off Mr. Keith from his stipulated benefit, and he must bear all the consequences.

† 2 Comyns, 635; 1 Vern. 138, Exton v. Graves; 2 Vern. 84, Manlove v. Ball; 1 Vern. 268, Barrel v. Sabine.

Against this, it is insisted, however, that the agreement was merely parol, and was not binding on Mr. Purvis; and that the statute of frauds need not be pleaded.

I am inclined to think that the answer of the defendant, admitting the agreement and the part execution of it, would take the case out of the statute of frauds. But admit that it is a parol agreement and void,

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can it \*be believed that the complainant is not to have redress? Can it be tolerated, that a creditor shall, at a sale of his debtor's property, lull him to sleep, and keep off other purchasers, by an agreement, under which he buys in the land for a small sum, much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should be allowed to have no benefit from the agreement, whilst he reaped all its fruits? Surely not. Courts of justice would be blind indeed, if they could permit such a state of things. If the agreement was void, then Mr. Purvis must surrender up his advantages under it, and be liable to make good the loss sustained by the adverse party from his conduct.

It is said, indeed, he has made nothing by this great bargain. This may be so, but his improvidence in selling the land, and the balance of the debt, merely for the amount of the debt, does not weaken the complainant's title to redress.

It is alleged, that the complainant asking equity should do equity, and should have paid or offered to pay the balance of the debt, and thus redeem the land. It is a complete answer to say, that the speedy sale of the lands by defendant, took away the power of complainant to redeem and to have the land.

The only difficulty which remains, is, as to the nature of the relief to be given. If the defendant had not sold the land, as he has stated in his answer, I should be inclined to think that the proper relief would be, to let in the complainant to redeem on paying the debt; unless, indeed, there had been a great alteration in the value of the property.

But, as he has sold the land, I am unwilling to disturb the rights of third persons. I will endeavor to give relief in another way.

It is, therefore, ordered and decreed, that the defendants do give credit as of the day the sale took place, for the sum of \$3,000, [being the amount of which Mr. Howell was prepared to give for the land,] on the judgment which they held against Mr. Keith, as admin-

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is\*trator of Mr. Young;—and that if this be impossible from an actual sale and assignment of the judgment, that the defendants do pay to the complainant the sum of \$2,000, with interest from the day of sale, being the difference between the \$1,000, at which the land was bid in, (and which has been already

credited) and the \$3,000 which Mr. Howell was ready to give. And that defendants do pay the costs of this suit..

There was no appeal from this decree.

Blanding for complainant. Nott and Egan for defendant.

## 4 Desaus. 122

## Case XXIII.

Columbia.—Heard by Chancellor Desaussure.

DUNCAN M'CRAE v. JOHN HOLLIS.

(June, 1810.)

[Account ⇨25.]

This court will open settlements made in mistake, though receipts in full have been given, and the note taken up; and will allow the larger sum established by evidence.

[Ed. Note.—Cited in McDow v. Brown, 2 S. C. 110, 111.

For other cases, see Account, Cent. Dig. § 145; Dec. Dig. ⇨25.]

[Account ⇨25.]

On the other hand, it will permit the defendant to shew mistakes in the credits, and will correct the errors on that side.

[Ed. Note.—Cited in McDow v. Brown, 2 S. C. 110, 111.

For other cases, see Account, Cent. Dig. § 145; Dec. Dig. ⇨25.]

[Equity ⇨339.]

The scales of evidence being poised, the defendant's answer will have considerable weight.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 685, 686, 688-696, 703-705, 710, 714; Dec. Dig. ⇨339.]

There are two questions in this case:

First,—Whether any mistake was made in the calculation on which the settlement of the note in question was made?

Second,—Whether the defendant is not entitled to two credits, which have not been given him in the settlement?

These two questions are entirely distinct from each other.

As to the first, there can be no doubt at all, for the calculation is made on the back of the original note, and it begins with the sum of \$191 15 cts. instead of \$291 15 cts. which is the sum expressed on the face of the note. All the calculations are made on this erroneous foundation; and after two credits given,

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the balance is stated to be \*\$111 5 cts. which was paid together with the costs, and a receipt in full given.† There can be no doubt then on the first point, and the petitioner is entitled to have the error corrected. But it is said,

Secondly,—That although there was an error in the calculation, upon which the settlement was made, yet there was another error in the settlement, by which an omission of

† Mr. Elison states all these facts on his oath, and is entirely uncontradicted in them.



two credits for two payments took place, which he is entitled to have rectified, and by which the note was more than paid off. There is no doubt that the defendant is entitled to have this error rectified, if it be supported by evidence.

The evidence upon this fact must be strictly examined and compared:

Mr. Ellison, a gentleman of character who transacted the business, (and who is not interested, as appears by Mr. M'Crae's declaration of release, in case he had been liable,) swears that Mr. Hollis produced him only two receipts, one dated 6th of April, 1805, for \$64 4 cts. the other dated April 11, 1806, for \$50, both of which were credited in the statement, on which the settlement was made; that no other receipts were produced by Mr. Hollis except those two. That he afterwards saw Mr. Hollis, and conversed with him on the subject, and stated the error in the calculation, and that Mr. Hollis did not then deny that a mistake had been made, but said it was an old affair, and he had paid much money on the business. He also spoke of other receipts, but did not produce them—that he did not know the exact amounts, nor dates, nor where they were. And that there are no credits in the books of M'Crae and Cantey, for more than the two payments which were credited in the settlement made by Mr. Ellison. He believes those books may be relied upon for correctness generally, though he has understood there have been a few instances of omissions.

Mr. Joseph Ellison, had not a distinct or strong recollection of the conversation be-

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tween Mr. Ellison and \*Mr. Hollis, but corroborates what Mr. Ellison had stated, and adds, that Mr. Ellison having asked Hollis, whether he supposed he had seen any other receipts than the two for which credit was given, or could suppress them, he answered, no.

On the part of defendant, his answer states, that he had made four payments on the note, and placed four receipts of M'Crae, Cantey and Co. in the hands of Mr. Ellison to make the statement on which the settlement was made, and he left the receipts in Mr. Ellison's hands, being satisfied with his receipt in full.

Mr. William Hollis, a witness for defendant, swore, that he saw a receipt for \$82 and some cents, in the hands of Mr. Starke, for so much paid by him on account of Mr. Hollis' debt to M'Crae and Cantey; but could not say if it referred to the note. He did not know in whose hand writing the receipt was, nor who signed it—supposes it was from Gen. Cantey, of whose hand writing he has some knowledge, but he is not sure. He saw the receipt in Picket's store, late in 1804, or early in 1805, but does not know the date of the receipt.

Daniel Hollis swore, that he knows of four

receipts, one paid to M'Crae and Cantey, for about \$80; one paid by Moses Hollis for 50; one of about 60; and one of 35 or \$40; and that he got the four receipts the day his father went to court to settle with Mr. Ellison, and gave them to his father to take with him. He believes the receipts referred to a note; for he did not know of any other debt from his father to M'Crae and Cantey. Has no recollection of the dates, nor does he know the hand writing of M'Crae and Cantey. The receipts were in their name; and the note was to M'Crae, Cantey & Co.

Mr. Nott, for defendant, produced in evidence an old note, dated 13th Nov. 1800, to M'Crae and Cantey for \$235 78 cts.; and the new note on the 10th April 1804, is a mere renewal of the old note, with the interest calculated up.

I have been thus particular in reciting the testimony, because the case turns wholly on the evidence. I have compared the evidence

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on both sides, and I acknowledge \*that I feel a difficulty in deciding. All the witnesses are persons of credit, and I give full credence to what they have said; yet their evidence leads to very opposite conclusions.

I have no doubt that Mr. Ellison gave credit to the amount of the receipts which he saw; but it would seem extraordinary, that a man carrying four receipts to make settlement should produce but two of them;—and I cannot doubt, from the defendant's positive answer on oath, that he had made four payments on the note; especially, as that answer is corroborated by the testimony of W. Hollis and Daniel Hollis.

Some stress was laid by complainant's counsel, on the fact that the note is to M'Crae, Cantey and Co. and that the witness swore the receipts were by M'Crae and Cantey. But that is obviated by observing that they do not appear to have been very exact in their attention to the names of the firms in their dealings; for the first note is to Duncan M'Crae and Zach. Cantey, yet the renewal is to M'Crae, Cantey and Co. and there is a memorandum at the bottom of the note, that it is for M'Crae and Cantey.

Upon the whole, it appears to me, that there is sufficient evidence to induce a belief, that four payments were made, amounting to a sufficiency to discharge the debt, whether the receipts were produced to Mr. Ellison or not. And if there was even more doubt than there is of that fact, yet as a settlement has been made, and the defendant is in possession of a receipt in full, I do not think the evidence in the case would justify me to disturb that settlement.

The petition must be dismissed with costs of suit.

There was no appeal from this decree.

Blanding for complainant. Nott for defendant.

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## \*Case XXIV.

Columbia.—Heard before Chancellor Desaussure.

ABRAHAM ROACH v. JAMES RUTHERFORD.

(June, 1810.)

[Vendor and Purchaser ⇨114.]

The court will not set aside a contract for the purchase of a house and lot on the allegation of an imperfect or encumbered title, not clearly shewn to be so, after a long possession of the property by the purchaser, and after a confession of judgment for the purchase money. Such conduct amounts to a waiver of objections—though the court might give some relief, ultimately, if the title turned out to be really bad. The vendor having enforced the judgment for his purchase money, and bought in the property at a very low rate, but offering to rescind the sale on payment of the debt, the court decreed accordingly.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 204; Dec. Dig. ⇨114.]

[Judgment ⇨796.]

[A bona fide purchaser of land may plead the statute of limitations to a judgment which was a lien upon the land at the time of the purchase, after a possession of five years.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1395; Dec. Dig. ⇨796.]

[Vendor and Purchaser ⇨308.]

[A purchaser of land will not be permitted to resist the payment of the purchase money on account of a defect in the title, he having taken and remained in possession for more than five years, with notice of the defect, and without being disturbed in his possession.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 889; Dec. Dig. ⇨308.]

[Vendor and Purchaser ⇨308.]

[Where the purchaser of land has given notes for the price and taken a bond conditioned for a conveyance on payment of the notes, he cannot come into court for relief against the notes, in consequence of a defect in the title of the vendor.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 877; Dec. Dig. ⇨308.]

The bill charges that the complainant in the month of June 1806, purchased of the defendant a lot of land with improvements in Columbia, for the consideration of \$1,300; for which he gave defendant two notes of hand, and took from defendant a bond for titles, to be made when the whole of the purchase money should be paid. That when the notes became due, the complainant confessed judgment, not doubting the ability of the defendant to make titles; but, that afterwards, he learnt, that the defendant had purchased the lots of one Mathias Rush, who had taken the benefit of the insolvent debtors' act, and that the said lot was liable to the debts of Rush, many of which were judgments. That on looking into the clerk's office, he found one judgment at the suit of Robert Patton, for a considerable amount unsatisfied; and that several of the judgments are now open and unsatisfied. The bill further charges, that

the complainant applied to Andrew Wallace, the acknowledged agent of defendant, for a sight of the title deeds; and that Wallace would give no sort of satisfaction upon the subject; but ordered the sheriff to levy and sell under an execution issued on the said judgment. The bill further charges, that the complainant was desirous of selling the lot and house; but that owing to said Andrew Wallace's refusal to submit the titles of the said James Rutherford, to the inspection of

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James S. Guignard, he was unable to \*do so without sacrificing the property. That Rutherford ordered the sheriff to proceed, and upon the sale he purchased the said lot at a low rate. The bill further charges, that the complainant has laid out and expended on the said lot, in good buildings, &c. between two and three thousand dollars. That after the complainant became acquainted with the circumstances of the case, he intreated the defendant to take back the house and lot, which he refused, and actually levied for the balance of the debt upon two slaves of the complainant, for the purpose of satisfying the defendant's demands. The bill prays that the defendant may be enjoined until he shews a good title to the lot, and for general relief.

The defendant in his answer sets forth, that he admits the sale of the house and lot, &c. in the bill mentioned, by the defendant to the complainant, for the price, and on the terms therein stated; but insists that the complainant has no right to complain, because by the terms of the bond which the defendant executed, and is exhibited by the complainant, he was not bound to make titles until the whole of the consideration money was paid; and that after a full knowledge of all the circumstances of this defendant's title fairly disclosed, he made and entered freely and voluntarily into the said contract; and by virtue of that agreement, then entered on the possession, and has continued ever since by himself or tenants in the actual possession thereof; and that he still holds the possession, without the intervention or claim of any person whomsoever; and being conscious that he had purchased of the defendant by a good title, long after the notes became due, he confessed the judgment in the bill mentioned. But as soon as the defendant began to press for the recovery of his money, the complainant obtained an injunction and stayed the defendant's proceeding, which injunction was afterwards dissolved and the bill dismissed. That the complainant did not allege in that bill the want of a title in the defendant, although he then possessed all the information on the subject which he possessed at the filing of his last bill; and that his present bill is only filed to

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stay the payment of \*a just and honest debt.



The defendant admits that he purchased the house, &c. of Mathias Rush, mentioned in the bill, who never had, (as was well known to the complainant,) taken the benefit of the insolvent debtors' act in any of the courts in this state; nor are there any judgments appearing against the said Mathias Rush, except one at the suit of Robert Patton, which has long since been discharged and satisfied, as the defendant was informed and believes. The defendant further admits, that Rush purchased of J. Fleming, in the bill mentioned, who purchased of the commissioners appointed to sell the lands in Columbia: from whom the defendant deduces a title to himself; all which has been submitted to the complainant. An that Rush was not indebted beyond the value of his property, at the time the defendant became the purchaser of the lot in question: and that the defendant never has pretended that any one claiming to be a creditor of Rush, has ever set up any title to the lot in the bill mentioned. That if the complainant had performed his contract, he might have had the title from Rush to the defendant recorded within the time prescribed by law; and that the defendant does not pretend that Rush has ever sold the said lot, &c. since the sale to the defendant. The answer further admits, that the complainant may have made the application in the bill mentioned, to Andrew Wallace, for a sight of the titles; but he, not being an agent of defendant's, but attending to his affairs as a friend, might have refused to shew the said titles, before the filing of said bill to Abraham Roach or his counsel. The answer further admits, that the house and lot was purchased in for him at the sheriff's sale, but that the defendant is willing to release the purchase upon the payment of the principal and interest due him by the complainant. The answer further states, that after the sale of the house and lot, he did proceed for the balance, expecting the complainant would hold him out of possession of house and lot, (not with a view of imposing a bad title on complainant,) but for the enforcing a fair and just demand. The answer denies that the defendant was

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a stranger to the complainant, or that \*there was any studied concealment of the circumstances in the defendant's title; but that at the time of the contract, all circumstances were fairly and honestly exposed to the complainant.

Upon the hearing of the cause the following testimony was produced:

Mr. James Guignard, being sworn on the part of complainant, deposed, that Abraham Roach applied to the register's office, to see if Rutherford had any titles to a lot in Columbia, and none were found. Witness mentioned to Wallace, (agent for Rutherford,) that he would be glad to see the titles. But Wallace declined; saying, though he had

such titles in his possession, he would not shew them, as he did not feel justified to do so. On the day of sale, he heard Roach again make enquiry of Wallace, of the titles of Rutherford; but, he said, he would not shew him any titles at all. But Wallace told witness, he would give the titles to Mr. Starke, (attorney at law for Rutherford,) who might do as he pleased with them. There are two judgments on record against Rush—one satisfied. There are no titles on record from Rush to any other person. There is a regular deduction of title from the commissioners to Rush. Roach has been in possession of the house and lot for four or five years past.

Mr. Taylor was sworn, and deposed, that he understood from Mr. Wallace, that he was agent of Rutherford, and received particulars about the sale of the house and lot in Columbia. Witness was then deputy sheriff. The property was sold under two of Rutherford's executions (on this contract) and sold for 700 or \$750, but no titles have ever been made by the sheriff, as Mr. Rutherford declined them.

Mr. Egan was sworn as a witness for complainant. He applied to Wallace for Rutherford's titles, so that Roach might be safe. He refused to shew them. Witness applied to Wallace, and enquired for incumbrances. Witness found an execution in the office against Roach for \$250, and costs \$32; and a return to it of nulla bona, in April 1805, on a judgment at suit of Patton.

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\*Mr. Starke, counsel for complainant, produced an agreement between Patton and Roach, for a lot of land, and judgment by Patton against Roach for non payment of the purchase money. No titles for the land from Patton to Roach. Wherefore, as far as the lots go they are a security for the purchase money to Patton. Mr. Starke also produced a conveyance from Roach to Rutherford, on 16th May 1804, of the land in dispute, regularly proved, but not recorded, which had been left with Wallace for Roach. Produced the examination of Chas. Williamson, a witness for defendant, to shew that the judgment was paid off, as he was informed, by Burrage Purvis; but he was sure the payment was made.

Mr. Wallace, a witness for defendant, deposed, that the titles of Mr. Rutherford to the land, were left with him by Mr. Rutherford, to deliver to Roach when the money should be paid, and his powers extended no further. Rutherford placed in witness' hands, deeds from himself to Roach (September 1810) to be delivered when the money should be paid. Witness placed the title in the hands of Mr. Starke, after the time of probate, in August 1807, to shew Roach if he deemed it proper; and witness told Mr. Starke of it. This power was to deliver the titles when the money was paid. He refused

to shew them to Roach. After many repeated evasions by Roach, the sale was ordered, and he was authorized to go up in bidding at the sale, to the debt and costs. But no person bid against him, and he bid it off low. Witness offered to let the amount of Patton's judgment remain in Roach's hands, till the matter was cleared up.

Mr. Egan says, he applied to Mr. Wallace for the titles, but could not get them. Mr. Starke says, ever since he has had them, he has been ready to shew them. Mr. Starke stated, that he had them, and declared he was ready to produce them, whenever they were wanted. He produced in evidence Rutherford's bond to Roach, to make titles on payment of \$1,300.

After the hearing, and after argument, the chancellor made the following decree:

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\*This is an application to the court to relieve the complainant from a judgment at law, which has been obtained against him, as above stated: And, indeed, to relieve him from a contract, by which he became the purchaser of a house and lot in Columbia, for which he gave his notes, on which the judgment was obtained. The relief is sought on several grounds.

First.—That the defendant had not a good title in him, so as to insure a perfect and indefeasible title to the complainant.

Second.—That defendant has delayed very long in making out or disclosing his title to the complainant, who, therefore, is entitled to this relief.

Third.—That the property is encumbered by judgments, which render the enjoyment of the estate precarious.

The complainant also states, that the sale of the house, made under the judgment at law of this defendant, was injured by the improper conduct of the defendant's agent, in refusing to shew the titles of the vendor; by which means purchasers were afraid to engage in the purchase, and the defendant was enabled to become the buyer of the property, at less than a fourth of its value; and he seeks relief from that sale. And he also seeks reimbursement for large and expensive improvements put on the lot.

I have considered the circumstances of this case, and the arguments of counsel. It was argued by the solicitors for the complainant, very much as if this was a case resting solely in contract, and as if the vendor was now asking the aid of the court to carry that contract into specific execution; in which case, the court exercises a high legal discretion, and either grants or refuses that aid, according to the circumstances and the equity of the case. But, that is by no means the real situation of the parties, or of the transaction. Upon the agreement to purchase the house and lot in question, the purchaser, Mr. Roach, was satisfied to take a bond from Mr. Rutherford, the seller, dat-

ed the 19th June, 1806, by which he engaged, whenever the sum of \$1,300 was paid to him by Mr. Roach, to make good and sufficient

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titles to the house and lot, to the said Abraham Roach or his representatives: And Mr. Roach gave his notes of hand, for the amount of the purchase money, payable at fixed periods, in the ordinary mode of giving notes. In pursuance of this agreement, Mr. Roach was put into possession of the house and lot, which he has held and enjoyed peaceably ever since, and put great improvements thereon. And by the bond which he took from Mr. Rutherford, it appears that he was to pay the money before he was to have titles made to him for the house and lot. That money not having been paid at the time the notes fell due, the same, after some indulgences, were placed in suit, and judgment recovered upon them, against Mr. Roach; to avoid which judgment and a sale made thereunder, and to be relieved from the contract, as before stated, Mr. Roach comes to this court. This was certainly an incautious bargain, by which he put himself very much in the power of the other party; and placed himself in a position far different from that wherein the vendor is obliged to come to the court to ask its aid, to oblige the purchaser to go into a specific execution of the contract. Where the seller is obliged to come to the court for aid, a number of principles and rules are brought into operation, to protect the purchaser and to secure him a good title; but, a material difference is made between establishing and rescinding an agreement. In the former case, a purchaser may demand an abstract of the title, and the court will at least see that he has a good title, to a moral certainty, before it will force him to accept the title and pay his money. But here, all is reversed; the party gave positive notes for the money, and stipulated that he should pay the money, before he should have a title.

It is true, nevertheless, that the court will, in a clear and strong case, protect a purchaser against the payment of his bond for the purchase money, or will even assist him in recovering it back, if already paid, especially if no conveyances be yet executed: provided it shall be made to appear that the vendor cannot make him a good title; or he may, if he has only made a deposit of part

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\*of the purchase money, recover back that deposit, even at law. But in such case, it is not sufficient to shew that the title has been deemed bad by conveyancers, but he must prove the titles bad. See Sugden, 157: and 4 Espin. Rep. case 221, *Camfield v. Gilbert*.

It was objected, on the other hand, by the defendant, that the complainant could not come to this court for relief, because he might have set up the pleas, which forms the foundation of his complaint in this bill, as



a defence to the suit at law. That, however, is not certain, for it has not yet been settled, whether a court of law will enter into equitable objections to a title, where a purchaser is plaintiff.† And where the vendor is plaintiff at law, to recover the purchase money from the vendee, the only ground on which it is said, that a court of law may in such action, take cognizance of equitable objections to a title, is, that as the vendor brings his action on the contract, and on the equitable circumstances between the parties, therefore, the equitable defence may be set up. This, however, is doubtful; for it rests on the authority of a single modern decision, made by the court of king's bench, in *Shaw v. Jackman*, 4 East. 201. But if the point were more settled, it would not apply to this case, for the plaintiff at law, Rutherford, who is defendant in this suit, did not sue at law on the equitable circumstances between the parties. He brought a suit upon plain notes of hand, which did not there open the contract at all. I do therefore think, that as the complainant's remedy would have been very doubtful at law, he is not precluded from coming here for relief; and this court would give him relief, if he made out a proper case.

This has been attempted, and the complainant's counsel have relied on various grounds to support such a case.

It was insisted that the defendant ought to have made out a good title, and to have shewn it to the complainant: that his re-

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fusal or neglect to do so, entitles the complainant to relief; that even if he could make out a good title, he comes too late for specific execution, after such a great length of time. He ought to have done it in a reasonable time; and that time is essential in such contracts. That the title, as at last made out, is objectionable, as the deed from Rush to Rutherford, has never been recorded, as required by law; and as there was an outstanding judgment which bound the land in favor of Rush, for \$250 and costs.

The defendant, in answer to these objections, insists, that the complainant made no such defence to the suits brought long after the contract on the notes for the purchase money; but confessed judgment thereon, and that even when he filed a bill in equity upon another point, on this contract, which was dismissed, he made no mention of the present subject of complaint. And to be sure, this conduct on the part of the complainant

furnishes a strong presumption that he had been satisfied of the goodness of the title; which opinion is greatly strengthened by the defendant's swearing in his answer, (which is uncontradicted in this point) that at the time of entering into the contract, he exhibited his title to the complainant, part of which is noted and set forth in the bond which he gave to make good titles; with which the complainant after a full knowledge thereof, and of all the circumstances truly set forth and disclosed, was satisfied and entered freely and voluntarily into the contract; and did then take possession by the defendant's permission, of the house and lot, which he has held and kept ever since, and received the rents and profits undisturbed, and without any claim by any person whatever.

This certainly is a very conclusive answer to the complainant; for as the title was exhibited to him, and he was so well satisfied as to give positive notes for the money, and afterwards to confess judgment on them, and to take and hold possession for many years, and to put great improvements on the lot, it is extraordinary that he should now attempt to set up objections, which he ought to have done long before. The court must listen with suspicion to such objections after such

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a lapse of time. The decided cases are strong on this point, and establish that where the vendee proceeds in the treaty for the purchase, after he is acquainted with the title and the nature of the tenure, and does not object to it, he will be bound to fulfil his contract. See 4 Bro. C. C. 494, *Fordyce v. Ford*; 6 Vez. jr. 670; and 10 Vez. jr. 508, and 1 Vez. jr. 221, *Colcraft v. Roebuck*.

The taking possession and keeping it for so many years, is greatly relied upon by the court in such cases; it is even deemed a waiver of objections to the title. See 12 Vezey, 25 6, *Fludyer v. Cocker*. And this will be more relied upon in this country than in England, because it not only operates as a waiver of objections to the title, but as a positive title after the lapse of five years. For our statute of limitations fixes five years instead of sixty, as in England; and it operates as a bar to the right, and not merely to the remedy, as it does in England. Now the complainant has been in quiet and entire possession himself of the property for more than five years, under the permission and the consent of the defendant, who had held it sometime before. If it be answered, that this may not be an indefeasible title, as there may be infancy or coverture, or absence from the state, which would prevent the statute of limitations from being operative, the reply is conclusive: It is incumbent on you who object this, to prove it, after such circumstances of waiver, on your part, and of complete undisturbed enjoyment by you for the

† The only two decisions on the point, are, one made by Lord Kenyon, 8 Term Rep. 516, that the judges at law could not take notice of an equity title; and the other by Lord Alvanly, 3 Bos. and Pull., that the purchaser might recover his deposit at law, on equitable objections to the title.

full time required by the statute.†† Upon this ground, therefore, I do not consider the purchaser, who is the complainant, after long acquiescence and possession, as entitled to relief in this court, to get rid of a contract under such circumstances. But, in reality, there does not seem to be any just ground to complain of the title itself, as deduced by

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\*defendant and stated to complainant. It is deduced regularly from the commissioners of Columbia, to Mr. Rutherford. Every link in the chain seems to be complete. And if the defendant had been in default as to his title, as represented by the complainant, still, according to the decided cases, the defendant might and would be at liberty to perfect his title, at the time of the decree, so as to have the benefit of his contract. For the direction of the court to the master, is to enquire whether the seller can, not whether he could make a title at the time of executing the agreement.—See Sugden, 250; 2 P. Williams 629. Langford v. Pitt; 6 Vez. jr. 646. Jenkins v. Hill; 7 Vez. jr. 203. Seton v. Slade; 7 Vez. jr. 202. Wynne v. Morgan; 10 Vez. 294; and this is the rule at law too, 1 Rep. Cases, 184. And these cases operate, even where there had been a limitation of time to complete the contract: for time is not generally deemed essential in such cases, though it may become so, if evident disadvantages arise to the purchaser from the delay. See 7 Vez. jr. 265. Slade v. Slade; 1 Atk. 12; 4 Vez. 689; 4 Bro. 469. In this case, the purchaser has no pretence for he stipulated for no time; nay, agreed to postpone his having any title till he paid the purchase money—and the delay of that has been his own fault.

An objection was relied on, that the deed from Rush to Rutherford has never been recorded; and that it exposes the purchaser to inconveniences from double sales, and from judgments against Rush. Undoubtedly it was a neglect in Rutherford not to have recorded this deed, and might have exposed the purchaser to serious inconveniences. But the conduct of the purchaser in so long waiving all objections to the title, diminishes his right to object at this time, and the strength of his possession takes away the apprehension of his suffering any ill consequences. Besides, the complainant has not shewn that these effects have followed. The court will enquire whether any other deed from Rush is recorded, and order this deed to be recorded immediately.

As to the judgment on record against Rush, it would, if it still bound this land, be a sub-

†† I wish to avoid being misunderstood on this subject. I by no means mean to say, that the court would be disposed to oblige the purchaser to take a title, depending wholly on the statute of limitations where the vendor came to the court, to compel the purchaser to a specific execution of a contract. But that is not the case here.

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ject of compensation \*and deduction, and not of rescission of the contract;—for it must be indifferent to the purchaser to whom he pays his money, provided he is not asked to pay more than the amount of his purchase. But according to the cases decided at law, the possession of a bona fide purchaser, will protect, under the statute of limitations, the holder of real estates as well as personal, against the operation of judgments. In this case, I presume the operation of the judgment in question is barred by the statute, upon the possession proved. But some precaution may be used to make the purchaser secure beyond all doubt.

The complainant also sought relief against the sale of the house and lot, which was bought in very low by the defendant, at the sale under his judgment and execution founded on the notes. I am not sure, that the evidence would have borne me out in setting aside the sale in this case. There does not appear to have been any fraud intended by the friend or agent of Mr. Rutherford. But, as the sale was made at a price very greatly below the value, and as that effect may have been produced by the extreme caution of the friend of Mr. Rutherford, which made him reluctant to produce the title deed from Rush to Rutherford, which might have discouraged purchasers, I am very glad that the defendant has offered to rescind the sale, and to give the complainant an opportunity of obtaining a fairer price for the property, if he should not be able to complete his payments, so as to prevent a resale. I gladly lay hold to this concession, which is just and proper in itself, and indicates a liberal temper in the defendant towards the complainant, to set aside the sale which has been made of the house and lot under the judgment and execution.

It is therefore ordered and decreed, that it be referred to the commissioner to enquire and report if there be any conveyance on record, or mortgage of the house and lot in question, from Mathias Rush to any other person than to Mr. James Rutherford; and also, if there be no other judgment on record against the said Rush, than that in favor of

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Patton, for the sum of \$250 and \*costs of suit. And that upon its appearing that there is no such conveyance or mortgage, that the defendant do deposit the conveyances which form his title to the said house and lot, properly recorded, or certified copies of such as are not in his possession, in the hands of the commissioner, to be kept in safety by him until the complainant shall pay the amount of the purchase money, due by Abraham Roach to defendant, James Rutherford; and thereupon, to be delivered to the complainant.

That with respect to the judgment standing against the said Mathias Rush, and supposed



to bind the said house and lot, it is ordered and decreed, that the complainant shall be at liberty to retain the amount appearing to be due on the face of the judgment and the costs, out of the purchase money, for the space of two years; and if, in the mean time, the same shall be revived, the complainant may apply so much of the purchase money to pay off said debt.

It is also further ordered and decreed, that the sale heretofore made of the said house and lot, under the judgment and execution of the said defendant, be set aside; and that upon the delivery of the title deeds by the defendant to the commissioner, for the complainant as above directed, the injunction be dissolved, and the defendant be at liberty to proceed to a resale of the house and lot under his judgment at law. The complainant to pay the costs of suit.

HENRY W. DESAUSSURE.

An appeal was made from this decree; but it was afterwards abandoned.

Mr. Starke for complainant.—Egan for defendant.

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\*Case XXV.

Columbia.—Heard before Chancellor Desaussure.

JACOB HARTEN alias GIBSON v. JACOB GIBSON, Sen., and others.

(June, 1810.)

[*Bastards* ⇨98.]

A deed by a stranger, providing for his natural child by a married woman is valid, and will be enforced against the trustee, administrator and representatives of the donor; though imperfect in its form, and though no immediate possession of the property be given by the grantor.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 249; Dec. Dig. ⇨98.]

[*Bastards* ⇨98.]

It would be more immoral for the father of such a child, to deceive the nominal father, and leave him to support a child not his own than to avow the truth, and make the provision.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 249; Dec. Dig. ⇨98.]

[*Bastards* ⇨98.]

[The bastardy act has not changed the common law, and the putative father, who has neither wife nor lawful issue, may dispose of all his estate by deed or will. But a provision made by him for his child by another man's wife will be supported in equity.]

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 249; Dec. Dig. ⇨98.]

[*Gifts* ⇨21, 41.]

[A person executed to A. a deed empowering him to sue for and recover his property, and invest it for the benefit of B., and died. *Held*, that this was a valid gift to B., not revoked by the death of the donor before the recovery of the property.]

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 20, 36; Dec. Dig. ⇨21, 41.]

The bill states, that the complainant was always reported to be the illegitimate son of a certain Joseph Gibson, of Fairfield district, who departed this life about five years since, without wife or any lawful issue; that in the old man's lifetime, he uniformly acknowledged the complainant as his child, and treated him with tenderness and regard; that the said Joseph Gibson had, by frugality and industry, accumulated a little property, viz. a valuable slave called Anthony, some notes of hand, and other things, the precise amount not known; and he had always declared his intention, that the complainant should have all he possessed; and a little before his death, for the purpose of securing to complainant the property aforesaid, he executed an instrument of writing to his brother Jacob above mentioned, but complainant does not know the precise purport of said writing, which is in the possession of said Jacob Gibson. After the death of the said Joseph, the said Jacob administered on his property, and refuses to give the complainant any thing. That Messieurs M'Graw and Jones, mentioned in the complainant's bill, were security to the administration bond, which Jacob gave, and took the administration from him, sold the negro Anthony to one Claupitt; and they also refused to give complainant any of the estate. The complainant, therefore, prays for a discovery and amount of the estate of said Joseph Gibson, founding his claim thereon on the declaration of the deceased, and the

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instrument of writing aforesaid, and prays that the said Gibson and others, may be compelled to produce said writing, &c.

The answer admits the death of Joseph Gibson, without wife or children. It admits the execution of a deed, constituting Jacob Gibson his attorney, to sue for and recover money;† and desires his attorney to employ

† Abstract of the Power or Deed.

Know all men by these presents, that I, Joseph Gibson, sen. have made, ordained, constituted, &c. Jacob Gibson, to be my true and lawful attorney, for me, and in my name and for my use, to ask, demand and receive from all that are indebted to me by bond, note or any other account; and upon nonpayment thereof, the said Jacob Gibson or his attorney, for me and in my name, to sue, arrest, imprison, plead and prosecute for the same, &c. ratifying and holding firm, all and whatever my said attorney or his substitute shall lawfully do, or cause to be done, in and about the premises; and I also desire that my said attorney, do keep a record of all that he recovers or receives; and put the same to interest, or purchase any property with the same, that he may think most advantageous for my son, Jacob Gibson, jun. whom I claim and acknowledge to be mine; he is a son of Rose Harten, wife of Henry Harten, and I have given him the name of Jacob Gibson; and I do allow him to have all that I now possess whenever he comes to the age of maturity; and that the same be held by my attorney until that time, and then be given up to him; and in case he should die without issue, the property to revert back to Jacob Gibson,

the funds he might collect, for the use of his natural son, Jacob Gibson, the complainant. That no property was delivered to defendant by Joseph Gibson; who kept the estate in his own hands till his death. But defendant has administered and possessed himself of the property. Defendant denies any acceptance of a trust; and insists that the deed was only a power of attorney, which died with the maker. The defendant asks the direction of the court, in the construction of the said deed, as the same does not appear to be a regular or legal deed. The case came to a hearing.

Mr. Egan for complainant, argued that the deed is not testamentary; it was a trust

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deed, to be executed immediately, and was irrevocable. Whether the child can be recognized by the law as the son of Gibson, or not, is not of importance. He might make a gratuitous gift to the child, and that is good, unless creditors are injured, which is not alleged in this case.

Mr. Nott for defendants.—Gifts by deed are valid though no consideration; but where the deed shews a particular consideration which is not supportable, the deed is void.—Pow. on Con. 33.

As to the policy: Does the law permit any man to claim the child of a family, and dishonor a husband and wife? There is no consideration here; for there can be no love and affection for a natural child like this.

As to a gift, to a mere stranger, there must be an actual delivery of the property. In this case no delivery of the property took place. Will the court say this was not a revocable deed? The court would be governed by the construction which the party himself seems to have put upon it. Can it be supposed it was the intention of Joseph Gibson, to have divested himself of the property, so that his trustee or attorney might have recovered the property, and taken it out of the hands of Gibson himself? He lived for ten years after the deed, and never gave possession of any part of it to the trustee or attorney. Could it be supposed he meant to bind himself in such a manner as to preclude him from revoking it? Where a person undertakes to express a consideration, and that is not a justifiable one, (such as love and affection for a natural child by a married woman,) then it must be void; differing in that respect from the case where no consideration at all is expressed.

The court delivered the following decree: This case turns on the validity and opera-

sen, to be disposed of at his discretion. In witness whereof, I have hereunto set my hand and seal this sixth day of June 1796.

Joseph Gibson, Sen. (L. S.)

Signed sealed and delivered in the presence of us,  
David Gibson,  
Abel Gibson.

tion of a deed executed by Joseph Gibson, deceased, to Jacob Gibson, the defendant, for the benefit of the complainant, whom Joseph Gibson, claimed as an illegitimate son.

It appears that Joseph Gibson had neither wife nor lawful issue; so that the case stands clear of any objection drawn from the bastardy act; and Joseph Gibson was free to dispose of his property to any person by deed or will.

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\*One objection to this deed is, that the deed was either gratuitous, and no possession being given of any property, but it being to take effect at a future and uncertain time, it cannot legally take effect; such gifts being void at law. And that it cannot be supposed the executor of this deed, intended to preclude himself from altering or recalling the deed if he had chosen; which would be inconsistent with an absolute gift, and shews the same to be void.

I am of opinion, however, that this deed, though gratuitous, and unaccompanied by possession of the property, is valid. Verbal gifts, unaccompanied by possession, are indeed void. But the law considers the deliberate execution of a deed, sufficiently evincive of a settled purpose to give, which may take effect at a future day; and it is the duty of courts so to construe deeds, ut res magis valeat quam pereat. And though this deed be badly drawn, and awkward in its provisions, the intent of the donor is sufficiently clear. It intended to create a trust in the defendant Jacob Gibson, of all Joseph Gibson's property, for the benefit of the complainant.

It is not necessary for the court to embarrass itself with the question, whether the deed was revocable, and what effect that ought to have on the case. It is enough to say, that the deed was not revoked, and must have its effect, unless some legal or moral principle be violated thereby.

It is further objected, that this deed expresses a consideration of an immoral tendency, and which this court ought not to sanction. That it is a gift of property for a child, whom the donor recognizes to be the child of a woman, who was the wife of another man, which is a moral turpitude, that cannot receive the support of this court. God forbid that I should lend the sanction of the court, to any thing which would shake or loosen those great moral ties, which bind society together; but we must not permit our feelings and apprehensions to mislead our judgment. Although it is morally as well as legally improper to have illegitimate

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children, the law \*not only permits, but enjoins it on the father to maintain the illegitimate child. The immorality is in the act and not in the provision: for if this man had really violated the marriage bed of another, and had a child by the wife, it was



more proper that he should provide for it out of his substance, than that he should have allowed the injured husband to remain the dupe of his artifices and crimes, and to bear the burthen of the fruit of them. Besides, the child is innocent at all events, and it is he who is to be benefitted by the deed. I see no solid objection, therefore, against the deed being supported.

It is ordered and decreed, that the defendants do account with the complainant for the whole amount of the property left by Joseph Gibson, including the price brought by the sale of the negro: and that the costs of this suit be paid out of the estate of Joseph Gibson. (††)

There was no appeal from this decree.

††This is not an encouragement of any corrupt or vicious habits. If the donor had made use of this as a mode of slandering a virtuous family, the gift would be repelled with indignation, and the donor, if living, punished for the slander. But if it were really true, that a man had intruded himself into a family, and was the father of one of the children of that family, it was his duty to make some compensation for the evil he had done, by providing for the child; which was, at all events, innocent, and at liberty to accept such provision. Settlements made by men on their mistresses, and their children, have been supported in equity, when made in *præmium pudicitiae*, as a compensation for the injury done; though not where it is a reward for the continuance of the vicious connection, which would be *pro turpi causa*.

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##### Case XXVI.

Ninety-Six District.—Heard before Chancellor Gaillard.

ARCHIBALD DOUGLASS, et al. v. JACOB CLARKE, et al.

(June, 1810.)

[*Descent and Distribution* ⇨ 65.]

A widow is entitled, under the statute of 1791, for abolishing the rights of primogeniture, &c. to one third of the real estate of her intestate husband, in fee.—This is in lieu and bar of dower. If she dies without having claimed her dower, her representatives are entitled to the third which the statute gave her in fee.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 195; Dec. Dig. ⇨ 65.]

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\*The complainant, Douglass, married one of the daughters of Phebe Hearst, by her former husband, Cochran. The other complainants are her children by the same marriage. The complainants state, that shortly after Mrs. Cochran's intermarriage with Hearst, he died intestate, seized in fee of a valuable estate in lands, leaving Phebe Hearst his widow, and several children, all of whom were by a former marriage. That under the act for the abolition of the rights of primogeniture, and for the giving an equitable distribution of the real estate of intes-

tates, she became entitled to one third of the real estate of said intestate, in fee simple; and the children of Hearst to the other two thirds of it. That the said Phebe Hearst died intestate, about three years after the death of her husband, without having had her proportion of his estate, partitioned off to her. Her legal representatives, the complainants, claim the third of Hearst's real estate, and pray for a writ of partition. The facts are admitted by the defendants, who are the children of Hearst. The counsel for the defendants resisted the claim of complainants, on the ground stated in the answer, that in cases of intestacy, when the widow has not elected in her lifetime, to take the provision made for her in her husband's real estate by the abovementioned statute, she is considered as having made choice of her provision of dower. They relied on the following clause in that statute: "That in all cases where provision is made by this act for the widow of a person dying intestate, the same shall, if accepted, be considered as in lieu and in bar of dower," and they contend that the widow, having died without signifying by any act her acceptance of her distributive share, the same never vested in her, and was not transmissible to her representatives.

Chancellor Gaillard delivered the following decree:

Where a person entitled to real estate in fee simple dies without disposing of it by will, the act for the abolition of the rights of primogeniture, &c. directs the manner in which it shall be distributed. "First, if the intestate shall leave a widow and one or more children, the widow shall take one third

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of the real estate, and the remainder shall be divided between the children, if more than one, but if only one, the remainder of the estate shall be vested in that one absolutely forever." The court is of opinion that under this clause, on the death of Mr. Hearst, his widow became entitled to one third of his real estate; and that no act on her part was necessary to vest in her a right to this third. The intention of the clause which says that "where provision is made for the widow of a person dying intestate, the same shall, if accepted, be considered as in lieu and bar of dower," is obvious; it was merely to prevent the widow from having one third of the intestate's real estate, and her dower also. She cannot have her distributive share under the act, and her dower likewise. She has not had her dower, nor does it appear she ever intended to claim it. Her representatives, the complainants, are therefore entitled to that part or share of Hearst's estate which, on his death, vested in his widow. Let the writ of partition issue.

Theodore Gaillard.

From this decree there was an appeal, which was heard by Chancellors James, Thompson, Desaussure and Gaillard.

After argument, the decree of the circuit court was affirmed.

Goodwin, for appellant.—Yancey, for respondent.

#### 4 Desaus. 145

#### Case XXVII.

Ninety-Six District.—Heard before Chancellor Gaillard.

RICHARD QUARLES et al. v. S. GARRETT and J. MIDDLETON Administrators, and AGATHA MIDDLETON Administratrix of Hugh Middleton, Deceased.

(June, 1810.)

[*Executors and Administrators* ⚡288.]

The outstanding and undetermined claim of the widow to her share of the real estate of her deceased husband, ought not to prevent the administrator from settling with the children and distributees.—And it is immaterial to the admin-

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istrator whether the proportions re\*ported by the commissioner be correct or not, if the distributees are satisfied.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1145; Dec. Dig. ⚡288.]

[*Descent and Distribution* ⚡67.]

A widow claiming dower, and having it partitioned off to her by legal process, and holding and enjoying the same, for several years, has made her election, and cannot afterwards set it aside and claim the third in fee simple, under the statute, when the estate is nearly settled.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 205; Dec. Dig. ⚡67.]

This case was argued on exceptions to the report of the commissioner. The exceptions relied on were the 1st, 2d, and 10th. First, that the commissioner hath not made a general report between the parties, as the order of reference prescribed. Secondly, because the commissioner refers to a former report in the cause, which hath not been made by him to this court. Tenthly, that it is not such a report as will enable the court to decree according to equity and good conscience. It was contended by the counsel for the defendants, that different sums having been advanced by the intestate, in his lifetime, to some of his children, who claim a distributive share of his estate, those sums ought, as they were given in advancement to the children, to be brought into account; that the administrators and administratrix might know what sum to pay to each of the distributees. That the former report, the subject of the second exception, was never made to this court, and yet is engrafted in the subsequent report of the commissioner. That Mrs. Middleton, the administratrix and widow of the intestate, is entitled to one third of the real estate of the

intestate; and that until a decision can be had on her claim to this third, a complete and final division of the intestate's estate cannot be obtained. The court having heard arguments on the exceptions, is of opinion that the report is conformable to the order of reference. That the commissioner having ascertained the proportions of the estate due to each distributee, and also the distributees' being satisfied with these proportions, as ascertained by him, it is immaterial to the administrators and administratrix, whether they be correct or not.

The court having called upon the counsel to proceed on his cross bill, the object of which is to obtain the widow's third of the

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intestate's real estate, and he having \*stated that he was not ready to go into this matter, the court thought a postponement of the consideration of this point ought not to prevent a settlement of the accounts of the administrator and the administratrix. It is therefore ordered that the administrator and administratrix, do pay to the distributees, the sums respectively due to them according to the report of the commissioner, and that the costs of the original suit (not that withheld by the cross bill) be paid out of the estate.

February, 1811.

Afterwards, the case depending on the cross bill, Agatha Middleton v. Richard Quarles, and others, (children of Hugh Middleton,) came to a hearing before Chancellor Thompson. After argument the chancellor delivered the following decree:

The bill states, that Hugh Middleton, late of the district of Edgefield, died intestate, on or about the ——— day of ———, in the year of ———, leaving complainant his widow, and the children mentioned in said bill, who were the offspring of his three former wives. That the said Hugh at the time of his death, was seized and possessed in his own right of divers tracts of land, &c. of which, some of the said defendants, who had intermarried with the persons in the bill mentioned, had received their full share or proportion, or nearly so, by advancements made to them in the lifetime of complainant's intestate; and prays that they may discover as to their respective apportionment, so that an equal partition and distribution may be had, conformably to the act of the legislature of this state, abolishing the rights of primogeniture.

To this bill, the defendants have answered, and have also filed their plea, setting forth, that sometime, shortly after the death of the said Hugh Middleton, the complainant caused to be issued out of the court of common law, in the district of Edgefield, a summons in dower, for the purpose of having assigned to her one third part of the estate of her deceased husband, (during her life,) as dower



at common law. That in obedience to a commission, issuing from the said court, commissioners were appointed, who proceeded to ad-

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measure \*and lay out to the said complainant, her aforesaid dower; of which possession was delivered to her, and she continued in the enjoyment of it for several years; in consequence of which, she was barred from claiming a third part of the estate in fee simple, according to the regulations of the before recited act of the legislature.

The whole of the case, therefore, resolves itself into this single point, whether the proceedings in dower, at common law, are a sufficient manifestation of her having made her election to pursue her common law right, as to bar her of her statute remedy, or not? And the court is clearly of opinion, that they are; and more particularly, as, at the time the said proceedings were carrying on, it is apparent she entertained an opinion, that the estate of her intestate husband was insolvent: And that it is too late for her now to come in, after almost all the affairs of the estate have been adjusted, to set them again afloat and make a second election, and thereby acquire a right under the aforesaid act, to one third part thereof in fee simple. The court, therefore, decrees that the bill be dismissed, and that the complainants pay the costs.

There was no appeal from this decree.

Goodwin, and . . . . for Mrs. Middleton.—Calhoun and Bowie for Quarles, and others.

#### 4 Desaus. 148

#### Case XXVIII.

Union, Pinckney District.—Heard before Chancellor Gaillard.

JOSEPH SMITH and MARY SMITH, Executors of A. SMITH, v. JAMES MARTIN, in His Own Right, and P. MARTIN, JOSEPH PALMER and ELIZABETH MARTIN, Administrators of John Martin, Dec.

(June, 1810.)

[Bonds ⚡53.]

Though a bond be a joint bond, the obligors are bound in equity so that on the death or insolvency of one of them, the other and his representatives are liable.

[Ed. Note.—Cited in *Susong v. Vaiden*, 10 S. C. 255, 30 Am. Rep. 50.]

For other cases, see Bonds, Cent. Dig. § 69; Dec. Dig. ⚡53.]

[Principal and Surety ⚡123.]

Notice to the administrator of a surety in a bond to make titles, is not necessary, where notice has been given to the principal, and his

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\*representatives, and they have defended the title. The bond is considered as an agreement binding on the parties and their representatives. An issue was directed to ascertain the damage sustained by the purchaser, by the loss of eighty-eight acres of land, recovered from him by a bet-

ter title. The commissioner to ascertain and report the expenses.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 305; Dec. Dig. ⚡123.]

The complainants filed their bill to have an indemnity for the loss of certain land, sold by one of the defendants to Abram Smith, their testator, part of which was taken away by an older grant, on a trial at law. The complainants sought redress against James Martin, the vendor of the land, as well as against the representatives of John Martin, the surety, in a bond signed by both to guarantee the title to the whole tract.

The defendants, the representatives of John Martin deceased, relied on the bond being a joint bond, and that on his death the remedy was lost.

The cause came to a hearing before chancellor Gaillard, who, after argument, delivered the following decree:

Abraham Smith, in the year 1795, purchased from James Martin of York district, one of the defendants, a tract of land, supposed to contain 700 acres, for 490*l*. and took a joint bond of James and John Martin, dated on the 19th Feb. 1795, in the penal sum of 980*l*. conditioned to be void if the said James and John Martin, their heirs, executors and administrators, should make good titles, clear of all encumbrances, to the said seven hundred acres of land, lying in Union county, (within certain boundaries that are described,) to the said Abraham Smith, his heirs, executors, administrators or assigns, on or before a stipulated time. Titles not having been made to Smith in pursuance of the bond, and he being told that part of the seven hundred acres was claimed by William Gondilock, informed James Martin of it; and James Martin on the 8th of February 1797, for the sum of 490*l*. paid by A. Smith, conveyed to him and his heirs, seven hundred acres of land in Union county. [The wife of Jas. Martin joined in the conveyance.] The description of this land corresponds with the description of the land mentioned in the joint bond of the Martins. The lands, the subject

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of the agreement, were \*James Martin's, and the complainant states that John Martin joined in the bond as surety; James Martin, at the time he entered into the contract for the sale of the land, being generally considered insolvent. Abram Smith, notwithstanding he received the deed of conveyance from James Martin, still retained the joint bond; not intending to release John Martin from his liability on it. William Gondilock having committed a supposed trespass on these lands, in March 1802, a suit was brought against him by Abram Smith, with the consent of James Martin, to try the right to them. Martin, it is proved, was anxious concerning the suit: furnished papers to support Smith's title; attended the survey ordered by the court; accompanied Smith to the coun-

sel employed on his behalf, and communicated with the counsel about the conducting of the suit. From some irregularity a nonsuit was ordered, which was set aside by the constitutional court: a new trial was had, and on it a verdict was given, which took away from Smith, eighty-eight acres of the seven hundred he had purchased. On the trial Smith proved the trespass, and a regular chain of title from John Steen, the grantee, and through James Martin to himself. The defendant claimed under an older grant to A. Gondilock, which covered the eighty-eight acres.

The complainants alleged that they lost by the verdict, thirty acres besides the eighty-eight acres above-mentioned, the same not being covered by the grant to Steen, and Mr. Gondilock having obtained a grant for it. This grant to Gondilock is younger than the grant to Steen. The bill is brought against James Martin who resides out of the state, and against the representatives of John Martin, to recover the value of the one hundred and eighteen acres said to be taken away by the verdict, and the amount of the several sums of money expended by the complainants in the prosecution of their claim. No appearance has been entered for James Martin, and an order has been granted to take the bill pro confesso, as to him. Joseph Palmer, one of the administrators of John Martin, died

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without answering the bill. Eliza\*beth Martin states, generally, her ignorance of the various matters charged in the bill: her answer is not material.

This case has been very fully and well argued on both sides, and many points made which it is not necessary to state. Whether the estate of John Martin, is liable to make good to the representatives of Smith the loss sustained in consequence of the verdict obtained by Gondilock, is the principal question to be decided. It has been said that there was a mistake in drawing up the bond: that it was intended to have been a joint and several bond, not a joint bond only. If this was so, it has not been made to appear; and the court sees no reason for supposing a different intention in the contracting parties, from that to be inferred from the bond itself. It is a joint bond, and must be considered as having been intended as such: but, though a bond be joint only, both obligors are bound in equity. The case of *Bishop v. Church*, quoted by the counsel for the complainants, from 2 Vez. 101, 106, is in point: one obligor in a joint bond dies, the other becomes bankrupt; though the legal lien is gone, if there be no partiality or collusion by the obligee, equity will set up his demand against both him and the executors of the deceased: And in the case of *Primrose v. Bromley*, in 1st Atkins, it was held that where a joint obligor dies, his representative shall be charged *pari passu*, with the surviving obligor in the payment of the bond. Joint bonds are sometimes

considered as joint and several: a joint bond was so considered in the case of *Thomas v. Fraser*, 3d Vez. jr. 399. The defendant's counsel in his argument laid great stress on the want of notice to the administrators and administratrix of John Martin, of the suit brought by Smith against Gondilock; but it is to be observed, that the land, the subject of the agreement, was not John Martin's but James Martin's; and that James Martin was, therefore, the person most likely to be able to support the title: and it appears from the evidence that he did support it as well as he could. Mr. Palmer, as has been stated, died without answering the bill: and from the an-

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swer of Eli\*zabeth Martin, the administratrix, notice to her, it is probable, would not have benefitted the estate of her intestate. If it would have had that effect, it is reasonable to suppose she would have suggested by her counsel, that notice to her would have enabled her to repel the claim of Gondilock to the land recovered by him. There is no fraud or collusion between Smith and James Martin; and there is no doubt, that Smith's title was supported by himself, as well as by James Martin, from whom he had taken a conveyance, in the best manner he could. It would be too much, under these circumstances, for the court to say, that the want of notice to the administratrix, shall deprive the complainants of the relief they ask.

It was also said, the lands recovered by Gondilock, were not part of the lands described in the joint bond; but the surveyor, Mr. Thompson, and Mr. Gondilock, both say, that they are. Besides, if the land conveyed by Martin to Smith, be not the lands mentioned in the joint bond of the Martins, no benefit from that circumstance can result to the representatives of John Martin. Smith and his representatives are entitled either to have what was paid for, (to wit, 700 acres of land) or to have the money back again; and although the legal lien be gone, the court considers the bond as an agreement binding on the representatives of John Martin, as well as on James Martin himself.

With respect to the thirty acres of land, which are said not to be covered by the grant to Steen, the court will not order this item to be brought into account. It is said by the counsel for the complainants, that the representatives of Smith cannot recover them, as they are not covered by the grant to Steen; and that Wm. Gondilock has a grant for them. It may be so; but as the land formed part of the subject of the suit against Gondilock, and the jury have not mentioned it in their verdict, this court will not take on itself to decide on the title to it.

Let an issue be made up to ascertain the damages sustained by Smith, by the loss of the eighty-eight acres taken from him by the ver-

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dict, in the suit against Gon\*dilock; and let it be referred to the commissioner to report



the amount of the several sums, expended by the complainants or their testator, in the prosecution of their claims to the land conveyed to Smith by Martin. Costs to be paid by defendants.

From this decree an appeal was made on the following grounds:

First,—That the bond in question should not be taken in equity, any more than at law, as a joint bond, or in any way chargeable upon the estate of John Martin, he being dead, and James Martin being the surviving joint obligor.

Second,—That it was incumbent on Abram Smith to have given notice of the pendency of his suit against Gondilock, to John Martin in his life, and to Joseph Palmer and Elizabeth Martin, after the death of J. Martin.

Third,—That the land taken away from Smith by the event of the suit of Smith v. Gondilock, was not warranted or necessarily comprehended in the bond in question.

November, 1811.

The appeal was heard by the Chancellors James Thompson, Desaussure and Gaillard; and after argument the decree of the circuit court was affirmed.

Hooker for appellants.—Gist for respondents.

#### 4 Desaus. 153

##### Case XXIX.

Georgetown.—Heard by Chancellor Gaillard.

ALEXANDER GLASS v. F. M. BAXTER.

(February, 1811.)

[*Executors and Administrators* ⇐172.]

The court will follow a note of hand, as the property of an estate, if really taken for assets of the estate sold by the administrator, though the note be taken in the private name of the administrator—and will enforce this by injunction against the private creditors of the administrator.

[Ed. Note.—Cited in *Tolbert v. Harrison*, 1 Bailey, 600; *McColl v. Weatherly*, 5 Strob. 73; *Thackum v. Longworth*, 2 Hill, Eq. 274; *Rhame v. Lewis*, 13 Rich. Eq. 303, 304; *Gary v. People's Nat. Bank*, 26 S. C. 548, 2 S. E. 568, 4 Am. St. Rep. 733.

For other cases, see *Executors and Administrators*, Cent. Dig. § 650½; Dec. Dig. ⇐172.]

This bill states, that complainant, in the year 1800, applied for and obtained letters of administration, with the will annexed, on

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the estate of Joseph Alexander Glass, \*and was put in possession of a note as part of said estate for \$240.10, drawn by Samuel Commander and James Corbut, dated 21st May 1804, and payable to William Adams. That William Adams the payee of the note, had administered some time before on the estate of the said Joseph A. Glass; but that the letters of administration had been revoked

by the ordinary. That during the administration of the estate by said Adams, Samuel Commander became purchaser of various articles at a sale of the property of Joseph A. Glass, from William Adams; and also of a horse, from the said Adams, in his own right, of the value of \$120, and gave the note aforesaid, intending to include as well the value of the horse, as the value of various articles which he had purchased belonging to the estate of Joseph A. Glass, of Wm. Adams, administrator as aforesaid.

William Adams also became a purchaser at the said sale, to a considerable amount, to the value of \$120, and did then declare that his only object in selling the horse to Commander, and including the value of it in the note given for the purchase of the property of the estate of Joseph A. Glass, was to indemnify the said estate, and that the cause of his not being styled administrator in the note, was merely accidental. As proof that Adams did not consider himself the owner of the note, the agent of said Adams gave up the note by his direction, to the complainant, the present administrator of Glass, as the property of the estate. That on the 3rd of March, 1804, F. M. Baxter sued out a writ of attachment against the said Adams, who was absent from the state, and summoned Commander as garnishee of said Adams, to shew cause why the money due on the note should not be adjudged the property of Adams, and appropriated to the satisfaction of his debt. The bill further states, that legal proceedings were had on the said writ of attachment, and that a judgment was obtained against the said Adams, and execution issued thereon, by which Commander is stopped from paying to your orator, the legal representative. The prayer of the bill is, that a writ of injunction may be issued, to

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command the sheriff not to \*proceed in enforcing the execution, until the hearing of this case, and for other relief.

It appears from the testimony of Mr. Commander that he purchased cattle to the amount of \$120 from Adams, as administrator of Glass, at the sale of Glass' property, and that he gave him his note for \$240.10, part of this sum being for a horse he purchased at the same time from Adams: the horse was Adams' property, and the note for \$240.10, was taken by Adams, because he said, he himself owed the estate of Glass monies. Mr. Commander says, that Adams also purchased cattle belonging to the estate of his intestate, when he, Commander made his purchase, and the note is dated at the same time, in May, 1804. Some years afterwards, Adams ran away, and an attachment against his property was issued. He kept no account as administrator of Glass: the note is in the possession of the administrator de bonis non of Glass' estate. The court is of

opinion that the note was given for property belonging to Glass' estate, and that that estate is entitled to it.

THEODORE GAILLARD.

There was no appeal from this decree.

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Case XXX.

Columbia.—Heard by Chancellor James.

JOHN ELDERS v. C. H. VAUTERS.

(February, 1811.)

[Assignments ⇨109.]

A person entitled as distributee to the personal estate of her deceased brother, possessed herself of the same, without administering on the estate, and assigned part of it to another, with whom she lived in concubinage.—After her death, administration was taken out on the brother's estate, and the administrator brought suit at law against the assignee for the property, and obtained a verdict. The court will not in such a case interfere in favor of the assignee, and enjoin the judgment. The transaction was irregular, and no proof of valuable consideration to support it.

[Ed. Note.—Cited in *Bradford v. Felder*, 2 McCord, Eq. 170.

For other cases, see Assignments, Cent. Dig. § 188; Dec. Dig. ⇨109.]

[Contracts ⇨112.]

[A deed of conveyance, executed by a woman to a man with whom she was living as his wife, though unmarried, will not be sustained.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 514; Dec. Dig. ⇨112.]

[Executors and Administrators ⇨3.]

[Cited in *Screven v. Bostick*, 2 McCord, Eq. 417, 16 Am. Dec. 664, to the point that it seems that the sole heir and distributee of the estate of an intestate cannot dispose of the property, though the estate is not indebted, without taking letters of administration.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 10; Dec. Dig. ⇨3.]

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\*The bill states, that Hugh M'Clain died intestate possessed of a female slave named Betty, and other personal property—leaving Margaret M'Grew, his sister and only heiress. That Margaret M'Grew took possession of the personal estate;—and meeting with difficulties in discharging the debts, she applied to John Elders, the complainant, for assistance;—and he believing that Margaret M'Grew had a good title to the property of M'Clain, discharged all the debts of Hugh M'Clain to a considerable amount; and that Margaret M'Grew, in consideration thereof, and for other valuable considerations, sold and delivered to the complainant, and executed to him a bill of sale for the female slave, Betty. That the complainant continued to hold the property until the death of Margaret M'Grew, who died intestate. After her death, one Cornelius H. Vauters, obtained letters of administration on the estate of Hugh M'Clain, neither being a creditor or

next of kin—and commenced suit against the complainant at law, for the female slave Betty, and her offspring, who were in the complainant's possession; that the judge of the court of common pleas was of opinion that the legal right to the property in question was in Cornelius H. Vauters, who was therefore entitled to recover at law. That complainant appealed to the constitutional court, and a majority of the judges concurred with the judge below. The bill prays that Cornelius H. Vauters may be directed to stay all further proceedings at law, and that the complainant may be quieted in the possession of said property.

The answer admitted that Hugh M'Clain died intestate, and that Margaret M'Grew was the sole heir of Hugh M'Clain, and she was entitled to the administration of the said estate. The answer denies that the estate was considerably indebted, but asserts that Hugh M'Clain's estate was sufficient to satisfy all his debts. It further denies that Elders did pay debts to a considerable amount; but that Margaret M'Grew paid the debts of the said estate. The answer further states, that Margaret M'Grew, in her lifetime, employed John Elders as an overseer; and that they lived together as man

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and wife \*without having been actually married, and John Elders may have prevailed on her to execute the bill of sale mentioned; but denies that there was any consideration. It states, that after making the bill of sale, the slave continued on the plantation of Margaret M'Grew. The answer admits that Margaret M'Grew died at the time stated, and that the defendant did apply for and obtain letters of administration on the estate of Hugh M'Clain, at the earnest request of Elizabeth M'Grew, daughter of Margaret M'Grew, with whom he was about to be married, and whom he has since married. It further admits, that defendant did institute a suit against John Elders, and that the jury found a verdict for the plaintiff, which was supported by the constitutional court—and ought to be conclusive on the complainant.

The cause came to a hearing:—It was proved that the bill of sale was executed by Margaret M'Grew, on the 19th May 1800, for the female slave, Betty, to John Elders for 317. The slave had belonged to M'Clain's estate, and was in Mrs. M'Grew's possession after her brother's death. Elders was a poor man, but industrious, and had a little property. He came to live with Mrs. M'Grew, many years ago: He managed her property and that of M'Clain's estate, and worked himself. She was not wealthy, but was in better circumstances to pay debts than he was. They lived together as man and wife, and had two children, but were not married. The slave Betty, had two children, and they continued in Mrs. M'Grew's possession. She



was of much more value than the sum mentioned in the bill of sale; but some of the witnesses said she was not in perfect health.

Mr. Crenshaw, for the complainant, contended, that Mrs. M'Grew being the sole heir of her brother, H. M'Clain, had such an interest in his property, that she could sell or assign the personal estate, though she never administered on the estate, as she was entitled to have done. She had a legal and an equitable right, though not a legal possession, and could assign these rights. 2 P. Williams, 183, 608; 1 Powel, 156; 1 Com. 569; 2 Com. 361; 3 P. Wms. 132; 1 P. Wms. 254; 2 Atk. 209.

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\*An assignment may be made without consideration—Powel 318; 3 P. Williams, 199; 2 Eq. Cases Abr. 89; and if there be no fraud, there can be no relief,—1 Eq. Cases Abr. 84; 2 Vernon, 308. If creditors were in question, it would alter the case.

Mr. Blanding and Mr. Starke, for defendant, argued, that the defendant had established his legal right to the property by suit at law, and there is no ground for the interference of this court. The whole case was before that court. The cases cited of assignments supported without consideration, are where the assignors conveyed their own property; but if Mrs. M'Grew had administered, she could not have assigned without consideration; and she ought to have administered in order to pay the debts of M'Clain. 2 Bla. 495; 1 P. Wms. 277; Co. Lit. 38. If she had acted regularly and administered, the order of the court of ordinary was necessary to sanction her sale or assignment. The complainant was bound to shew a good consideration, which he has not done. There is no ground for this court to interfere and decree a specific execution, as of an agreement. This court does not interfere in cases of personal estate, where there is a remedy at law. 2 Powel, 215; 1 Fonbl. 148—9. Nor will this court be astute to carry an agreement into execution, where it is not shewn to be altogether fair and founded in morality; and the circumstances of this case, justify at least a doubt on that point.—2 Powel, 143, 221, 225, 259. In such a case, the court will leave the party to make what he can of his deed at law.—1 Fonbl. 215. Such a transfer by a wife would have been void—a fortiori when made to a paramour. There is strong presumption of fraud.—1 Fonbl. 114; 2 Vez. sen. 155. If the heirs or distributees should be allowed to take possession of the property, and dispose of it at pleasure, all the salutary regulations as to administration and security, made for the sake of creditors, and even of the heirs themselves, where there are several, would be defeated. If there be an equal equity this court will not interfere.

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\*After the argument, Chancellor James delivered the following decree:

4 DESAUS. EQ.—5

In this case, which arises on injunction to stay proceedings at law, it has been said, that the court of common pleas was of opinion, that Margaret M'Grew had a disposable equitable interest in the property in question; but that C. H. Vauters was entitled to recover at law as having the legal estate. But after the most mature consideration, I cannot see upon what grounds the complainant in this case, as claiming through her, has a right to recover in equity. It is not within the power of this court, any more than a court of common pleas, to legislate or dispense with any established law, the object of which is clearly defined; and such I take to be the law of 1789, directing the granting probates of wills and letters of administration. If, by a loose construction of this act, courts of equity were to allow persons under color of being heirs of any estate, to convey away property without administering, the obvious consequence would be, that creditors, especially by simple contract, would be deprived of that remedy, which they now have by law of suing for their demands. And bond creditors, also, must search about the country after heirs, who are not always properly designated or certain, before they could establish their legal demands. Besides these reasons, what has been urged at the bar must have considerable weight, "that letters of administration when granted, must relate back to the death of the intestate, and therefore, that this complainant, if he can recover at all, must recover by action against the administrator." These reasons might appear sufficient for decreeing against the complainant, but there is another, and a strong one, which has been urged. It is, "that the complainant in this case does not come into court, according to a common phrase in the court of equity, with clean hands; that the contract under which he claims, is not such an one as this court would aid him in, so as to decree a specific execution of it, and that it is in fact, contrary to the general policy of a well regulated society." It appears from the

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evidence, that the complainant \*and Margaret M'Grew, at the time the contract in question was entered into, were living together as man and wife, without the marriage ceremony having been performed;—that she had, also, children by her deceased husband, one of whom is married to the defendant, and that she had also children by her paramour, the complainant. Now, there can be no doubt, but what if she had been married to him, and made the deed in question, it would have been of no manner of validity, on account of that influence which the husband has over the acts of the wife. And if this be one and the principal reason, why contracts between husband and wife are set aside, certainly the same reason must have considerable effect, where the contract is between a woman and the man living in adultery with her: for his influence over her

must be full as great as that of a husband, and must be of a more improper nature. The question then is, will this court decree a specific performance of a contract under such circumstances, so as to deprive the children born in wedlock of the property? I apprehend not.

The property disposed of by the deed, was the whole of the property which came by the brother: it still remained in the possession of Mrs. M'Grew after the execution of the bill of sale;—it has not been proved that the debts of Mr. M'Clain were paid;—the consideration is somewhat impeached by the circumstances under which the contract was made; and, upon the whole, though no actual fraud has been proved, yet such a strong presumption of it arises, that I am compelled to refuse the aid of this court. Let the bill of sale be delivered to the complainant, and let him make the most of it he can; but let his bill be dismissed with costs.

W. D. James.

From this decree there was an appeal on the following grounds:

In this case the complainant moves the court of appeals, to reverse the decision of the presiding judge, on the following grounds:

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\*First,—That Margaret M'Grew being the next of kin, and only legal representative, had a right in equity to hold this property subject only to creditors and prior incumbrances.

Second,—The Court could not presume that there were creditors, because the defendant, who is the administrator of Hugh M'Clain, positively denies that he owed any debts at the time of his death, and if he did, admits that they were all paid: and it is not pretended that the property was encumbered.

Third,—Because if Margaret M'Grew had a right to the property, she had a right to transfer and assign it; and although the assignment was not good in law, it was good in equity.

Fourth,—Because the administrator is considered in equity, as a trustee for the next of kin, where there are no creditors or after the debts are paid; and, a fortiori, trustee for the assignee of the next of kin.

Fifth,—because the decree is erroneous, in supposing the complainant has come here, for a specific performance of the contract. He comes to be quieted in the possession of property which he holds under a contract executed, and of which he is about to be deprived by a mere technical form of law, contrary to equity and good conscience.

Sixth,—Because the court has presumed fraud, where it is admitted that none has been proved: and that it is presumed against the solemn deed of the only person interested, and against positive testimony offered by the defendant himself, that it was bottomed on a valuable consideration.

Seventh,—Because if the principle assumed by the decree is correct, that the complainant and Margaret M'Grew were to be considered as husband and wife, and that the contract was therefore void, the same principle would give him the property without any contract.

Eighth,—It is not correct that the property always after remained in the possession of Margaret M'Grew, for since it is admitted that they lived together, the possession must be presumed in the one who had the right,

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\*which, after the bill of sale, certainly was in the complainant.

Ninth,—It is equally incorrect to say, that this was all the property M'Clain had; for the contrary is admitted by the answer, and appears from the proceedings at law.

Tenth,—Because the decree goes to establish the principle, that an administrator, (although a stranger,) has the absolute right to the personal property against the next of kin.

Crenshaw appellant's solicitor.

April, 1811.

At the sitting of the court of appeals, at Columbia, present Chancellors James, Desaussure and Gaillard, the appeal was argued, and the court affirmed the decree of the circuit court.

#### 4 Desaus. 162

Case XXXI.

Union, Pinckney District.—Heard before Chancellor Thompson.

JOHN POWELL v. JOHN P. THOMPSON and Wife.

(February, 1811.)

[*Executors and Administrators* ⇐26.]

The court will order the husband of an executrix to give security for the property of the estate in his hands, on account of such misconduct as raises a strong ground of apprehension of the assets being wasted.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 144; Dec. 1 dig. ⇐26.]

The bill was filed by the legatees of James Powel deceased, to compel the executors of the will of the said Powel, to give security for the due execution of the will.

There was a provision in the will, (after a number of specific legacies,) that the whole of the testator's plantation, which he then possessed, together with all his unbequeathed lands, negroes, horses, cattle, &c. should be disposed of in the following manner, viz. That the wife and children of testator should live together on said plantation, as long as the wife remained a widow, and the children under age; and that they should have the whole of the benefit of the said property for their support, and for the education of the



children; but if they should not agree to  
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live together, that then the \*stock should be sold, and the negroes hired out, and the plantation rented; and that the benefit of the whole should be applied to the aforesaid purposes of maintenance and education; and that when the children should come to lawful age, the whole of the said property then remaining, should be sold and equally divided among the legatees.

The widow was the only qualified executrix living, and she afterwards married John P. Thompson. Two of the children are some years under age.

The bill stated that there was danger of the said John P. Thompson's wasting the property, before the period at which it is liable to be sold and divided. That he does not manage it with prudence and economy:—That his own affairs are in an embarrassed situation; and he is in the habits of dissipation and extravagance. The complainants pray that he and his wife may be compelled to give security to execute the will according to the provisions of it, and to give security to account for and pay over to the legatees, at such time as he ought, by the provisions of the will, such sums as may at that time be due to them respectively.

At the hearing of the case, the complainants proved, that Thompson has sold notes which were the property of the estate at a discount; one in particular at a discount of 28 or 38 per cent. and another at some discount not specified.

They then offered and were about to prove the following facts:—That Thompson was insolvent;—that he had conveyed by deed to his own children all the property that he had;—and that he had mortgaged a negro belonging to the estate of Powel, for a private debt of his own.

The complainants, however, confessed that they did not expect to prove that Mr. Thompson had lost or destroyed any particular part of the testator's estate; but only that the estate was in danger from the embarrassed situation and the conduct of Mr. Thompson.

The judge held, that if the whole of this was proved, it would not authorize the court

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to decree security and \*therefore dismissed the bill, without proceeding further with the evidence.

The complainants appealed from this decree, on the ground that the circumstances proved and offered in evidence, manifested a necessity that the defendants, as executors of the will mentioned in the bill, should

give security according to the prayer of the bill, and that they should have been decreed to give such security.

November, 1811.

The appeal was heard by the Chancellors JAMES, THOMPSON, DESAUSSURE, and GAILLARD.

Mr. Gist, for the respondent, contended that the executor ought not to be compelled to give security. That the testator reposed confidence in the executrix, and the court ought not to interfere, and order security, unless there be very gross misconduct, and actual waste of the assets of the estate. That though the executor had sold some of the notes of the estate, he had since accounted for them fully; and though he had mortgaged a negro slave of the estate, for his own debt, he had afterwards paid the debt and redeemed the slave. There was, therefore, no actual waste. That the apprehension of waste is not a just ground to order security; nor the smallness of the executor's property; nor his conveyance of that property to his children—for these only furnish grounds of apprehension.—See 2 Eq. Cases Abr. 420.

If the court should order security, and the executor should not be able to give it, then you take away the trust and authority given by the testator.

Mr. Hooker, for the appellant, contended, that the actual sale of the notes of the estate at a discount, and the mortgage of a negro of the estate, for a private debt, would be sufficient acts to induce the court to order security to be given by an executor, and still more strongly by the husband of an executrix. That these acts, connected with his conveying away his property to his children, excited such strong grounds to apprehend a loss, that the court would interfere and compel security to be given.—See 1 Eq. Cases, 238; 2 Vern. 249, Rouse v. Noble; Amb. 273, Farrar v. Prentes.

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\*The court unanimously reversed the decree of the circuit court, and ordered, "that the defendants should give security to the commissioner, to the amount of the property belonging to the estate of James Powel; J. P. Thompson, one of the defendants, and husband of the executrix, having been guilty of misconduct in relation thereto.

The court of appeals afterwards, in May 1812, made an additional order, correcting an error in the christian name of Powel, on certain terms.

## 4 Desaus. 165

## Case XXXII.

Union, Pinckney District.—Heard by Chancellor Thompson.

WILLIAM LITTLEFIELD and ABRAHAM LITTLEFIELD v. JOHN CLARKE.  
(February, 1811.)

[Evidence ⇨586.]

The positive testimony of several witnesses of unimpeached character, will outweigh very strong and concatenated circumstances in opposition to them. And the court will upon their evidence, though contradicted by the answer in part, rescind a contract for the sale of land, and order the notes for the purchase money to be given up. The bond to make titles had been given up by the complainant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. ⇨586.]

The complainants state in their bill, that in the month of December 1806, they entered into contract with the defendant, for the purchase of a tract of land, containing 450 acres, lying on Pacolet river, for which they gave their notes aggregating twelve hundred dollars, and received from John Clarke, the defendant, a bond bearing coeval date with the said notes, with condition to make titles for the land when the money should be paid. That some considerable time afterwards, the complainants discovered that the said John Clarke was only a co-devisee of the said land, and could not make such title thereto as was contemplated by the aforesaid contract: and in consequence thereof, and at the express solicitation of the defendant, the bargain was rescinded.

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\*The defendant contends, that part of the land was purchased by William Littlefield, and part by Abraham Littlefield; and that the rescision of the contract was partial and not total:—upon which pivot the whole of this case rests.

The court has no hesitation in pronouncing, that in no case that it has presided over or heard, there has been exhibited as strong and concatenated circumstances, amounting almost to positive proof, in contradiction to direct testimony of six witnesses, who testify positively, that the contract was rescinded entirely. The court, therefore, consoles itself, that where the credibility of witnesses has not been attacked, it is not bound to impugn them, but is under the necessity of abiding by the legal rules, of giving a preference of positive to negative or circumstantial testimony. It is considered as unnecessary to go into the detail of this case, as the weight of testimony so strongly preponderates in favor of the complainant; and although there are very strong reasons to suppose there was nothing more than a partial rescision of the contract, the court is imperiously bound, (on account of the positive witnesses on behalf of

the complainants) to say that the contract was rescinded in toto.

It is, therefore, ordered and decreed, that the defendant do deliver up to the complainants their note, which he has for \$500, and that the contract entered into between them be entirely rescinded:—that the injunction obtained on the 27th January 1810, be perpetuated:—That the average difference between the interest of the money advanced by complainants, and the rents of the lands, be ascertained by the commissioner, and the balance of such principal be paid by the defendant to the complainants, or that they have the benefit of the process of this court to recover the same.—Each party to pay his own cost.

## 4 Desaus. \*167

## \*Case XXXIII.

Abbeville.—Heard by Chancellor James.

ANN TAYLOR, per Prochein Ami, v. WALTER TAYLOR.

(June, 1811.)

[Husband and Wife ⇨283.]

The charge of great personal ill usage by the husband to the wife, and slander of her character being made out fully, and no evidence of any criminal conduct on her part, the court decreed alimony; though the answer, supported by some evidence, denied the ill usage in some respects, palliated it in others, and recriminated in others. Offers to receive back the wife, do not necessarily prevent the allowance of alimony, unless the court is satisfied that the wife may return home in safety, and will be received and treated kindly, as a wife ought to be.

[Ed. Note.—Cited in Rhame v. Rhame, 1 McCord, Eq. 206, 16 Am. Dec. 597; Converse v. Converse, 9 Rich. Eq. 571.

For other cases, see Husband and Wife, Cent. Dig. § 1064; Dec. Dig. ⇨283.]

Mrs. Taylor filed her bill against her husband for the recovery of alimony, alleging such extreme ill usage by her husband, that she was compelled to leave his house and to live apart from him.

The answer of the defendant denied the allegation in part, palliated them in some respects, and recriminated in other respects.

The case came to a hearing, and much evidence was given on both sides, and the case was argued by the counsel. The chancellor states the evidence fully in his decree, which he delivered after the argument.

As this was a case of great magnitude, and the time for trying it short, the court endeavored to confine the counsel as much as possible to two points: First,—Whether, what is termed in the civil law *sevitia*, and which is translated by judge Blackstone, intolerable cruelty, had been fully proved against the husband. Second,—Admitting it to be proved, whether complainant would be entitled to alimony, after the repeated offers



of defendant to take her back, and cohabit with her as his wife.

The first evidence adduced to prove the sevitia or cruelty of the husband to his wife, is a commission under which John Taylor, father of the defendant, Hugh Nesbitt and Dr. Anderson Watkins have been examined.

John Taylor, the defendant's father, deposed, that about two or three years ago he

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was present at defendant's house, and saw him throw a stool at complainant, which struck her on the breast, and occasioned her to fall back on the floor. That he heard complainant's character called in question by her husband; but deponent has always considered her a chaste and virtuous woman.

The evidence of Hugh Nesbitt and Dr. Watkins, will be more properly considered hereafter.

Mrs. Sturgenegger, the sister of complainant, lived with complainant and defendant from 1795 til 1804, and saw several instances of his abuse of her. Once, defendant dragged complainant up stairs by the hair, and locked her up in a room all night:—that witness once saw the marks of a whip upon complainant, as she was told by her it was. She did not actually see him whip her, but has seen him take a whip to whip her, for going to see her cousin, Mrs. Myers, who was dying. That witness has heard defendant repeatedly call complainant, a damned strumpet.

James Pantton has stated, that he staid at defendant's four or five months; that in March twelve-month, the witness, the defendant's father, his daughter and Miss M. Taylor, were all present at breakfast with complainant and defendant. Witness asked defendant, it being Sunday, if he was going to church? He replied, no; for that his house was in too much confusion: his wife said, if the house was in confusion, he was the proper person to restore it to order: and that immediately the defendant flung his knife and fork across the table at complainant, and struck her on the breast with them. Complainant then ran out of doors, and defendant after her;—the young ladies shrieked, and begged deponent to interfere; he ran to the bottom of the steps, and saw defendant raise his hand as if to strike, and complainant fell, but the body of defendant intervening, he did not see the blow. The witness caught defendant, and the young ladies came to the assistance of complainant: and while they were doing so, defendant said she deserved to be kicked, and immediately kicked her. Mrs. Taylor gener-

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ally conducted herself with prudence and attention to her family, and the causes of dispute arose from the husband.

Complainant's counsel were about to prove other instances of harsh usage, as he said, by six other witnesses, but the court directed him now to confine himself to the last

outrage alleged in the bill, to have been committed against complainant on the 4th of August last.

Allen Nesbitt, the son-in-law of complainant, said, she had taken refuge in his house three several times, and stated circumstances after what has been mentioned, which do not appear to be highly material: but the last time she came to his house (in August 1810,) with John Bracket, the complainant was then very low, and lay in a cradle some time before she could go up stairs—and she had a cut on her lip, which was all that was to him perceivable. That a few days after, witness went to the house of defendant, and he said, he had traced her steps into the woods, and believed he could prove her guilty of infidelity; and that he had given her a complete kicking, where it could not be easily discovered. Witness had also other conversations afterwards, in which the defendant stated that he and one Barnett had watched his wife, and saw a man have carnal knowledge of her.

Hugh Nesbitt deposes, that in July or August last, he had a conversation with defendant in his own house, and he observed he had had a difference with complainant, and she left the house and he followed her; but did not abuse her further than by a kick or shove of the foot, which did not put her off her feet. He also made insinuations against complainant's character, which witness did not believe; and he says, he has always believed her to be virtuous and exemplary in her conduct.

Mrs. Clarke, sister of complainant says, that eight days after the last time that complainant went to Allen Nesbitt's, she went to visit her, and never saw such bruises. That her lip was cut and one of her teeth loose; and Mrs. Williams, who was present, said to them, that if they did not send for the doc-

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tor Mrs. Taylor's wounds would mortify. That accordingly a doctor was sent for.

Dr. Anderson Watkins, deposes, that about the 15th August last, he was sent for to Allen Nesbitt's to see Mrs. Taylor,—that he found her then walking about; that some of the bruises, said to be the worst, were exhibited to his inspection;—one, a little inside of the left lower extremity, a little above the knee, he found to be a contusion or bruise, extending from four to six inches in length and breadth: though much extravasated blood was under the skin, the skin itself was not broken. One other contusion or bruise was observed, on the other lower extremity, though not of equal extent with the former, which, with a small cut on the lip and a slight bruise on the face, were all the marks of violence he saw—but that Mrs. Taylor yielded with reluctance to his examination.

Mrs. Nesbitt, wife of Allen Nesbitt and daughter of the complainant, states, that her

mother came to their house on the 4th August 1810, and was very ill, complaining much of her bruises—that two of these were larger than common;—she thinks that if her mother would return to her father it would terminate in her death; witness don't know what might be the effect of some unlucky blow. After this observation, the witness appearing to be much overcome, the court requested complainant's counsel to desist from examining her further, and defendant's counsel did not cross examine.

Defendant's counsel introduced twelve witnesses:—The first, John Brackit, a nephew of defendant, appeared to be called to impeach the testimony of Mr. Pantan, and to put another face on the matter that took place on the 4th of August last. His evidence to contradict Pantan was altogether negative, and therefore I shall not notice it. But as to the affair of the 4th August, he states that he was present at dinner, and complainant upbraided the Taylor family, saying none of them made good husbands; some contention arose between them, and she retired into the garden, but witness did not see defendant strike her. That defendant

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went \*and told her to come out from the garden, and she came out, and in attempting to jump over the sharp pailings of the garden, fell into the garden and bruised herself. That he saw a mark upon her lip—that he went with his aunt to Mr. Nesbitt's; and that his uncle sent him there with his aunt on horseback.

John Fleming was called to contradict the testimony of A. Nesbitt, to a point not here stated; but as his evidence as to that matter, was also negative, I shall not notice it.

Fleming was for about fifteen months overseer for defendant. He says complainant's temper was high, and they quarrelled because complainant would persist in visiting her relations, who were the enemies of defendant.

As this order not to visit her relations, among whom were her son-in-law and daughter, appeared to be unreasonable, the court suffered defendant's counsel to examine witnesses, as to the extent of that enmity, but found nothing in it sufficient to impeach the credibility of complainant's witnesses.

However, Dr. Walter Taylor and his wife deposed, that they heard Allen Nesbitt say, when they advised him to take no part, that he was determined to take his mother-in-law's part, and that he would have revenge against his father-in-law. These witnesses also stated, that they thought a prudent woman might live happily with defendant, and advised complainant, as it was her husband's wish, to give up her own relations. Mrs. Taylor, the witness, also stated, that complainant was jealous of her husband, but she saw no cause.

Mr. Shinholtz was twenty years acquaint-

ed in defendant's family, and never saw him maltreat his wife. He knew of some quarrels between them, and thinks complainant tolerably high tempered. These quarrels arose after defendant's disputes with his wife's family.

Mr. Neal deposes to the same effect.

Mr. Carstlefin was present at a dispute between them at breakfast, and exhorted them, at considerable length to peace; after he was

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done, defendant held out \*his hand, and said to her, if you will be a good wife, I will be a good husband; but she said, I have been a good wife to you, but never will be again.

Jerry Minor, a boy, lived at defendant's two years, and left him about a year ago. There were many quarrels between them while he was there, and these were commonly begun by her. Sometimes she sent him with friendly messages to her relations.

Mrs. Susannah Taylor and Ann Flint, examined upon commission in Georgia, depose, that the conduct of complainant to her husband, has been of late contradictory, ill natured and irritating.

Mr. Galphin, a relation, after he heard of the affair of the 4th August last, called on the defendant and asked if he was willing to accommodate affairs with his wife; he agreed to do so, on certain terms, which he stated to the witness, and included in a letter, which he wrote to complainant, dated 23d April, 1810, in which he offers her a room and closet in his house, and the use of the servants in common—tells her, she may eat at his table, and entertain her friends, that may come in the usual way, but not his enemies; or, if she was not pleased with that, he would build a house for her in the yard, and allow her servants and all other things in full. That witness called on complainant and asked her, if it was possible to settle matters? She answered it was impossible, and would not read the letter. Then he stated the terms contained in the letter, and she said she would not live in his house, nor on his land, and would never see him if she could help it.

The Rev. James Holcomb and Mr. Owens, waited on the defendant to persuade him to accommodate matters. Defendant agreed to do so, and gave witnesses a letter containing certain conditions, which letter is dated 13th December 1810, and contains an offer to take her back to his bed, provided she would clear herself of the infidelity he had alleged against her, on the 4th August last. The reverend witness waited on her, but she refused to enter into any negotiation, and said, she despaired of happiness. The first of these two

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gentlemen, \*afterwards, on the 4th February 1811, received a letter from Mr. Goodwin, counsel for complainant, written with the assent of complainant, authorizing him to receive and hear any terms compatible with the



character, security and support of the complainant. And afterwards, on the 7th February, Mr. Holcomb writes to Mr. Goodwin, that he had seen Mr. Taylor, whose determination relative to the business was unfavorable. That he would not advance one cent to his lady, but was determined to risk the law-suit.

Mrs. Neal had been intrusted by defendant on the 2d February, two days before the last mentioned application, with a letter, which contained a great many exhortations to her to return to her duty, and states, that if she would clear herself of being unfaithful to his bed, on the 4th August last, that he would forgive her, and receive her as his wife again. Mrs. Neal says, that the passage in the letter, relative to her being unfaithful to him, fired her considerably, and she said, she feared to go home.

This is all the evidence of witnesses that appeared to be of any weight on the part of the defendant. There was, indeed, a circumstance of her cutting him with a knife, stated by John Sturzenegger, and commented upon by defendant's counsel; but as this appeared to be the effect of accident, for which she was very sorry, and happened before they had any quarrels, the court did not think it worthy of any notice.

Defendant in his answer denies the charge made in the bill, of having beat his wife on the 4th August last but admits that he charged her with infidelity to his bed, and says that he can explain the whole matter by testimony, which, it is supposed, is that of John Bracket; but it is hardly to be conceived that she would have fled from her husband, or that she would have jumped over the sharp pointed pailings of the garden, unless she had been urged by some terrible fear, or some desperate conduct on his part. Then, even supposing John Bracket's testimony to be all true, there are strong circumstances which lead us to suppose that violence was

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offered. But \*it will be unnecessary to make any further comment on the answer and this witness' testimony; it is presumed that the declarations of defendant to Allen and Hugh Nesbitt—the circumstances related by Allen Nesbitt and wife, of her going to their house so much bruised on that day, and in a low condition; of what Mrs. Clarke relates; and finally, of the state in which she was eleven days afterwards, when visited by Dr. Watkins, I say, it must be presumed from these facts, stated by these witnesses, that defendant bruised and beat the complainant in the manner that has been stated in the bill.

The court said at the hearing, that the conduct of the defendant on the 4th August, last, was the principal part of his behaviour towards his wife to be commented upon, as im-

mediately after that he sent her away from his house; but in making this observation, it was not intended to preclude other cases where he had acted violently towards her. The dragging of her up stairs by the hair of the head, and imprisoning her all night; the flinging a knife and fork across the table at her, and the knocking her down with a stool before his own father, have all been fully proved, and are instances of outrageous conduct, seldom witnessed in civilized society. That she was in fault, is not a sufficient excuse.

Without any hesitation, I declare myself of opinion, that these outrages, amount to the highest degree of the *sævitia* of the civil law, or of the intolerable cruelty mentioned by judge Blackstone, and therefore, that they would authorise the ecclesiastical court to pronounce a divorce, a mensa et thoro. But defendant has made an offer in open court, to take back complainant as his wife, and to cohabit with her; and has, by an instrument of writing with his own hand, acquitted her of the charge of being unfaithful to his bed; and his counsel ask, is there no room or place for repentance? Will this court proceed to pronounce a divorce between the parties and separate them forever? This court will pronounce no divorce; but after such repeated outrageous conduct on the part of the defendant, it will endeavor to provide for the security and maintenance of the wife, until

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both parties \*may be somewhat cooled, and she may return with some kind of safety to her husband. Her fears are expressed to every one who speaks to her about reconciliation, and from all that has been related of the violent temper of defendant, I cannot think them groundless. I shall decree the defendant to pay the one third of his net income, as alimony to the wife, to commence from the present day, and to be payable on the fifteenth days of October and April, half yearly, until in the opinion of this court, the complainant may return in safety to her husband. Therefore, let it be referred to the commissioner, to ascertain instantaneously the one third of defendant's income, on a mean of three years, and let defendant pay the costs of this suit.

Upon the coming in of the statement of the commissioner and before report made, it appeared that one third of the nett income of the defendant, would amount to \$1,550.19, and it being offered to the court by the defendant to pay \$500 per year, as above mentioned, waving the right of appeal, it is therefore ordered and decreed, that defendant do pay the said \$500 as above mentioned, and the costs of this suit.

There was no appeal from this decree.

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## Case XXIV.

Laurens, Washington District.—Heard by Chancellor James,

Executors of HASTING DIAL v. JOHN ROGERS.

(June, 1811.)

[Partnership ⇨328.]

Bill for an account by the representatives of a deceased co-partner, in a particular line of business. The answer admits the partnership, but states that a settlement had taken place with the deceased. This being corroborated by evidence of the declarations of the deceased, the bill must be dismissed.

[Ed. Note.—Cited in *Fraser v. Hext*, 2 Strobl, Eq. 254.

For other cases, see *Partnership*, Cent. Dig. §§ 779-781; Dec. Dig. ⇨328.]

The complainants state that their testator entered into copartnership with the defendant to survey lands, and to divide equally the profits of the sale of such lands between them. That defendant did survey certain

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lands, \*and obtain grants for the same, and that the expenses of such grants were paid by Dial, the testator. That the defendant has sold said lands, and refuses to account with the complainants. Therefore, the bill prays that he may account and pay over to the executors, one half the amount of the sales.

The answer admits the copartnership upon the conditions stated in the bill, that certain lands were granted to the defendant and the expenses paid by Dial. That defendant sold the lands; and defendant states, that he has fully settled with Dial, the testator, for the same.

This statement in the answer, of having settled with the testator, has also been supported by the evidence of Maj. Downs and Gen. Wolf, who have sworn, that Dial, the testator, told them, that the defendant had settled all matters, and that he, the testator, claimed no land.

The complainants offered the evidence of James Bumpass, taken under commission, and the testimony of James Dial, the son of the testator, sworn on his voir-dire, but neither of these appeared to contradict the evidence of the two witnesses, Downs and Wolf.

Therefore, as the testimony on the part of the defendant evidently preponderates, let the complainant's bill be dismissed with costs.

W. JAMES.

From this decree there was an appeal which was heard by the Chancellors James, Thompson, Desaussure and Gaillard; and the decree was affirmed.

Creswell for appellant.—Farrow for respondent.

## 4 Desaus. 176

## Case XXXV.

Abbeville.—Heard by Chancellor James.

SARAH CRAWFORD, Widow of John Crawford, and Others, v. MICHAEL CRAWFORD, the Elder,

(June, 1811.)

[Judgment ⇨435.]

This court will enjoin a party from availing himself of a judgment at law, which was

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grounded on a bill of sale, fraudulently or \*surreptitiously obtained, or put to an use not intended by the parties. The defendant denied the fraud charged, and insisted he had obtained the bill of sale fairly, and paid a valuable consideration; and several witnesses supported the answer, but the great weight of evidence was against the defendant.

[Ed. Note.—Cited in *Dyson v. Jones*, 65 S. C. 319, 43 S. E. 667.

For other cases, see *Judgment*, Cent. Dig. § 785; Dec. Dig. ⇨435.]

The bill was filed in this case to obtain a perpetual injunction against a judgment at law, obtained by Michael Crawford the elder, against Sarah Crawford, in an action of trover for certain slaves; on the ground of fraud in the said Michael in obtaining the bill of sale for the slaves in question, on which bill of sale he had succeeded in gaining the verdict at law. The injunction was granted on the filing the bill. The defendant demurred, but the demurrer was overruled, and he was ordered to answer the complainant's bill.

Afterwards some additional orders were made, and leave given to amend, and to make the children of John Crawford parties to the suit. This was accordingly done, and answers put in to the amended and supplementary bill. The case came to a hearing, and a decretal order was made, by which the cause was struck off the docket.

November, 1810.

On appeal that decretal order was reversed, and the cause ordered to be restored to the docket in order to a full hearing on the merits.

June, 1811.

The cause afterwards came to a plenary hearing before Chancellor James, who after hearing the pleadings, evidence and arguments, delivered the following decree:

The bill in this case charges the defendant, with having fraudulently obtained the bill of sale of six slaves in dispute, which slaves the defendant recovered of complainant, by an action of trover against her individually.

The complainant alleges that her husband, John Crawford, when on a visit to his father, in Anson county, North Carolina, in December, 1800, signed his name to a blank piece of paper, intending that it should be filled up with a title to defendant of a certain tract of land, but that defendant filled or pro-



cured it to be filled up with a bill of sale of the slaves in question.

In the answer, defendant has stated that he paid \$1,000 to his son for the six slaves,

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and took the bill of sale for them. And to refute that part of the bill which states that he was in distressed circumstances, and had taken the benefit of the insolvent debtors' act, and was not able to raise so large a sum of money, he states, it is true he did take the benefit of said act, in the year 1793, but that since that time, he has been able to reach a state of considerable affluence: declares himself to be worth \$5,000; and to shew it, makes a statement of the property of which he is possessed.

To support the answer, Titus Crawford, a son of the defendant has been sworn, and two witnesses, Chas. Strother and Matthew Stallions, have been examined in North Carolina.

Titus Crawford, the son, has most minutely and particularly related all the circumstances respecting the payment of the \$1,000 consideration money mentioned in the bill of sale: He says, that it was drawn by his brother Richard some time previous to the signing;—that he read it, and several of the family did so likewise;—that his brother John signed it at the supper-table, and that the money was counted out upon the table, partly in silver and partly in paper. He also adds many other circumstances, which might either argue that his memory was uncommonly retentive, or that he has proved too much.

The witnesses Strother and Stallions, have also stated, that they heard John Crawford, while on a visit at his father's, say, that he had sold the boy Sam, and negroes Warner and others to his father for \$1,000.

To contradict this testimony, the complainant has produced the evidence of Stephen Tompkins, the elder and the younger, and the depositions under four commissions.

Stephen Tompkins the younger, relates, that after the death of John Crawford, he went into North Carolina to the house of the defendant, and first related to the father and family the news of his son's death. That in the evening after, when the trouble and confusion in the family had somewhat subsided,

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(he being the brother-in-law of John Crawford, and acquainted with his affairs,) Michael Crawford the elder, asked him, if John Crawford had made a will? The witness answered he had not. Then, said the defendant, his negroes will be sold, and I am sure he never intended them to go out of his family. The defendant next told the witness, that he would advise complainant to administer, and to buy in the negroes, for she could not do without them; and to fix it so that all the negroes might be sold in a lump. The

witness asked him, if he thought this would be treating the children with justice, and defendant answered in the affirmative. That witness staid at the house of defendant, from about three o'clock in the afternoon, till breakfast next morning, and never heard from the defendant a syllable about his claim to the negroes, or of the bill of sale. That he afterwards rode thirty-two miles with Richard, the son, who, it is said, drew the bill of sale, and was in his company three days, and yet he never mentioned the bill of sale.

Stephen Tompkins, the elder, stated that he was very intimate with John Crawford, his son-in-law, who told him of all of his affairs, and that he never informed him of this circumstance, so material, as being the sale of the whole of the negroes he possessed. That after the return of John Crawford from North Carolina, in Dec. 1800, when it is stated he sold the negroes, he was about to fight a duel, and made a will, which witness saw, and he therein disposed of his negroes to his family, except Sam, whom he had sold to one Griffith, after his return from North Carolina. This witness also states, that when the defendant came in from North Carolina, and a little while previous to his commencing a suit at law for the negroes, he told him, he had a bill of sale for them. Witness asked him, how he came by it? and defendant said, that his son Dick told him, when his son John was in North Carolina, he gave the bill of sale to him, saying he might die or get killed on the way home; and that he wished his brother Dick to give the bill of sale to his father, that he might, in such case, make over the property to his children.

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Witness asked him, if he intended to do so? and defendant answered that he did. Defendant made many professions of love for the family, spoke of removing the body of his son to North Carolina, and endeavored to persuade his widow and children to remove there with him. Upon being cross examined, the witness stated, that Michael Crawford, the defendant, also told him, that he had never seen the bill of sale, till after the death of his son John.

Upon being called a second time, Stephen Tompkins the younger, said, that he had never sued Griffiths for Sam, and at the conversation above mentioned with defendant at his house, his wife said, that she would advise that Sam should not be sold, as he was a fine boy, and the defendant assented to what she said, and mentioned nothing of his claim to Sam. That defendant told this witness, that being old, he never would see Edgefield; that his going would be of no service, as witness could advise as well as he.

At the close of the testimony given by these two witnesses, the court asked defendant's counsel, if he could impeach their tes-

timony, but he did not attempt it, and upon enquiry it was found, that this evidence is unimpeachable.

In answer to the interrogatories in the commissions, Henry Key stated, that he heard defendant say, "If his son's widow, the complainant, would go into North Carolina, and settle on a tract of land his son died possessed of, he never would attempt to take one of the negroes from her, but as she would not, he was determined to take every one." This witness also stated, that before the trial at law, he asked Richard Crawford if the consideration money had been actually paid; he replied that six hundred dollars had been paid; and that afterwards, on the trial, he was surprised to hear the said Richard Crawford declare on oath, that he saw his father pay his brother \$1,000 in silver.

Lewis Dickson deposes, that Michael Crawford the younger, told him, that either he, or his father, (witness is uncertain which) had possession of a blank paper, signed by

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John Crawford, which they intended to \*fill up as a bill of sale of the negroes, to secure them to the children of John Crawford.

Robert Troy, attorney at law, testified, that it has been generally reported, and he understands and believes, that what property Michael Crawford, the defendant, has in his possession, is covered by the claims of either his sons, or sons-in-law, and that he has obtained a judgment against him, amount not recollected, at the suit of Chesnut and others, which remains unsatisfied.

Philip Gathings has sworn, that about the year 1800, M. Crawford, the defendant, told him, all the property he then possessed, belonged to Ellerbias; that Ellerbias left it there for him to live upon, and that he was worth nothing. And witness also states, that defendant is a crafty, tricky person.

William Cash says, from common report, the defendant is a poor man and a tricky one, and that he would not trust him.

Charles Vivion swears, that about three or four years before the death of John Crawford, he saw Michael Crawford, jr. have in his possession a blank piece of paper, with the name of John Crawford signed to it.

Having stated so much of the evidence as appeared necessary, we will proceed to remark upon it, and to draw such conclusions from it as appears to be equitable.

The first thing that must strike even an inattentive observer, is the very positive nature of the evidence offered by the defendant. In his answer, not content with denying the allegations, which were material, he has contradicted all parts of the bill, both material and immaterial. Every thing is recollected—every thing is positive. But unfortunately for him, he has in one instance gone too far. He has stated himself to be a man in affluent circumstances, when all his

neighbors who have been examined, declare the contrary: and one of them in particular, Mr. Gathings, has sworn, that defendant told him, that all the property, he was possessed of belonged to Ellerbias; and that he was worth nothing. When, therefore, he is found to deviate so much from the truth, in one part of the answer, I cannot bring my mind to assent to the truth of it in any other part.

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\*His son Titus also, appears after such a lapse of time to have proved too much. He states every thing that happened, and comes forward into court, with such a bold confidence, repeats his evidence without the least stop or hesitation, and goes on so directly in a straight line, that it appeared he had often couched it over as a lesson. The memories of Strother and Stallions also, appear to be remarkable after eight or ten years. They can recollect not only the exact sum of money, but also the names of the negroes, (and one of them a very unusual name,) which John Crawford said he had sold to his father. If these negroes had been known in North Carolina, it would not have appeared so extraordinary; but it seems they were not. I cannot help thinking the whole a confederacy, to deprive this woman and her children of their right, and I am of opinion that Richard and Michael Crawford, jun. have been actually proved to be confederates. A blank paper signed by John Crawford, was seen in possession of the latter, and the former declared to his father that his brother had given it to him, in case of accident, to secure his property to his children. Indeed, the former also stated, that it was intended to make the same use of the blank paper. If old Crawford had a positive bill of sale of these negroes, it is hardly to be presumed, that he would have told Stephen Tompkins, jr. to advise the widow to set them up for sale in a lump, and to buy them all in herself. Upon being asked by the witness, if this would be acting fairly towards the children, he answered in the affirmative, which circumstance, of itself, goes to shew, that he must be the crafty and tricky man, he is represented by his neighbors to be. During all this time, he speaks of the negroes as belonging to the estate of his son, which shews, either that the bill of sale was an after-thought, or that it was delivered by John Crawford to his brother Richard for the purposes that defendant first stated to Stephen Tompkins, the elder. It will be unnecessary again to repeat the evidence of the elder Tompkins; the declarations of defendant to him, seem to be at considerable variance with his positive and

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individual claim to the negroes, set forth in the answer, and they afford such a strong ground in favor of the children, and such strong presumption of fraud against the



grandfather,† that in my opinion equity will never lend its aid to him in obtaining the negroes. At law it may have been necessary to bring the action against complainant in her individual capacity; but the rights of administrators and of minors, will not be precluded by such short-hand proceedings at law. Upon the whole of this case, I think it attended with such strong presumption of fraud, that I cannot lend the assistance of this court to the defendant. An injunction has been obtained against him, and it must stand, unless removed by a higher tribunal. Let him take his bill of sale and make the most of it he can; but let him pay the costs of the supplementary bill.

† See the case of Elders and Vauters, decided at the last court of appeals at Columbia.

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##### Case XXXVI.

Laurens, Washington District.—Heard by Chancellor James.

JUDITH WILLIAMS, per Prochein Ami, v.  
JOSIAH WILLIAMS.

(June, 1811.)

[*Husband and Wife* ⚭283.]

A husband abused and ill treated his wife, so as to drive her from his house—and he kept a mistress in his house under the eyes of his children. The court decreed alimony to the wife; and that the daughters should be removed from under the care of the husband, and placed under the care of the wife, and an allowance made out of the father's income for their maintenance and support.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⚭283.]

The complainant filed her bill to obtain alimony from her husband, on account of extreme ill usage and cruelty to her, and thus driving her from his house, and keeping a woman of bad character in the house with his family, several of whom were daughters.

The defendant denied the cruelty and ill treatment; and denied that he had ever

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struck the complainant except once, and that by accident, for which he solicited and obtained her forgiveness. He admitted that they had latterly lived unhappily together, which he attributed to the interference of her relations, who stimulated her to leave him and his house, and to seek the peace against him; and that he had been bound over to keep the peace. The defendant stated, that he was anxious for her return to him; and he offered to receive her home.

The case came to a hearing, and the evidence was very strong and clear as to the ill usage and abuse of the wife; and also, as to the misconduct of the husband in keeping a mistress in his house, and under the observation of his children.

Whereupon the chancellor made the following decree:

This was an application on the part of the wife for alimony. She proved such intolerable cruelty towards her on the part of the husband, that his counsel abandoned his cause, and the court conceived itself bound to decree to the complainant suitable alimony. The complainant also proved such abandoned and flagitious conduct on the part of the defendant, in keeping a mistress in his house, and under the observation of his children, that the court was induced to take away from his guardianship the three daughters, to wit, Louisa, Ann and Martha, and to place them under the guardianship of the wife, with suitable maintenance for their education from the father.

Therefore, it is ordered and decreed, That the commissioner do take into account and state the one third part of the nett amount of defendant's income, and also, what sum will be sufficient to board and educate the daughters, and that the said sums respectively be allowed to the complainant for alimony, and the maintenance and education of the daughters, and that defendant do pay the costs of this suit.

W. D. JAMES.

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##### \*Case XXXVII.

Laurens, Washington District.—Heard by Chancellor Thompson, and subsequently by Chancellor James.

WM. GARY AND NANCY, His Wife, v. the  
Executors of JOHN JAMES and Others.

(February, 1811.)

[*Wills* ⚭59.]

A man turned away his wife and child without any provision, and took home another woman as his wife. After many years he solicited his daughter to come and live with him, and promised by letter, that on her doing so, she should heir his estate. She, with her mother's consent, accepted the invitation. Subsequently he drove her out; and, becoming ill made his will, and bequeathed all his estate to the woman who lived with him, and to some others after her death. The daughter sued the executors for the estate, under her father's written promise, and was decreed to be entitled to it, and to have an account.

[Ed. Note.—Cited in *McKeegan v. O'Neill*, 22 S. C. 467, 474; *Fogle v. St. Michael Church*, 48 S. C. 90, 26 S. E. 99.

For other cases, see *Wills*, Cent. Dig. § 166; Dec. Dig. ⚭59.]

[*Parent and Child* ⚭5.]

[Where a father drives from his house his wife and a child three months old, making no provision for their support, and the child at the age of 16 years returns home at her father's request and is again driven from the house, the father is not entitled to her services during minority.]

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. § 73; Dec. Dig. ⚭5.]

The bill set forth that on the 6th day of April 1780, the testator intermarried with Elizabeth Roten and had issue, your oratrix, their only child. Some time after, he drove from his house his said wife, Elizabeth, with your oratrix, then an infant in her arms, without one shilling for their support. In this situation, the said Elizabeth took your oratrix to Charleston, and there obtained a place in the orphan house, in which she was tenderly brought up and educated. That a short time afterwards, your oratrix had left that institution, and the said Elizabeth was about to remove with your oratrix to the western country—and as they travelled through the district of Newberry, she obtained permission from her mother to go and see her father, the testator. That shortly after taking leave of her father, for the purpose of pursuing her journey, she was called upon by John Hatton, with a letter from her father, in the following words:

"March 2d, 1807.

My Dear Daughter,—I take this opportunity to request you to come and live with me; if you will come, you shall be the object of my care, and shall enjoy all the care and attention that can be bestowed on you by a tender father. You are the object of my love, and shall be the heir of my property.

John James."

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\*Upon considering the contents of which, and her mother's deplorable situation, she obtained permission from her mother to go and live with her father, and did return to him in company with the bearer of the letter. That she continued to live with him, industriously attending to his business, until a short time before his death; at which time the testator drove her from his house, ordering her never to return again. Upon which she went off and lived with her mother.

That the said John James on the fourth day of December, 1807, made his last will and testament, and therein appointed William Rutherford and James M'Morris his executors; and in two days afterwards departed this life. And by his said will, gave to Nancy Tucker, a woman with whom he had contracted a pretended marriage, after having driven off his first and lawful wife, and with whom he continued to live until the time of his death, all his estate, both real and personal, during her life or widowhood, and at her death to Levi Casy and William Day. The said executors caused the will to be proved, and took upon themselves the execution thereof; permitted the said Nancy Tucker to enjoy the said estate, and refuse to let your orator and oratrix have any part thereof.

The bill charges the said Nancy Tucker with wickedly and corruptly defrauding and unjustly injuring the complainant, at the time when the complainant lived with her father, as the said Nancy was continually us-

ing all the influence which she had over him, to compel him to drive your oratrix from his house, as he was old, and in a low state of health, and not expected to live many days, as he was violently afflicted with sickness; and that she was influenced to act that inhuman part, for fear, if your oratrix continued to live under her father's roof, he would comply with his promise to her, by dying without a will. That at the time the testator was confined to his bed, not able to help himself, the said Nancy did contrive, by all the acts that depravity could plan or invent to render him more wretched than his torturing anguish could make him, to compel

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him to make \*in esse, which a man cannot do. Powel on Contracts, a will and leave his estate to her, and that two days before his death he was thus compelled. That at the time the said will was executed, the said testator was not of sound and disposing mind, in consequence of the great pain and anguish under which he labored. The bill prayed relief and an account.

To this bill a general demurrer was filed by the executors of John James. The demurrer was argued before judge Thompson, who over-ruled it, and ordered the defendant to answer.

From this decree an appeal was made on the following grounds:

First,—That the letter of John James to his daughter Nancy, set forth in the bill of complaint, was insufficient in law and equity to entitle the complainants to any relief or discovery.

Second,—That as the complainant Nancy, was a minor at the time the letter was written, (which was previous to her intermarriage with the complainant, William Gary,) her father was entitled, as her natural guardian, to her services and society.

Third,—That as the will by which John James disposes of the whole of his property to three of the defendants, to wit, to Nancy Tucker for life or widowhood, remainder to Day and Casey, was admitted by complainant to have been regularly proved and acted upon, it ought not to be controverted in equity, but should have been contested or repealed in the court of ordinary.

Fourth,—That the will admitted to be the last will and testament of the testator, and to have been regularly proved and acted upon, was not the same will charged to have been fraudulently obtained, when the testator was insane, inasmuch as the former is stated and described in the bill to be "the last will and testament," and gives "to Nancy Tucker all the testator's estate during her life or widowhood, and at her death to Levi Casey and William Day," without a single badge or allegation of fraud or insanity, and

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makes an exhibit of a \*copy of the said will; but the bill describes the latter in the follow-



ing words, to wit, that the said Nancy Tucker did "compel him, (the testator,) to execute a will, and to leave his estate to her," without making any exhibit of a copy of the said latter will.

Fifth,—Admitting the said Nancy Tucker did live in a state of adultery with the testator, as was alleged, yet the use of a small estate for a short life, cannot be more than a fourth of the entire interest in fee. Besides, the bill does not state the decease of Elizabeth James, the wife of the testator, who is entitled to a part of the surplus, over and above one fourth of what was given to Nancy Tucker.

Sixth,—That all the material facts and allegations stated in the bill were triable at law.

Seventh,—That as the discovery prayed for, was only assistant to the relief, demurrer to the relief was good also as to the discovery, though the demurrer was to both relief and discovery; the bill having prayed for a discovery of the whole of the testator's estate, and that with the rents, profits and issues, it be delivered to the complainants.

The presiding Judge over-ruled the demurrer. The defendant's solicitor moves the court of appeals to set aside the decision of the judge on the circuit, and to grant such further relief to the appellants as to the court may seem fit.

April, 1811.

The appeal was heard and argued as follows:

Crenshaw for appellant.—The letter containing the promise to the daughter, is void, for uncertainty as to his object; as to the property intended to be given;—whether the whole of his estate then possessed, or that possessed at the time of his death.

The word "heir" is technical. It cannot arise out of contract; it must be by the effect and operation of law.

Can it be said, that John James could not have alienated any part of his estate, after this promise, during his life? Surely not. Then he could dispose of it by deed or by will. It is a contract on a subject not yet

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\*153. There is no mean to render this contract certain.—1 Fonbl. 172. A contract must be clearly fixed, and vest an interest in the lifetime of the parties. No contract can be valid which does not induce an obligation, or convey a right.—Fonbl. 27. There is no valuable consideration in this case; only a good one. But the parent had a right to the services and society of his child. If the contract operates at all, it operates as a last will and testament—yet it has none of the requisite of a last will, and the subsequent will revokes.—1 Com. on Con. 15; 2 Powel on Con. 233. Gifts of personalty must be accompanied by possession, or they are void—

Bla. Com. There was no particular previous estate, to support the contingent remainder to the daughter. The will proved in the court of ordinary cannot be set aside by this court. Its due execution and its validity must be decided there. Fraud in obtaining a will is not triable in this court—nor to be questioned till the probate is repealed.—1 Fonbl. 13, 70; 2 Fonbl. 316.

The bequest of the estate for life to Nancy Tucker, is not such a devise (being a small estate for a short life) as amounts to a third part of the fee simple, so as to bring the devise under the act against bastardy.—See Fearn. 163-4.

The material facts were triable at law. A suit might have been brought by the daughter at law, to enforce the contract. Damages might have been recovered for the non performance. Specific performance not enforced unless essential to the purposes of justice, where damages might be had at law.

Mr. Farrow for complainant.—The demurrer admits the facts charged in the bill. The bill alleges that the will was obtained by fraud, wickedness, &c. and that the testator was insane, &c.

The bill also states the contract by the father with his daughter, and that he afterwards drove her off.

The child is entitled to the protection of the parent, yet she had no protection from her parent originally, till he saw her, and moved by the feelings of nature, solicited her to quit her mother and live with him, and

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made \*her the offer to provide for her. By driving her off with her mother in infancy, he lost the paternal power and the right to her services. She was then as a stranger, and could contract with him. She did so, and he is bound.

He relies upon the letter from the father—it was a promise to provide for her, in consideration of her leaving her mother, and living with him, and giving him the comfort of her society. When forbidden to visit her mother, and driven off by her father, she was at liberty to go away without any violation of her duty or contract. She was driven off as the bill alleges, by the arts of the adulteress, within two months of her father's death.

It was alleged that she should have objected to the probate of the will. She was a minor, and moneyless. Would the adulteress have confessed to the ordinary, the wicked arts by which she obtained the will?

Where there is any writing it cannot be nudum pactum. It is laid down that the lord contracting with his villein, emancipates his villein. So a father driving off his child, and withdrawing his protection from her, entitles her to contract with him, to do that for a consideration, which before she was bound by natural duty to have done.—1 Bac. 107-8; P. Williams, 219, 220. Where could the com-

plainant obtain a discovery of the estate, and an account of it, but in this court?

After the argument, the court, present Chancellors James, Desaussure and Gaillard, affirmed the order of the circuit court; and sent the case down for trial.

The defendants, the executors of John James, then filed their answer to the complainant's bill.

Defendants admit they have heard that John James and Elizabeth Roten did intermarry; but they believe that at that time John James had a lawful wife living. That the said John James did not drive off Elizabeth as stated, but that the ill temper and conduct of Elizabeth were the causes of their parting by consent; and that Elizabeth eloped with a paramour, taking the oratrix then an infant with her. They do not believe the oratrix is the child of the said James. They

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know not whether James executed said letter, but at the time it is stated to have been written, the oratrix was a minor. That on the reception of the letter, the oratrix went and lived with James until he drove her away. Defendants believe the cause of his turning her off was her undutiful behaviour and a belief she was not his daughter; and that her object was, in concert with her mother, to get possession of his property. That James did make the will mentioned; and he was of sound and disposing mind; and that N. Tucker used no influence to obtain the will or drive off the oratrix. That Nancy Tucker is old and infirm, and will be left destitute if deprived of the benefit of the will. That Nancy Tucker was married to James after the elopement of Roten, and lived with him, industriously attending to his business until his death. She was induced to that marriage from a report of the death of his first and lawful wife—and that the marriage with Roten was unlawful. That the two defendants, Day and Casey, had a claim on the bounty of James: and that the cause has been tried at law, and determined in favor of the defendants. That at the time the separation of James and the said Elizabeth took place, she consented to receive, and did receive of James, about one third of his property.

June, 1811.

The cause came on before Chancellor James, who after hearing the evidence, and the argument of counsel, pronounced the following decree:

This case originated at law, where Ann James, now Ann Gary, brought an action to recover the property of her father, John James, deceased. It was tried before Judge Grimke, in the court of common pleas, for Newberry district, and the judge charged the jury in favor of the defendants. Before the jury delivered in their verdict, the plaintiff's counsel suffered a non suit, and brought up the case to the Constitutional Court at Co-

lumbia, upon the ground that his honor's charge was contrary to law. After argument the Constitutional Court confirmed the decision of Judge Grimke; but recommended the plaintiff's counsel to carry her cause into equity.

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\*Ann James afterwards intermarried with William Gary; and they filed their bill in chancery. The substance of the case, as made out there, was as follows:

John James, of Newberry district, the testator and father of Ann the complainant, having had some differences with his wife Elizabeth, the mother of Ann, turned them both out of his house, when his daughter Ann was about three months old. The mother afterwards travelled to Charleston, where she obtained a place in the orphan house, and placed her daughter under the protection of that excellent institution. Beholden to charity alone, the daughter Ann continued there, and was maintained and educated, till she was sixteen years of age.

About eighteen months after John James drove away his wife and child, he took home as a wife Nancy Tucker, one of the defendants, and afterwards lived with her as his wife, taking no further care of his real wife Elizabeth and daughter Ann. When Ann had arrived at the age of sixteen, her mother left the orphan house with her, intending to remove to the western country; and as they happened to pass through Newberry district, near where the father still lived, her daughter asked permission of her to go and see her father; to which her mother consented. In consequence of her mother's permission, Ann visited her father and remained with him a few days, and again returned to her mother. During this short visit, he was so much pleased with her, that upon her leaving him he requested a certain John Hatton, to go to her and persuade her to return to him; and he wrote her a letter by him, dated 2d March 1807, in which, addressing her as his dear child, he invited her to return; promised "to regard her as the object of his love and affection; to treat her with care and attention; and declared if she would come back to him, that she should be the heir of his property." As a further inducement for her to return, he authorized John Hatton to tell her, if she ever wished to visit her mother, while she was with him, he would furnish her with a horse and saddle for that purpose. When the letter was presented by John Hatton, and read by the

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\*mother and daughter, the mother joined with Hatton in persuading Ann to return to her father. Ann returned, though reluctantly, and lived with her father some time, in compliance with her mother's persuasion and advice; but it appeared that A. Tucker led her an unpleasant life.

Three respectable witnesses, near neigh-



bors of John James, deposed, that Ann demeaned herself as a dutiful child. Indeed, they all agreed, that she behaved uncommonly well to her father; and one of them, Mrs. Crenshaw, who had been very intimate with her, and often at her father's, said she never knew her to go any where without his permission.

Soon after she returned home, John James introduced her to Mr. Edward Finch, a respectable neighbor, and telling him she was a very fine girl, asked his leave to let her visit his daughter, (now Mrs. Crenshaw) to which Mr. Finch consented.

Sometime after Ann had been with her father, her mother came to Mr. Finch's in the evening, and sent for her; and early the next morning she went to see her—staid till about one o'clock in the afternoon, and then returned home with Miss Finch;—but the moment she arrived, her father ordered her out of his house, and drove her away. Upon being asked his reason by Mr. Finch, for doing so, he did not complain of any disobedience on her part, but said she loved her mother better than him; and that she and his little woman could not agree.

Not long after John James was taken extremely ill, and Ann Taylor sent two messages to Charles Brown, (a witness for the complainant,) to go and see the testator execute his will. After the second message, Charles Brown was induced to go; and found John James in extreme misery; the witness saw him sign his will—and afterwards he said to Ann Tucker, "Now I hope you are satisfied."

The testator died leaving the will in full force, and by it he left the whole of his property, during life, to Ann Tucker, and the

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remainder to two of the other defendants; thereby depriving Ann, his only child, of all benefit under it.

The letter delivered by John Hatton was prior in date to the will. The prayer in complainant's bill was to set up this letter as a contract on the part of the father, so as to defeat the bequests under the will.

The defendants demurred to the equity of the bill, and the demurrer was argued before Judge Thompson, at Laurens, in February last, and he over-ruled it. The defendants brought up the demurrer to the court of appeals in equity, in April last, and three of the judges, Desaussure, Gaillard and James, in the absence of Judge Thompson, affirmed his decision, and ordered the defendants to answer.

The defendants have answered, and relied upon the will. They also stated, that John James, the testator, who was a foreigner, had a lawful wife in England at the time he married Elizabeth the mother of Ann; and after he turned Elizabeth away, his wife in England died, and he married Ann Tucker, who was then his lawful wife. The answer

besides alleged, that Ann had been disobedient to her father after she returned to him. But these allegations were not supported by proofs.

The cause being thus ready for hearing upon the merits, came on for trial.

Mr. Farrow and Mr. Caldwell, solicitors for the complainants, argued, that the father having abandoned his daughter, when but three months old, and leaving her, for aught he knew, to perish, was not of right entitled to her services, when she arrived at the age of sixteen: that under the particular circumstances of this case, she was independent of him, and capable of contracting with him for her services; and that the letter was a valid contract to that effect.

Mr. Crenshaw, solicitor for defendants, in order to prove that Ann Tucker was the lawful wife of John James, called a witness who was about to repeat what the testator, John James, had said to that effect, after he had driven his wife Elizabeth away. But the judge refused to hear such testimony,

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stating, that cohabitation \*and general reputation which had been given in evidence, were sufficient to establish the marriage with Elizabeth in the present case, and if they wished to controvert such reputation, they must do it by higher testimony than the declarations of John James not upon oath. The defendant's solicitor then called a witness to prove the disobedience alleged against Ann. This witness deposed that he lived at John James' after the return of his daughter Nancy. He said that she did not misbehave herself, nor gad about in the settlement; but that on a certain morning, he believed the one on which she visited her mother, she was dressed and ready to go, and her father said she must not go; that notwithstanding she went; and yet that the father did not appear to be in the least displeased at her going.

Mr. Crenshaw relied upon the general ground, that the father was of right entitled to the services of the daughter: that she as his child and a minor, was incapable of contracting with him; and he urged the instance of disobedience in her, as stated by, the witness.

On the following day, the Judge gave his opinion in substance as follows:

In this case four grounds offer themselves for the consideration of the court: First,—Whether under the circumstances stated, the father was of right entitled to the services of the daughter? Second,—Whether she was capable of contracting with him? Third,—Whether the letter in question contains a valid contract? and Fourth,—Supposing the contract valid, whether Ann has not forfeited her right to the benefit of it by disobedience?

The first ground would lead into a wide

field of discussion, but our time is short, and the press of business appears to be great. No authority in point has been stated, and perhaps the like of this case cannot be found. The legal duties of a parent are to maintain, protect and educate the child;—those of the child are to obey and be subject to the parent; moralists also add, that of making provision for the child. The law of nature teaches, that the father is neither to leave

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his own offspring to perish, \*nor by abandoning it, is he to cast the burden of it upon others. And the revealed law declares "that if any provide not for his own, especially those of his own household, he hath denied the faith, and is worse than an infidel." In particular, the duty of maintenance on the part of the parent, and of subjection on the part of the child, appear to be reciprocal, and mutually dependent upon each other. Otherwise, without maintenance how is the child to grow up from helpless infancy, to that more mature state of body and mind, in which he may have ability and understanding to subject himself to the parent? The answer is obvious; and shews that the duty of maintenance is antecedent to subjection; and that the latter is derived from and exists not independent of the former. Then as to obligation, except the due performance of the parental duties, the child is under none to the father, but in the single instance of giving him being: Yet it would be better to say, that a brute conferred a favor on his young by begetting him, than to urge that a father by the like act, bestows one upon his offspring, when he abandons him, and refuses to maintain and educate him. Then in such a case as this, there being no obligation conferred, there can be no rights to be claimed. The rule that a child owes its parent subjection, is a general one, and I wish not to impair it; but if there were to be no exceptions to general rules, it would be much better that such were not adopted. Besides, in this case, the father appears to be conscious he had forfeited the right to the services of the daughter; otherwise when she was with him, why did he suffer her to return to the mother? Or why, when he employed one to go to her, did he not tell him, to command, rather than persuade her to return? For the reasons adduced, and sitting here as I do, to mitigate the rigor of the common law, I am of opinion that the father in this particular case, was not of right entitled to the services of his daughter.

The second question is, whether the daughter was capable of contracting with her father? First, as his child, and second as a minor. The decision of the former general question, has embraced the first part of the

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\*latter one; for if the father was not of right entitled to the services of his daughter

as a parent, she, although his child, was as capable of contracting for them as any other indifferent person. But the other objection is that she was a minor. This has no weight, for it has been long held that infancy is a personal privilege, of which none but the infant himself can take advantage, and therefore he may enforce a contract made with an adult.

The third question for consideration, is, whether the letter in question contains a valid contract? Now it appears to me to have all the requisites of a contract. There is a person able and one capable of contracting. There is assent on both sides, and words expressive of such assent. And there is a good consideration. On the part of the father, the advantage to be gained was, in his old age to regain the services of his daughter; which he was conscious he had forfeited; and what was, or ought to have been of more importance to him, to fulfill the moral obligation by which he was bound, to make provision for his child. On the part of the daughter, the disadvantages were to quit a tender mother, and to subject herself, not to the reasonable will alone, but also to the caprices of a father, governed by a woman, who had usurped her mother's place, and who, it might be expected, was naturally her enemy. Surely such sacrifices should have entitled her as an only child, to look forward to the remuneration offered her by the letter, of being "the heir of her father's property."

We come now to the last question,—Has not the daughter forfeited all right to the benefit of the contract by disobedience? This has been much insisted upon, and therefore requires more attention. If she has been guilty of disobedience, she cannot be favored in this court. The father had promised his daughter that she should be at liberty to visit her mother, and when she came home to him, had particularly pointed out to her the house where she was to visit. Now, of all others, the mother had come to that very house, and sent for her daughter. How then was she to act? To her father she owed

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obedience; to her mother she \*did not, according to her late engagement, if contrary to his will; but still to her as that parent who had maintained and educated her, and in poverty and disgrace had never forsaken her, she owed affection, love, and gratitude. Was she then to forsake that mother? I apprehend not; I rather think that the father was bound by his promise, and that his commands were unreasonable. But I am not bound to decide upon this point alone. The question presents itself in another view.

Three respectable witnesses, who had a good opportunity of knowing, state, that Ann was an uncommonly dutiful child. And one of them, who was often with the father and daughter says, she never knew her to go any where without his permission. Also, the



witness against her states the same thing generally; but still, he says, that on the morning she was going to visit her mother, her father ordered her not to go, and she disobeyed him; and yet he says, the father was not in the least displeased, which is an unaccountable circumstance. The father never complained of her disobedience; three witnesses depose that she was uncommonly obedient; and yet all this is to be overturned by the testimony of a single witness, swearing to a single fact, which is inconsistent with the other parts of his evidence. I cannot give his testimony the effect contended for. Indeed in my mind it has but little weight. Therefore, the charge of disobedience is not proved.

To the decision on the first ground there is an objection, that if application had been made for it, this court would have compelled the father to maintain the child; and therefore he being still liable for maintenance, she was still liable to perform services. This objection is founded upon a mere possibility, that the child might stand in need of assistance, which did not happen in this case; and every case should be decided on its own particular circumstances. But supposing that the daughter when arrived at the age of sixteen, had wanted support from the father, and this court had ordered him to provide for her; still the maintenance afforded her must have been precedent to services on her

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part, or in other words, \*he would have had no right to the latter, until he had entered upon the performance of the former. But again, with the charge of maintenance the father would also have been entitled to the care of the person of his daughter. Then, after the improper connection he had formed, can it be for a moment supposed, that this court would have placed her under the direction and control of Ann Tucker? I hope not. For myself I can declare, that I would not have delivered the lamb into the custody of the wolf.

Upon the whole of the reasons above stated, and under the particular circumstances of this case, I am of opinion that the contract entered into by the father with the daughter, is binding upon his estate, and claims precedence of the will; but though the will is attended by some suspicious circumstances, I shall not meddle with it further.

Let the executors account with the commissioner for the rents and profits of the estate, and after payment of the debts, give up the remainder of the property to be settled on the complainant and wife, &c.

From the above decision there was no appeal.

Farrow for complainants.—A. Crenshaw for defendants.

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Case XXXVIII.

Columbia.—Heard by Chancellor James.

JAMES KNOX et al. v. SHEPHERD PICKET et al.

(June, 1811.)

[*Husband and Wife* ⇨102.]

The husband is liable for the debts of the wife, whether arising by contract, or malfeasance, as in case of *devastavit*. And her settled and separate property will be protected from the effects of her *devastavits* before marriage, unless his estate be insufficient to pay. But the husband is liable for *devastavits* after marriage only so far as he received the money. Beyond that, her separate estate will be liable.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 379; Dec. Dig. ⇨102.]

[*Executors and Administrators* ⇨125, 537.]

Administrators liable for costs arising from their own neglect; but they are entitled to be reimbursed out of the estate, for costs properly incurred in defending the estate. One administrator is not liable for the acts of another, if they are distinct and separate. This court

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\*may decide on questions arising on an administration bond, coming incidentally before it, as well as on any other deed. And though the bond of two administrators be joint, the court may refer it to the commissioner to ascertain how far each administrator has been guilty of a *devastavit*.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 522, 2485; Dec. Dig. ⇨125, 537.]

[*Executors and Administrators* ⇨128.]

[The executors of a deceased husband are liable for the acts of the wife, as administratrix, done before the marriage, to the extent of the property brought to the husband by the wife.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 531; Dec. Dig. ⇨128.]

In this case the following questions have arisen for the decision of the court:

First,—Whether the defendants, being co-administrators, are liable for the defalcations of each other; and whether, in such case, if the administration bond comes incidentally before the court, it will not decide upon it, without directing a suit at law?

Upon the first branch of this question, the court is of opinion, that the acts of one administrator may be so distinct and separate from those of another, that it may not be equitable to charge them jointly, and that they ought not to be so charged, unless for some joint act.

Upon the second branch of the question, the court cannot see why (to do complete justice,) they might not as well decide upon an administration bond, coming incidentally before them, as upon any other deed, on which they are in the habits of thus decid-

ing: nor why, even upon such bonds, though joint, it may not be referred to the master to ascertain, how far each administrator, separately, has been guilty of a devastavit.

Second,—Whether the executors of Reuben Stark, who intermarried with the defendant, Mrs. Picket, after the death of her first husband Knox, be liable for her acts as administratrix before the said marriage?

It would appear that the husband is liable by law for the debts of the wife, whether such arise by contract or misfeasance, such as on a devastavit; but how far the executors may be liable, is a question which will depend upon circumstances. In this case there was a settlement of part of the wife's fortune, and the other part went to the husband. Then there will arise a third question:

Whether, if the executors are liable, her own property under the settlement should not be first chargeable?

I am of opinion that it should not. The very intention of the settlement must have

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been to guard that pro\*perty from the claims and the debts of the husband, and it does not appear to be material whether those debts should be of his own contracting, or whether they arose in consequence of his marriage with her. The marriage is considered in law as a good consideration, to make him so liable, and he ought to have been aware that there might have been such debts before he made the settlement, and either not have entered into it, or made provision thereby (which was not done,) for his indemnification out of the settled property. I am, however, of opinion, that the property of the husband is not liable any further than the defalcations which may have taken place before the marriage, for which the fortune which came by her may be an indemnification, nor further during the marriage, than the sums actually received by him; and that afterwards, the separate property of the wife will eventually be liable. In this case I can see no distinction between the property which came by the wife unsettled, and the property which was his own. As soon as the marriage took place and he had reduced the first into possession, it became just as much his own as the last.

Fourth,—Whether the administrators of Dr. Knox, are liable for costs incurred by their own neglect, and whether they are not entitled to credit for them where it became necessary to defend the suits?

It is very plain that administrators must be liable to costs incurred by their neglect; and it is but equitable where it became necessary to defend suits, that the complainants should there be chargeable.

Therefore, let it be referred to the commissioner to report what sums are due to the complainants upon the above principles.

## 4 Desaus. \*202

## \*Case XXXIX.

Orangeburgh.—Heard by Chancellor James.

B. HART v. JOHN FELDER AND MICHAEL DUKES.

(June, 1811.)

[Execution  $\hookrightarrow$  271.]

W. a creditor of H. F. obtained a judgment which bound his lands. H. F. afterwards contracted to sell his lands to M. and gave bond to make titles therefor; and he received a small part of the purchase money, and took M.'s bond for the balance; which bond he afterwards assigned to his creditors. M. afterwards dying insolvent without paying the balance of the purchase money, H. F. took possession of the lands and sold and conveyed part of them to D. for valuable consideration. The judgment of W. which originally bound the land, was revived, and the land was sold under the execution, and J. F. became purchaser thereof for valuable consideration; and got sheriff's titles. An old judgment creditor of M. afterwards revived his judgment, and sold the same land (which M. had contracted to purchase from H. F.) at sheriff's sale under the execution. B. H. became the purchaser for valuable consideration and got the sheriff's title; and B. H. also got an assignment of the bond to make titles, originally made by H. F. to M. The original judgment never lost its lien, and the purchaser J. F. will be protected, there being no fraud in any of the transactions, and the statute of limitations not being pleaded or relied upon by any of the parties—and D. was a fair purchaser from H. F. without notice of the equitable title of M. and those claiming under him.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 776; Dec. Dig.  $\hookrightarrow$  271.]

Henry Felder being entitled to, and possessed of several tracts of land, was indebted to Christopher Williman in a considerable sum of money; Williman brought suit and obtained judgment against Henry Felder, on the 20th April, 1786. In the month of November 1789, Henry Felder contracted to sell the said lands to C. S. Middleton for £250.; and on receiving £30. cash, and a bond for the balance of the purchase money, he gave to the said Middleton a bond to make titles to the said land.

In 1792 Mr. Middleton died without paying the said balance, and Henry Felder took possession of the lands, and sold and conveyed part of the said lands to Dukes and other persons.

In 1799 the judgment of Williman v. Henry Felder, being unsatisfied, was revived by scire facias, and part of the lands in ques-

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tion was sold under the said \*judgment in the year 1800, by the sheriff, and John Felder, one of the defendants in this suit, became the purchaser, and received the sheriff's titles for the same, and claims as a bona fide purchaser for valuable consideration. The defendant Dukes, relied on his purchase and title from Henry Felder, as a bona fide purchaser for valuable consideration, without notice of the equitable title of C. S. Middleton.



In the year 1802, a judgment held by Mr. John Kean against the estate of Charles S. Middleton, was revived, and the land in question, which the said Middleton had contracted to purchase from Henry Felder, was sold under the said judgment and execution, and the complainant Mr. B. Hart became the purchaser for valuable consideration. He also obtained from the executors of said Middleton an assignment of the bond to make titles to the land, originally executed by Henry Felder in 1789. Henry Felder in 1802, assigned Middleton's bond to his creditors.

Mr. Hart filed his bill to have the benefit of his said title, under the said bond to make titles, and under his purchase at sheriff's sale.

The cause came to a hearing. There was no proof of fraud on any side, though Mr. Hart had notice of the preceding sale under Williman's judgment.

Chancellor James delivered the following decree:

In the argument of this case the court suffered the gentlemen concerned, on both sides, to go into evidence as to some defects which they alleged to be in certain judgments and executions under which they respectively claimed. But after it was found that such alleged defects were merely formal, and did not affect the gist of the question, the court then refused to go any further into them, as being proper for the consideration of a court of law alone. It is possible that a question may arise in equity in which it would be necessary to examine with great care, proceedings in the court of common pleas; but when that is the case, I apprehend that such examination will not extend itself to form, but must be confined to substance. When

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the present question comes \*thus to be divested of the darkness in which it was involved, its true character may be plainly discerned. A short statement will disclose its merits.

On the 20th November 1789, a bond was entered into by Henry Felder, now deceased, but against whom this bill was originally filed, to make titles to Charles S. Middleton for certain tracts of land in bill mentioned. At the time the bond was so made by Henry Felder, Charles S. Middleton paid him £30. 10s. in part payment of said lands, and gave his bond for the remainder. Afterwards, in the year 1792, the said Charles S. Middleton died; and in the year 1802, the said Henry Felder still holding the said bond of the said Charles S. Middleton, and being insolvent, took the benefit of the insolvent debtor's act, and assigned over to his creditors the said bond, for payment of his debts.

Now it does not appear necessary to state any more of this case than what is done at present, to shew that the lands in bill mentioned must belong to the estate of Middle-

ton, and not to that of Felder. In the year 1789 Felder sells them to Middleton—receives £30. 10s. in part payment, enters into a bond to make titles, and receives his bond to make payment; and then again, in the year 1804, the same Felder by his own act assigns over Middleton's bond to his creditors. What more could be done to complete the bargain? What can be more plain, than that by these proceedings Felder has divested himself of the property, and vested it in Middleton? I will not enter into the question here, whether an equitable interest like the present is liable for debts: no authority has been cited to shew that it is not, and I believe that it has been settled that it is so; but if not, it is high time it should. But further, in the year 1800 an execution is taken out, and these lands are sold as the property of Felder, and purchased in at sheriff's sale by his son John the defendant. Again, in 1802, they are resold by the same sheriff to satisfy the debts of Middleton, and bought in by the complainant. Both complainant and defendant have sheriff's titles, and both titles are from John Bynum. Com-

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plainant's title is no doubt subsequent, \*but he stands in the shoes of the creditors of Middleton, in whom the interest was vested in 1789; and Felder in those of his father's creditors, who divested himself of the property at that time. This, however is not a question between the creditors, wherein it might be enquired whether Felder was so much indebted at the time that the sale should be set aside on a presumption of fraud; but it is a question between two persons claiming under the original bargainor and bargainee. Then, I presume it will be of no consequence whether the sheriff's title made to Felder be prior in point of time or not; since as I have before stated, the father had so long ago as the year 1789 divested himself of all claim to the land. Neither can the charge made against complainant and Middleton of laches, avail the defendant, because the defendant's father by assigning Middleton's bond so late as the year 1804, did an act confirming all the acts he had done before. In looking into the bill I find that complainant has offered to pay the balance of Middleton's debts to Felder the father; but I cannot see if he does pay it, how the son can be entitled, as the father has received a quid pro quo, in Middleton's bond, which he has assigned and the creditors have received. If complainant does pay, it must be for the benefit of these; and I shall so decree, for although they are not parties they have judgments, and perhaps complainant will receive this advantage from making the payment, that he will not be further disturbed by such creditors. Under all the circumstances above stated, I am of opinion that the lands in question should have been sold by the sheriff for the payment of the debts of Charles

S. Middleton, and not those of H. Felder: Wherefore let the subsequent conveyance made by the sheriff in 1802, be considered as the legal one, and the prior one be set aside, and let the defendant give up any papers which he may have of his father's to the complainant, should the same be necessary to complete his title.

It is also decreed, that it be referred to the commissioner to ascertain the balance still due, if any, on Middleton's bond, and that

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the complainant pay the same to \*the assignee claiming priority, and to John Felder for so much as he has paid to the sheriff, at the sale; and let the costs of this suit be paid by the defendant, John Felder; and those of the one which has abated be paid out of any monies which the complainant may have to pay over to the creditors to be taken out of it in the first instance.

W. D. James.

Hart v. Dukes.

The lands claimed by Michael Dukes make a part of those above mentioned, sold by Felder to Middleton. They were exchanged with him by Felder for other lands, and the exchange was subsequent to the sale to Middleton. It has not been pretended that Dukes has gained them by possession under the act of limitations; and therefore those lands claimed by Dukes, must be considered as liable under this decree to go as the other lands to complainant. W. D. James.

From this decree there was an appeal on the following grounds:

First,—That Middleton's interest in the said lands is not such as is subject to the operation of an execution against the said Middleton's property.

Second,—That if it were, yet John Felder being a fair and bona fide purchaser of said lands, under the execution of a judgment older than the bond to make titles from Henry Felder to Middleton, ought not to be disturbed in his possession.

Third,—That after so great a lapse of time, the court of equity will not decree the specific performance of the contract between Henry Felder and the said Middleton.

The appeal was heard by the Chancellors James, Thompson, Desaussure and Gaillard.

The court of appeals after argument delivered the following decree:

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\*Nov. 1811.

"Decree unanimously reversed as it relates both to Felder and Dukes; the court being of opinion that Williman's judgment was a legal lien on the land purchased by John Felder; and there being no evidence of fraud to shake the purchase made by John Felder, and that Dukes was a fair purchaser without notice of the contract entered into

between Henry Felder and Middleton. Respondents to pay costs."

Felder and Clifton for appellants.—Egan for respondents.

Hugh Rutledge, the senior judge of this court, dying in January 1811, Thomas Waties, then a judge of the Court of Common pleas, was elected in his room, in December 1811.

## 4 Desaus. 207

Case XL.

Georgetown.—Heard before Chancellor Desaussure.

STUKES and Others v. ALEXANDER COLLINS and Wife, Administrators of Skinner.

(February, 1812.)

[*Executors and Administrators* ⚡391.]

An executor selling on a credit the personal estate of the deceased, and not taking personal security from the purchaser, as prescribed by the order of the court of ordinary, is liable for the debt, in case of the insolvency of the purchaser, but such insolvency must be established, before the executor's estate is made absolutely liable.

[Ed. Note.—Cited in *Massey v. Cureton*, Cheves, Eq. 185; *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1589; Dec. Dig. ⚡391.]

The principal question in this case, is upon the alleged liability of Skinner's estate to make good a debt due to the estate of Mary Ridgell, of which he was executor. Skinner as executor applied to the ordinary for leave to sell the personal estate of his testator. The ordinary gave leave to sell on the terms proposed in the petition, to wit, that the sale should be on a credit of twelve months, the purchasers giving bond with sufficient per-

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sonal security. At the sale, James Magill became a purchaser to the amount of £119. 4s. and gave his bond dated 7th of March, 1797, to George Skinner as executor, payable in less than a twelve month, but without any security to the bond; Skinner kept the bond and no suit was brought on it till his death, which occurred in 1801. The bond has been in the hands of his administratrix ever since, and no suit has been brought upon it; but she swears in her answer that she has always been ready and willing to give up the bond to the complainants, who were entitled to Mary Ridgell's estate.

The complainant refuses to receive the bond, alledging that Skinner by taking the bond without personal security had made himself liable, and that Magill was insolvent; but no proof of insolvency was adduced. There can be no doubt upon this statement of facts, that the estate of Skinner will



be bound for the amount of this bond, if Magill's estate should really prove to be insolvent; for the executor by taking the bond without requiring personal security, as the terms of sale prescribed, made himself liable. But how liable? I apprehend only in case any injury should result from his neglect: some proof should be furnished of that injury; none has been shewn. I think therefore the bond should be sued, and the insolvency ascertained before resort is had to Skinner's estate.

It is therefore ordered and decreed that the bond be delivered up to the complainants with proper authority to sue the same, and if the money cannot be obtained by reason of the insolvency of Magill, or of his being out of the reach of the justice of the country, or of his estate being wasted, that the estate of Skinner in the hands of his administratrix shall be liable for the payment of the debt.

At the sale Skinner himself became purchaser of part of the personal estate, which has never been paid for. It is ordered and decreed, that the administratrix account with the complainants for the amount of his purchase with interest. The costs to be paid by the defendant.

There was no appeal from this decree.

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\*Case XLI.

Georgetown.—Heard before Chancellor Desausure.

THOMAS I. I. DUPREE v. M'DONALD.

(February, 1812.)

[Evidence ⇨390.]

The drawer of a marriage settlement, who swears that he drew the deed according to the instructions he received, shall not be allowed to prove that the object or intention of the deed is different from that which appears on its face: there being no allegation of fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1719; Dec. Dig. ⇨390.]

[Deeds ⇨120.]

In the construction of the deed, the property having been given to the husband, restricted by certain limitations; on failure of those limitations, it vested absolutely in the husband, and his representatives.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 439; Dec. Dig. ⇨120.]

[Husband and Wife ⇨35.]

[Where the intention of a marriage settlement appears to have been to provide for the issue of the marriage, the court will go great lengths to effectuate such intention.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 210; Dec. Dig. ⇨35.]

Sarah Johnson being about to marry James Dupree, and being entitled to certain negro slaves, a written agreement was entered into on the 2d Feb. 1785, by which she, in consideration of the intended marriage agreed, "that in case the said marriage should take effect, she would convey the said slaves

with their increase to the use and behoof of the said James Dupree."

He on his part covenanted, that, "in consideration of said marriage, that if the said Sarah Johnson should die before the said James Dupree, then he should possess the said slaves and their increase, for and during the term of his natural life, and upon his decease, the said slaves and their increase should go and be to the use of the heirs of the body of the said Sarah Johnson, by the said James Dupree lawfully to be begotten." But by default of such issue, "then the said James Dupree should possess the said negroes with their increase, for the term of his natural life, and at his death the said negroes and their increase to go entire to the use of Mary and Thomas Johnson, and the heirs of her body, if she or they be then alive. But if the said Mary and T. Johnson should chance to die before the said James Dupree, and without issue, then the negroes and their increase should go after the death of the said James Dupree, to the use of the nearest akin of the said Sarah Johnson, and their heirs forever."

John Murray and John Hughs joined in the execution of the said deed, as third parties;

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but they are not \*called trustees in the deed. The intended marriage took effect, and the complainant is the only issue. James Dupree the father died first. The mother afterwards married the defendant, who claims the negroes. Previous to her second marriage she made and executed a deed, by which, she (with the privity and consent of her intended second husband) gave part of the negroes in question, and their issue, (nearly half) to complainant.

Sarah Dupree, (afterwards M'Donald,) administered on the estate of her first husband, James Dupree; and a division was made of that estate—she taking one third, and the complainant taking two thirds: She then died. The negroes included in the marriage settlement remained with the defendant, her second husband. But the complainant has administered on James Dupree's estate. The complainant alleges, that a mistake was made in drawing the first mentioned deed, between James Dupree and Sarah Johnson, which he can prove by the person who drew the deed.

The bill prays that defendant may discover the names of the negroes, and their increase comprised in the settlement, and an account, and that they be delivered up to him.

The defendant does not contest any of the facts stated; but denies that any parol proof is admissible to shew any mistake in drawing the deed.

At the trial the complainant offered in evidence the examination of John Murray, who is one of the parties to the deed, which had been taken, subject to the determination of the court as to its admissibility. The admission of this testimony was objected to by the

defendant. I admitted it to be read for information, but without prejudice.

His evidence stated that he drew the deed, and as he thought according to the instructions he received. That if there was any defect therein, it was owing to his want of skill;—that the main object of the deed was to provide for the issue, in all events which might happen;—that the deed was read and approved by the parties; and it was supposed to answer its design:—And he never

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\*heard of any complaint of any defect in it till this controversy arose. He does not state that he kept any memorandum of this deed.

The first question which arises in this case is, whether the court can resort to the testimony of Mr. John Murray, to prove that the deed is imperfect, and that by mistake an important clause was omitted, making more distinct and clear provision for the issue of the marriage, than appears to have been done by the deed as it now stands. I will not go into an examination of the decided cases on this subject. It cannot be dissembled that they are somewhat at variance with each other. At times, the apparent imperfection of the deed, and the strong desire of the court to get at the whole justice of the case has prevailed, and the parol evidence has been admitted: at other times the great apprehension of the danger of admitting parol evidence to control or vary a formal deed has operated to prevent its admission. In the conflict of these opposing principles, it is not to be wondered, that some inconsistency appears in the cases.

Even the great distinction of *ambiguitas latens*, in which parol evidence has been more freely received, and of *ambiguitas patens*, in which it has been more cautiously received, has not been sufficient to guide the minds of the judges with unerring correctness: some of the later cases shew that there is a middle ground, furnishing circumstances of extreme difficulty.

In this dilemma we must resort to principles. The great rule is, that parol evidence shall not be introduced to alter or vary a written deed formally drawn. This was the rule even at common law, before the statute of frauds. The great exception to that rule is, that if from any fraud, mistake, or want of skill, the meaning and intention of the parties has not been properly expressed, but in reality has been changed, justice requires that parol evidence should be admitted to correct the error, so as to attain the real object of the parties. But it is obvious that the application of this exception requires the utmost delicacy and caution, or men's wills and agreements would be in the greatest dan-

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ger of being overthrown, or \*varied by false testimony. Among the cautions requisite, I apprehend it should appear pretty plainly to have been an error which requires to be rectified. Another is, that the attempt to vary,

or alter, or add to the deed on the ground of mistake, should be made in a reasonable time whilst the parties or some of them are living; and that the witness should speak from some minutes or memorandum preserved; or if he is admitted to speak from memory, (which should be done with infinite caution,) then he should speak with great clearness, and particularly to the exact point in which the error consists: not in general terms.

In the case under consideration, the parol evidence offered is that of Mr. John Murray; who is said to have drawn the deed; and I have no doubt but that his testimony would be fair and full to the best of his recollection. But when I reflect that all the parties originally interested are dead, and that there is no evidence that they were ever dissatisfied with the deed—and that it is not alleged or pretended that Mr. Murray kept any memorandum of the instructions given him, and that he is now called upon after a lapse of twenty-five years, to speak merely from his recollection, to add to or vary a formal deed, and that too in the case of an *ambiguitas patens*, I do not feel that I should be justified in admitting this parol evidence. It might promote the purposes of justice in this particular case, but it would open the door for the admission of parol evidence still wider than it is; and I think it is already wide enough.

We must then consider the deed itself, and endeavor to give it such construction as its terms and the authority of the decided cases will warrant. On examining the deed in question, it is obvious to every discerning eye, that it is ill drawn, and bears the marks of an unskilful hand. Two persons join in the deed as parties, who had no interest, John Murray and John Hughs. They were certainly meant to be trustees if there was any meaning at all; yet they are no where called so through the deed: they are men of straw, put up apparently without object. The deed bears many other marks of being

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drawn by a \*man unacquainted with such matters. It is not then to be wondered that it appears imperfect.

There is but one case really provided for in the deed, in case of issue, if taken literally, and that is the case of the wife dying before her husband leaving issue of her body. In that case, upon the death of the husband, (who surviving her was to have a life estate) the negroes were to go to that issue. In default of such issue the property is to go over to others—no express provision is made for the case of her surviving her husband, and then dying leaving issue. There is such a disposition manifested to keep the property in the family, not only by providing for the issue in the specified case, but for remote relations, that one cannot help being irresistibly drawn to the opinion that there was a mistake, and an omission



of an intended provision for another contingency, to wit, the case of her surviving her husband and then dying leaving issue. The evidentialia rei, seems to furnish this presumption violently. In such cases the court will go great lengths to get at the intention and give effect to the deed. In the case of *Kinlish v. Newman*, 1 P. Williams, 235, the court supplied the words, "if the wife should die without issue," to prevent the estate going from her issue to others, which a literal adherence to the deed would have produced. In the case of *White and Barber*, reported in 5 Burrows, the court of King's Bench, on an issue out of chancery, construed the words which provided for the child or children of whom the testator's wife might be enient at his death, so as to protect and provide for children born after the making of the will, and before the testator's death, and the chancellor approved the construction.

So in this case, I am strongly inclined to think that the words, "but by default of such issue," which are in the third clause, need not be taken with reference to the particular provisions of the preceding clause, to wit, the case of the wife dying before the husband: but as a substantive distinct clause, providing generally for the failure of issue of the body of Sarah Johnson, to be begotten by James Dupree: and by such construction, the issue would take, and the complainant would recover.

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\*But it is objected, that even if such construction could be given to the clause, the limitation would be too remote and void. I am not, however, of that opinion. It is true, that generally, the words "heirs of the body," are words of limitation; but they may be and are qualified by the use of other words. For the words which follow are, "But by default of such issue," and the word "issue" is generally neuter, and may be considered words of limitation, or of purchase, as other words and the intent of the parties and the justice of the case may require. Under the circumstances of this case, I am of opinion there are words enough to shew that this should be construed words of purchase, and vest the estate in the issue. But let us suppose this to be a case of limitations—then, according to the rule, it would vest the estate in the first taker, to wit, the first husband:—and we shall see presently how this would affect the case.

There is however, another objection; it is, that there is really no ground for construction in this case. That the omission to provide for the case of the wife's surviving the husband, was a prudential and designed omission, intended, in such case to restore all the property to its original state, and to re-vest it, unincumbered with any limitations, in Mrs. Sarah Dupree, to whom it

originally belonged. I admit that it is possible and that it might have been contemplated by the parties. But I can know this only by conjecture. There is no express provision to that effect, nor any thing on the face of the deed to shew such intention. But the counsel for defendant say there was no occasion for such provision. That the limitations provided for not taking effect, the property returned of course to the wife, the first owner, as the deed was *functus officio*. This however, appears to me not to be the case. The deed gives the property to the husband absolutely;—then follow certain limitations. If the events provided for by them have never occurred, there is nothing to prevent the first provision by which it was given to the husband James Dupree, from taking effect. If then, the property remained in him, how do the rights stand? On his death intestate,

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his widow was entitled to \*a third of these negroes, as well as of the rest of his estate, and his son the complainant to two thirds. She has since conveyed one half of the negroes, which was more than her share, to her son the complainant. Thus it appears to me, that in any point of view, the complainant is entitled.

It is therefore ordered and decreed, that the defendant do account before the commissioner for the hire and labor of the negroes, from the first day of January, subsequent to the death of the late Mrs. McDonald—that being the time fixed upon by the consent of the parties, expressed to the court.

The haste, however, in which we are obliged to try and decide upon the cases, and the intrinsic difficulties of this case, would make me regret if the parties should not carry up this case for revision to a higher tribunal, should they have any doubts of the correctness of the decision.

There was no appeal from this decree.

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##### CASE XLII.

Georgetown.—Heard by Chancellor Desausure, and afterwards by Chancellor James.

The Administratrix of ERASMUS ROTHMAHLER v. J. MYERS, M. MYERS and SOLOMAN COHEN, Executors of Abraham Cohen.

(February, 1812.)

[Wills ⇐490.]

Parol evidence, even of the person who drew the will, and who is of unimpeachable character, rejected, when offered to support the allegation of a mistake in the will, and to prove that the testator intended to dispose of the property in a manner not apparent on the face of the will. But such was the obscurity of the will, that the testimony, if it had been received, would not have explained it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1048; Dec. Dig. ⇐490.]

[*Executors and Administrators* ⚡14.]

If a legacy be given to an executor in that character, he cannot take it, unless he qualifies and makes himself executor.

[Ed. Note.—Cited in *Shuman v. Heldman*, 63 S. C. 491, 41 S. E. 510.

For other cases, see *Executors and Administrators*, Cent. Dig. § 42; Dec. Dig. ⚡14.]

[*Wills* ⚡104.]

Where the will is so obscure that the court cannot discern the intention of the testator, the legacy fails, and the property will pass under the residuary clause.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 242; Dec. Dig. ⚡104.]

[*Evidence* ⚡213.]

[In equity, it is usual, where the admissibility of evidence is doubtful, to receive it without prejudice, subject to be subsequently admitted, or rejected.]

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 747; Dec. Dig. ⚡213.]

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\*The bill states that Abraham Cohen being possessed of a large estate, real and personal, made his will on the 25th May, 1800, and appointed the following persons as executors: Solomon Cohen, Moses Myers, Jacob Myers, —Isaac Cohen, and Jacob Cohen, (when they shall be twenty-one,) Thomas Waties and Erasmus Rothmahler. That in the will the testator introduces the following clause:—

"Item, I give and bequeath to my executors herein after named, and the survivor and survivors of them, his executors and administrators, eight negroes, viz. Caesar, Rose, Harry, Binah, and her four children, Lucy, Judy, Billy and Tom, with the issue and increase of the females: Also, all my household and kitchen furniture of every kind, (except such as may be hereinafter specially given away,) together with all my stock of cattle, riding chair, horses and horse cart: In trust, nevertheless, to and for the uses, intents and purposes hereinafter mentioned and declared of and concerning the lot No. 54, and to and for the sole benefit, use and behoof of Margaret M'Wharter during her life, so as that the said goods and chattels should not be at the disposal of, or liable to the debts and engagements of her; declaring it to be my will, that from and immediately after the death of Margaret M'Wharter, herein before mentioned, that the above described goods and chattels shall be equally divided between them."

That the testator died, leaving Margaret M'Wharter alive:—That Solomon Cohen, Moses Myers and Jacob Myers qualified as executors, and that Isaac Cohen, one of the named executors, died before 21. That Margaret M'Wharter died some time in the year 1806, and that the executors Cohen, and Jacob and Moses Myers, have from the death of the testator until the present time, had the negroes in possession. That the said personal estate on the death of Margaret M'Wharter, became distributable in equal shares among the executors, and that the

complainant as administrator, is entitled to the one sixth. The bill then prays for an account and discovery.

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\*The answer admits the will, and the possession of the personal property by defendants;—but charges that Erasmus Rothmahler, intestate of the complainant, never did qualify. They further say that there are three claimants to the above property: First, Mrs. Minis, formerly Dinah Cohen; Secondly, —Esther and Sarah Myers, nieces of testator; Thirdly, —the residuary legatees.

That Mrs. Minis claims, because that immediately preceding the clause of the will under which the executors claim, there is a clause to this effect: "Item, I devise unto my executors herein after named, and the survivor or survivors of them, my lot of land, No. 54, on Prince's street, in trust and for the use of Margaret M'Wharter, during life; and after her death, then I give and devise the premises to my niece, Dinah Cohen, and her heirs and assigns. That this clause of the will is connected with the words lot No. 54, in the subsequent clause of the will under which the executors claim, and proves by evident construction what the testator intended here under the words divided equally between them."

That Esther and Sarah Myers, are made legatees in a clause subsequent to that under which the executors claim, in the following manner: "Item, I devise unto my nieces Sarah and Esther Myers, or the survivors of them, the house and lot No. 55, on which I now reside, in Prince's street." These persons contend that the concluding words "divided equally between them," of the clause under which the executors claim, refers to them. That they can adduce parol testimony to prove that this was intended by those words by the testator.

That the residuary legatees contend, that the clause under which the executors claim is unintelligible, and the legacy therefore lapsed, and that it falls into the residuum. That by consent, these claimants are considered as parties to the bill. Under these circumstances of doubt, they pray the direction of the court.

On the coming on of this case before Chancellor Desaussure, it was moved on the part of the defendants, that the person who had

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received the instructions of the \*testator, and had made the draught of the will, should be examined, in order to explain who was intended by the testator to have the property in controversy. It appeared that the testator devised the lot No. 54, and buildings, (in Georgetown,) in trust for a free woman named Peggy, for life, and after her death to Dinah Cohen and her heirs. And he also devised to his executors eight negroes, (by name,) with their issue, and some house furniture, "in trust for the uses and to the pur-



poses hereinafter mentioned, and declared of and concerning lot No. 54." But it appears that the lot No. 54 is not afterwards mentioned; having been mentioned before: and it was lot No. 55, which is in fact afterwards mentioned in the will; and is disposed of differently from lot No. 54, being devised to the testator's two nieces, the Misses Myers. There was also a residuary clause in favor of his brother, and his nephews and his nieces.

It was argued by Mr. Richardson, the attorney general, that the will being so doubtful, that the intention of the testator cannot be learned from it, it was necessary to resort to parol evidence to ascertain what the intention was, in order to give effect to it. Transpose the clauses as to the lots No. 54 and 55, and the will becomes intelligible, and the intention manifest. And this transposition is sometimes made to get at the intention of the testator—1 Bro. C. C. 472, *Fonnereau v. Poyntz*; 3 Vezey, 140, *Abbot v. Massey*.

The object of the motion is to introduce the parol testimony of the person who drew the will, to shew the mistake, and point out the object of the testator's bounty. It is not to contravene the will, but to give effect to it.—See 1 Vezey, 331, *Goodinge v. Goodinge*; 2 Vezey, 216, *Hampshire v. Peirce*; 1 P. Williams, 674, *Attorney general v. Hudson*; and *Roberts on Frauds*, p. 20.

Mr. Mitchell, for the complainant, argued, that there is no such ambiguity on the face of this will as requires explanation. That if the testator intended to bequeath the property in the disputed clause, to the executors, no other words more apt could be used than

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those \*actually used. Parol evidence then, is not wanted to explain what is clear. But if the will was not so clear, the ambiguity is not of that kind which the court suffers to be explained by parol evidence. It is not an *ambiguitas latens*, which is explainable by evidence, but *ambiguitas patens*, which is not so explainable.—See *Roberts on Frauds*, page 16; 2 P. Williams, 141.

In the cases where parol evidence has been received, the ambiguity has been respecting the name and not the person of the legatee.

Chancellor Desaussure made the following order:

In this case a motion is made to examine a witness who is said to have drawn the will of the testator, as to the intention of the testator, in the disposition of several negroes and some furniture.

It was argued on the part of the complainant that there was no ambiguity on the face of the will, which required any explanation by extrinsic evidence; for that it was manifest the testator intended to bequeath this property to the executors. And again, that if there was an ambiguity, it was an *ambiguitas patens*; in which case the court never resorted to parol evidence to explain a will.

On the part of the defendant it was insisted, that there was an ambiguity, which if not allowed to be explained by parol evidence, would defeat the intent of the testator and prevent the will from having any effect as to the property in question. That the ambiguity related to the persons whom the testator intended to benefit, and that the court generally admitted parol evidence to explain to whom the testator intended to bequeath, where there was any ambiguity on that point. That there was a palpable mistake in the clause in the will under consideration, as it referred to a subsequent clause in his will; wherein he says, he devised his lot No. 54, conformably to which he intended the property now in dispute should go; whereas, in fact, the subsequent clause referred to, did not dispose of the lot No. 54, but the lot No. 55; whilst the devise of the lot No. 54, had been made in a clause preceding the contested

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clause bequeathing the negroes.—\*That this mistake could be explained by the person employed to draw the will, and then the testator's intention would be made plain, and his will could take effect.

I have considered the arguments, and I have examined the cases cited by the counsel on both sides, and many others which have occurred to me; and if it were my intention to decide this point definitively at this time, I would go very fully into this very delicate and difficult question. I perceive there are great ambiguities in this will, and the court wants light. But there is no occasion to make a definitive decision at this time, because in this court, the parol proofs are generally permitted to be gone into without prejudice—See *Roberts on Frauds*, page 31, note 16. And when the evidence is before the judge who tries the cause, he can see precisely what is the proof offered, and can decide upon its admissibility much better than the court now can, where it is a mere suggestion of what the parties expect to be able to prove.

This course appears preferable, as it will tend to the more speedy determination of the cause. For if I should now undertake to decide the question, I would refuse the evidence offered, and if an appeal should be made and the court of appeals should be of opinion that the evidence should have been received, the cause would be sent down to be tried, with directions to receive the evidence offered; and upon the decree of the court on the merits, there might be another appeal from that decree. Whereas, by the course I propose to pursue, the evidence may be taken without prejudice, and offered to the judge who may try the cause, and his decree on the whole case, whether founded on such parol evidence or not, might form the subject of one appeal, which would be definitive.

I shall therefore direct the examination of the witness offered, to be taken without prejudice, and to be offered at the trial of the

cause to the judge who may try it, who will be better able to judge if the testimony actually given is admissible, within the cautious rules which reason and the authority of the decided cases has prescribed for the conduct of the court. In giving this permission to examine the witness, it is not my inten-

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tion to \*prescribe the limits of the examination: I shall leave this to the judgment of the parties to offer what they please to the future presiding judge, who will receive what he may deem admissible within the rules heretofore established. But I must be permitted to say, that I have no idea that parol testimony can be received to the great and dangerous extent, proposed by the defendant's counsel in the paper handed to me.† In the proposed examination I would particularly recommend an enquiry from the witness, whether there was any mistake in the description of the lot, to which reference is made in the contested clause by the No. 54; and to say whether the testator meant No. 54 or No. 55, which last is the only one devised in the subsequent part of the will; and which if clearly explained by the parol testimony, (and received by the judge,) would tend more to the elucidation of the difficulty, than any thing else within the range of admissible testimony.

Let the witness be examined on interrogatories without prejudice—and the examination when taken to be submitted to the judge who may try this cause, to be admitted or rejected, in whole or in part, as to him may appear to be correct.

February, 1814.

The witness was accordingly examined, and the cause came to a hearing before Chancellor James. The evidence was produced, but finally rejected by the judge.

The case was argued as follows:

Mr. Blanding for defendants, contends, that the clause in question relates to No. 55, and that No. 54 is mentioned by mistake.

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The word "them," must relate \*to the two nieces after mentioned, to whom lot 55 was given, and not to Dinah Cohen to whom lot 54 was given. Roberts on Frauds, 28; 2 P. Williams, 135, Harris v. B. London; Selwood v. Mildmay, 3 Vezey jr. 306; Roberts on Wills, 326; 232.

†Not even under the sanction of the cases of Abbot v. Massu, 3 Vezey, jr. 148; Fonnreau v. Poynts, 1 Brown, C. C. 472; Selwood v. Mildmay, 3 Vezey, jr. 306; and a case in 1 Vezey jr. 259; Nor even under the authority of Hampshire v. Pierce, 2 Vezey, 216; Pultney v. Darlington, 1 Brown, C. C. 177; and 6 Vezey jr. 385, Druce v. Dennison. These cases do go a great way indeed to let in parol evidence extrinsic to the will, to explain it, or rather to inform the court what was intended to be given, and thereby to give effect to a will which would otherwise fail from its incurable ambiguity. But they do not go to the extent the defendants contend for.

Mr. Silliman for Dinah Cohen, insists upon the wording of the will, and number 54 corresponding with the number of the lot devised to Dinah Cohen. By the word "them," he meant the heirs of D. Cohen, mentioned in first clause.

Blanding for Esther and Sarah Myers.—Dinah Cohen cannot take. The number of the lot not so much present in his mind as the disposition over. "To be equally divided between," D. C. would be absurd. The word "them," cannot apply to her, but to Esther and Sarah Myers. The executors cannot take: They not being the objects of his bounty—7 Bac. 343.

The apparent intention is to be the pole star. The property is given to the executors only upon trust. To give it to them absolutely, would be contrary to the intent that they should have only a trust. The executor cannot take as such unless he qualify—3 Vezey jr. 148, Abbot v. Massey. The master refused to admit evidence to prove who W. G. was, but the chancellor over-ruled his decision. Pow. on Dev. 411. If the devise fails, the residuary legatees in this case must take.

Carr for D. Cohen—6 Vezey jr. 397, Druce v. Dennison. The ambiguity not a latent one. In all the bequests to Dinah Cohen, she takes only remainders. This is a remainder.

Mitchell for Complainant—The executors are the first persons introduced into the clause, and the word "them" can only refer to executors as the antecedent.

That construction is to be adopted which is most favored by the words—2 Atk. 372.

There is a clause between the clause above, and the one in favor of Miss Myers's.

The chancellor delivered the following decree:

The question to be considered in this case, arises out of three clauses in the will of Abraham Cohen, which are to the following effect:

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\*First clause,—“Item, I devise unto my executors herein after named, and the survivors or survivor of them, my lot of land, number fifty-four, on Princes street, in trust for the use of Margaret M'Wharter during life; and after her death, then I give and devise the premises to my niece Dinah Cohen, her heirs and assigns.”

Second clause,—“I give and bequeath unto my executors herein after named, and the survivors or survivor of them, eight negroes, (naming them.) Also, my household and kitchen furniture, &c, in trust for the uses hereinafter mentioned and declared, of and concerning the lot No. 54, and for the sole use of Margaret M'Wharter during her life; and after her death, that the above described goods and chattels shall be equally divided between them.”

Third clause,—“I devise unto my nieces Sarah Myers and Esther Myers, or the sur-



vivor of them, the house and lot (No. 55) fifty-five, on which I now reside, in Princes street."

Erasmus Rothmahler was one of the executors named in the will of Abraham Cohen, but did not qualify, and his administratrix, by her will now claims a part of the personal property mentioned in the second clause above cited, on the ground that the words "shall be divided equally between them," can relate only to the word "executors," as their proper antecedent. Her claim, therefore, is founded on grammatical construction alone. But I cannot think the complainant is entitled under the will; because the testator has discovered no intention to give the executors any thing expressly, either by stating that it was on account of his friendship for them, or on account of their trouble in the management of his estate. But admitting that the legacy had been given expressly to Erasmus Rothmahler, upon the authority of the case cited, he could not have entitled himself to it, unless he had acted as executor. See *Abbott v. Massie*, 3 Vesey jr. 148. Besides, if these reasons were not sufficient, to make the executors trustees, to preserve a remainder which they were themselves to take, would

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be entirely \*unprecedented. If the second clause had stood singly, a construction in favor of the executors upon grammatical rules might prevail, but the context does away every presumption in their favor. A will is not to be construed per parcella, but by the entirety: and to support the intention, a construction may be made upon the whole will, even against strict grammatical rules. Thus far as to the claim of the complainant, which is the only question made by the bill.

The answer has brought into view two other conflicting claims. The first is that of Dinah Cohen, now Mrs. Minis, under the first clause; and the second is that of the other two nieces, Sarah and Esther, under the third clause.

Mrs. Minis claims all the negroes and other property mentioned in the second clause, because that by it the said property was to pass in and for the uses declared concerning the lot 54. Now after the life estate, the uses of the lot 54 were declared to be for her; and so she contends ought also the uses of the negroes. That to effectuate this, it would be only necessary to rectify a mistake of the testator, and instead of the words "herein after mentioned," to read the words "herein before mentioned," in the second clause of the will recited as above.

On the other hand, the other two nieces urge that the words, "lot No. 54" have been used by mistake of the testator, in the second clause, instead of the "No. 55," and that if the court would only rectify this small error in the will, it is plain they would be entitled to the property.

Such are the claims of the three nieces:

the first praying for a greater, and the two last for a lesser alteration of the will. Perhaps the intention of the testator was to leave the property in question equally among them. I was much inclined on the first opening of the case to think so, and therefore referred it to the commissioner to report, how their portions, under the will, would stand in the scale of equality, if the one third of the personal property were added to them respectively. In the mean time I examined the

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context to see if such intent could \*be discovered from the general scope of the instrument, such intention however does not appear to be clearly expressed, and the difficulty seems to be inexplicable. The ambiguity is inherent in the will itself; it is according to the legal phrase, a patent ambiguity, and cannot be explained by extrinsic evidence. It is a case of the absolute omission of the names of legatees; and nearly the same, as where a blank is left for the insertion of such names, in which case parole evidence is always excluded—See 3 Atk. 257, by Lord Hardwicke, in which the difficulty does not appear to have been so great as in the present case. I am well aware that the doctrine in favor of legatees has been considerably extended by more modern decisions. This sufficiently appears from the cases of *Dobson v. Waterman*, and *Selwood v. Mildmay*, cited by the counsel from 3d. Ves. jr. 306.

In the first of these cases the testator bequeathed to J. D. £700 in three per cent consolidated bank annuities, and was not at the time of making his will, or of his death, possessed of any such annuities, but owned £1800 three per cent south sea annuities. In the second case the testator bequeathed to his wife during life, the interest of £1250 part of his stock in the four per cent annuities of the bank of England; and after her death to other legatees. It turned out that the testator had no such stock, but at the time of his death was possessed of £137 per annum, in long annuities. In both cases, the ambiguity was decided to be latent; a resort was had to extrinsic evidence; the mistakes were naturally accounted for, and rectified, and the legacies were established, to be paid out of the stock, which the testator died possessed of. In the present case, it was contended, and I think properly, that parole evidence was inadmissible. However it was admitted by the court without prejudice, on the authority of the standing rule, to that effect, in equity. But the witness has not been able to solve the difficulty; he is not able to account for the mistake, as was done in the cases cited, and he even tells us that the ambiguity is to him inexplicable. This makes a wide difference. In the cases cited,

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the mistakes could be rectified by the state of facts; in the principal case they cannot be

rectified, either by the context, or the state of facts. The words, "to be divided equally between them," referring to nobody, are vague and uncertain. To give them any sense, I must add legatees, which would not be to explain, but to make a will. I am therefore of opinion that the nieces cannot take under the second clause of the will above cited; and that according to the rule of law in such cases where a legacy fails as to a particular object, it must pass to those entitled under the residuary clause.

Therefore it is decreed, that the property in dispute be equally divided between Solomon Cohen, the brother of the testator, and his nephews and nieces in the will mentioned, who were alive at the time of his death, agreeably to the terms of the last mentioned clause, and let the complainant's bill be dismissed with costs. W. D. James.

From this decree there was an appeal on the following grounds:

First,—Because the decree was contrary to the evident intention of the testator.

Second,—Because, that by the words of the testator, according to their true import and grammatical construction, the complainant as administratrix, was entitled to one sixth of the personal estate.

Third,—Because the opinion of the chancellor that an executor who had not qualified, was not entitled to a legacy, is contrary to law.

The appeal came to a hearing at Columbia. —Present, Chancellors Desaussure, Gaillard, Waties, James, and Thompson.

After argument, the court unanimously affirmed the decree.

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\*Case XLII.

Georgetown.—Heard before Chancellor Desaussure.

ARCHIBALD TAYLOR v. ROBERT HERIOT, Executor of Wm. Heriot.

(February, 1812.)

[*Principal and Surety* ⚡179.]

A surety may apply to the court for relief and protection as soon as he is endangered.

[Ed. Note.—Cited in McKnight v. Bradley, 10 Rich. Eq. 570.

For other cases, see *Principal and Surety*, Cent. Dig. § 512; Dec. Dig. ⚡179.]

[*Fraudulent Conveyances* ⚡95.]

Conveyances of property by a husband in trust for his wife and her issue, and purchases made on their behalf, will not be set aside as voluntary or fraudulent, where the husband has received and applied to the payment of his debts, or other use, funds or property of his wife, even though the values be not exactly the same.

[Ed. Note.—Cited in Henderson v. Dodd, Bailey, Eq. 110; Trustees v. Bryson, 34 S. C. 415, 13 S. E. 619.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 275; Dec. Dig. ⚡95.]

[*Husband and Wife* ⚡29.]

A marriage settlement not recorded within the time prescribed by the statute, is void as to creditors, though the property was the wife's, and though it was recorded before the debts contracted. The mere recording, after the legal time, is not sufficient notice to such creditor, as to set up the settlement, against his demand.

[Ed. Note.—Cited in Phillips v. Rivers, 1 S. C. 449.

For other cases, see *Husband and Wife*, Cent. Dig. § 167; Dec. Dig. ⚡29.]

[*Evidence* ⚡230.]

[Where the purchaser of certain lots received deeds in which the names of the grantees were not filled out, and subsequently gave a mortgage thereon to indemnify a security, declarations of the purchaser going to show that he purchased the lots with a trust fund for the benefit of his children were inadmissible against the security.]

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 846; Dec. Dig. ⚡230.]

[*Fraudulent Conveyances* ⚡146.]

[Cited in Trustees v. Bryson, 34 S. C. 416, 13 S. E. 619, to the point that retaining possession by husband of property conveyed to wife does not furnish evidence of fraud.]

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. ⚡146.]

The bill was filed in this case by the complainant, who had become surety for the late Wm. Heriot, in a bond executed in April, 1803, and conditioned to pay a large sum of money to Mr. Withers, the guardian of Miss Butler, at a time when Wm. Heriot was in good credit, and apparently in affluent circumstances. Mr. Heriot on 24th June, 1807, executed a mortgage to the complainant of four lots of land, and eight negroes, part of which however were comprized in the deeds hereinafter mentioned, or were subject to judgments. Since the death of Mr. Heriot, in Nov. 1807, it appeared that his affairs were embarrassed, and that if the marriage settlement executed by him previous to his marriage with Miss Thomas, on the 10th May, 1792, and certain other subsequent deeds were supported, his estate would not be adequate to the payment of his debts; and in that case the complainant would be obliged to pay the debt of Mr. Heriot to Mr. Withers, for which he was surety.

The bill sought relief, by setting aside those deeds, and subjecting the property to the debts of Mr. Heriot.

An objection was made at the hearing, that the complainant came too soon for relief, as he had not yet been damaged, not having been obliged to pay the security debt. But the judge was of opinion that a surety

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need \*not wait until he had paid the debt, but might come for relief as soon as he was endangered; and that it was manifest in this case, that he was endangered. From this part of the decree there was no appeal.

With respect to the marriage settlement, it was executed on the 10th May, 1792, and



It was not recorded till the 4th March, 1795. This was greatly beyond the time allowed by the statute, prescribing the time within which marriage settlements should be recorded. But it was stated to the court, and not contradicted at the hearing, that the deed of settlement was recorded at that time, (4 March, 1795) in Georgetown, which was the place of residence both of Taylor the complainant and of Mr. W. Heriot; and that the debt for which Mr. Taylor became surety for Mr. Heriot, was not contracted till April, 1803.

For the defendant, it was argued by Mr. Richardson, the attorney-general, that though the marriage settlement was not recorded within the time prescribed by statute, yet having been recorded upwards of seven years before the debt was contracted, for which Mr. Taylor became surety, there was no fraud, imposition or surprize on him. That though there was no positive proof of direct notice to him of such settlement, there was a strong presumption of notice, which brought this case within those cases which had been decided under the registering act, and which established that the first recorded deed should not have priority if the vendee had knowledge of the existence of a deed prior to his own for the same property, though not recorded according to law. (See *Leneve v. Leneve*, 3 Atk. 646, 651. *Newland on Cont.* 509 & 510.) And that the court would be the more inclined to give this construction, as the property comprehended in the marriage settlement in question, was wholly the property of the wife. And of this opinion was the presiding judge, (*Dessaussure*) who decreed in favor of the marriage settlement. But as the presumption of notice to Mr. Taylor arose altogether from the deed being recorded (as was then stated) at the place of his residence; and as Lord Hardwicke

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in *Hine and Dodd*, 2 Atk. 275, \*requires the proof of notice to be very clear, to prevent the registering acts, the judge desired that this question should be carried up to the Court of Appeals.

The other deeds, the validity of which was questioned, were the following:

A deed dated the 29th August, 1795, and executed by Mr. Heriot, by which he conveyed to Mr. E. Thomas, a lot in Georgetown, (No. 218,) with the improvements, and several slaves, whom he had recently purchased, in trust for Mrs. Heriot and her issue.

The consideration was stated in the deed to be Mrs. Heriot's joining her husband in conveying her moiety of a tract of 36 acres of land, on Charleston neck, (which was her own property,) the price of which came into Mr. Heriot's hands, and to his use, on his promising to make compensation therefor. It appeared that the price obtained for the 36 acres was only £1200. but it was then really worth more, and had since risen to a much

greater value. The lot and negroes conveyed in trust were proved to be worth a good deal more than Mrs. Heriot's moiety of the £1200. but much less than the increased value.

Also another deed dated the 1st. Feb. 1802, and recorded the 2d Feb. 1802, by which Mr. Robert F. Withers conveyed a lot of land in Georgetown, (No. 217) to Mr. E. Thomas, in trust for Mrs. Heriot and her issue, for the sum of £180.

It appeared that Mr. Heriot paid the purchase money. But it appeared also, that Mr. E. Thomas, the father of Mrs. Heriot, advanced several sums of money to Mr. Heriot as part of his wife's fortune, which he promised to secure by a trust deed. And Mr. E. Thomas, in his last will and testament, dated 6th Oct. 1807, deducted £660. from the share of his estate bequeathed to his two grand sons (the children of Mr. and Mrs. Heriot) because of the advances he had made their father, on a promise to be invested for their benefit.

It appeared from the evidence that Mr. Heriot had a good deal of property, and was in good credit and extensive business prior

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to, and in the year 1795. That in \*1797, he contracted some large debts, and gave bonds, on which judgments were afterwards obtained, and executions returned nulla bona, in the year 1809. And though large payments had been made, considerable balances remained due. It was proved that the £600. derived by Mr. Heriot, from the sale of Mrs. Heriot's land on Charleston neck, was applied to make a payment on one of those debts.

It was contended for the complainant, that the property comprized in the two above mentioned deeds of the 29th August, 1795, and 1st Feb. 1802, were fraudulent and void, as to creditors, and ought to be set aside.

It was not denied that some value had been given in the case of the deed of the 29th, August, 1795, by which Mr. Heriot conveyed a house and lot, and seven slaves, to Mr. B. Thomas, in trust, for the use of his wife and her issue; as Mr. Heriot had received and applied to the payment of his debts, the £600. which was obtained on the sale of Mrs. Heriot's land of inheritance. But it was insisted that the property so conveyed in trust, greatly exceeded in value the sum so received; and that at least for the excess, the trust deed should be set aside.

But the presiding judge was of opinion, that "as to this inequality of the values it appears by the evidence that the land on Charleston neck, was sold for £600. which went to the payment of Mr. Heriot's debts. But the land which was then worth more, has encreased prodigiously in value, perhaps five fold. The house and lot, No. 218, conveyed to Mr. Thomas, were worth, according to the evidence given in the cause, about £500 and negroes at that time were worth about

£50. each, though some of these were individually worth much more. The difference of value then at that time was from £250. to £300. If there had been any evidence to shew a mala fides, a disposition in these arrangements to defraud creditors, undoubtedly the court would lay hold of this or any other circumstance, to defeat such intent. But so far as we have gone, I do not think we see any thing indicative of fraud.

The proceeds of the sale of the land of Mrs.

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Heriot on \*Charleston neck, were fairly applied to creditors. It was of great and increasing value, which was generally known. And though we cannot take its increased value as the standard by which to form a comparison with the value of his property conveyed in 1795, in trust, we may look at that circumstance as some evidence of the fairness of the transaction. And when the mind is satisfied on that point, the court does not weigh these comparative values in golden scales.

If indeed the property of the wife conveyed to the use of the husband, or sold to pay the husband's debts, was grossly inadequate in comparison with the property of the husband conveyed for the benefit of the wife and children, this might be evidence of fraud: And the court would not protect a conveyance for the benefit of a man's wife and children, of a vast property on a trifling consideration. But this is not such a gross and outrageous inadequacy as should produce that impression; more especially, when it is recollected, that the father of Mrs. Heriot made other advances to Mr. Heriot.

It was strenuously urged, that Mr. Heriot being indebted to others, though not to Mr. Taylor, at the time of this deed (August 1795) being executed, he could not make lawfully such a deed. It would be fraudulent against all creditors or purchasers under the statute 13 Eliz. C. 25 and 27 Eliz.

The first of these statutes was made for the avoiding fraudulent feofments, &c. of lands or goods and chattels, contrived to delay hinder or defraud creditors, and others of their actions, debts, &c. But the statute is declared by one of its clauses not to extend to conveyances of estates, or interests made upon good consideration and bona fide. The 27th Eliz. declares that every conveyance of lands with intent to deceive and defraud purchasers, for money or other good consideration, shall be deemed null and void as to such purchasers. The 4th section provides that the act shall not extend to impeach or make void any conveyance of land, made for good consideration and bona fide. In the construction of the stat. of 16 Eliz. the question

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has arisen, whether a voluntary conveyance made by a person indebted at the time, can be maintained? And to be sure the reason

of the thing, and the authorities of the decided cases, are clear that such conveyances cannot be supported, though in favor of blood and natural affection. This was decided as far back as Twines' case, 3 Co. 81 and all the cases have followed that—See 1 Vez. sen. 27, Beaumont v. Thorp; 2 Vez. 11, Townsend v. Windham; 1 Atk. 15; Ambler 121.

All these cases, however, turn upon the conveyance being voluntary and mala fide. But where a settlement is made by a father on his son and wife, in consideration of a portion paid by the wife's father, though the husband's father was indebted at the time, and though the settlement was after the marriage, it was decided not to be fraudulent as to creditors, being for a valuable consideration and bona fide—See Russel v. Hammond, decided by Lord Hardwicke, reported in Atk. 13. See also Wheeler v. Caryl, Amb. 121, where a husband made a settlement after marriage for a valuable consideration, it was decided to be good against creditors. Also Bro. C. C. 90, Stevens v. Olive. And such settlement after marriage for valuable consideration, is good against creditors or purchasers—See Atk. 187; 2 Vezey, 16, 308; 2 Atk. 44-46. Our own court of law has decided that a marriage settlement made after marriage, and comprizing part of the husband's property is good, if made bona fide, and when the husband was in good circumstances and able to pay his debts—[Hamilton v. Greenwood] 1 Bay, 173, [1 Am. Dec. 607;] Cowper 434 and 710.

Indeed, the being indebted at the time of making even a voluntary conveyance, is only a presumption of fraud so as to set aside the deed; and being a presumption may be repelled by evidence or circumstances. For if the debt in question is secured by an adequate mortgage, the sale of another property could not render the debt insecure, and a voluntary conveyance would be supported. Lush v. Wilkinson, 5 Vez. 384; Stevens v. Olive, 2 Bro. 92. Nay the person so indebted must be insolvent, or at least in very

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doubtful circumstances, in order \*to impeach a voluntary conveyance made on a meritorious consideration. Lush v. Wilkinson, 5 Vez. 384; East and Co. v. Clavel, Gilb. Rep. 37; Newld. 384.

For to say that the mere circumstance of the person being indebted at the time, without reference to the comparative state of his debts, and of his means of paying them, shall be a sufficient proof of fraudulent intention, with respect to creditors, tho' the conveyance is on the most meritorious consideration, is to assert, that if a man possessed of an estate of £1000. per annum, should after marriage, settle on his wife a small jointure of £40. or £50. per annum, it shall be considered as a settlement to defraud creditors, though he may not owe much more than £100



or £200. This certainly was not intended by the statute, and therefore we must always examine the proportion between the debts and the estate, and the extent of the settlement before we pronounce a settlement void, even when voluntary and after marriage.

It is, perhaps, difficult to form a very correct opinion in this case, relative to the comparative value of Mr. Heriot's property and funds, and of his debts. A great deal of testimony given in the case, shews, that Mr. Heriot had considerable funds, and still more considerable credit, long after the marriage settlement, and all the other deeds in question; and long after Mr. Taylor's engagement for him as his security. We learn too, that he made considerable payments on his debts after the execution of all these deeds. And the proof is extremely vague and uncertain as to the extent of his debts, at the time of these deeds being executed. I cannot, therefore, ascertain clearly what was the exact situation of his affairs. But certainly, the proof does not establish insolvency, or any thing like it, at the time of entering into the deeds. Upon the circumstances of this case, therefore, I am of opinion this conveyance was fairly made for valuable consideration, and the disproportion of value is not so inadequate and outrageous as ought to bring the case within the statutes; and that therefore, it shall be protected against all, except creditors, who may have had a specific lien,

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or a judgment \*and execution which bound the property at the time of making the deed.

With respect to the possession by Mr. Heriot, it was consistent with the deed, and with the nature of the connexion between the husband and wife, and therefore does not furnish that evidence of fraud, which possession retained by the person conveying usually does—*Newland on Contracts*, 373-4; 10 *Vezey*, 150, *Lady Arundel v. Phipps*.

The next deed to be examined, is that of Feb. 1, 1802, by which Mr. Withers conveyed a lot, (217.) to Mr. Edward Thomas, in trust, for the wife and children of Mr. Heriot.

This case does not turn upon the statutes which relate only to sales made to defraud creditors and purchasers, and not to purchases made by the debtor, by which property is conveyed by third persons, not to himself, but to a trustee for his family. No provision is made by statute law for this case. It is left to the great principles which govern all these questions, which turn upon the fact, whether it is a fair bona fide transaction, founded on valuable or other sufficient consideration; or a mere collusion and fraud, to deceive and defeat creditors. If the former it is valid; if the latter, it is void. For a person deeply indebted, approaching to insolvency, shall not be permitted to convert his funds, which ought to be applied to pay his debts, to purchases of property conveyed to trustees for the benefit of his family, to the

prejudice of his creditors. The facts proved are the conveyance of some property of the value of £180. by Mr. Withers to Mr. Thomas, in trust for the children of Mr. Heriot, the grand children of Mr. Thomas. So far Mr. Heriot's creditors have nothing to do with the transaction, for no part of his property has been subtracted from them or their claims. And there may be gifts or sales and conveyances by third persons to a man's children against which he or his creditors can have nothing to say.

But Mr. Withers, when cross examined, stated, that he was pretty sure that it was

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Mr. Heriot, who paid \*him the value of the property in question, though Mr. Thomas had spoken to him on the subject.

This undoubtedly raises a presumption that he did apply his private funds to this purchase, which ought to have gone to the payment of his debts; which, if done in a state of insolvency, or approaching to it, might make it fraudulent as to creditors.

On the other hand, there is a presumption that Mr. Thomas the trustee, furnished the funds to make the purchase; for he was the grand-father of the children to be benefited by the conveyance; he spoke to Mr. Withers about the purchase; and he was in the habit of advancing for the benefit of his daughter and her children. Besides the whole amount of Mrs. Heriot's property sold, and of Mr. Withers' advances, are more than equal to the whole amount of the direct conveyance by Heriot to Mr. Thomas, of the house and lot (218;) and of the negroes in the deed of August 1795, and of the land comprized in this conveyance from Mr. Withers. For the account seems to have stood thus:

Amount of sale of Mrs. Heriot's land	}	£ 600
on Charleston Neck.		
Advance made by Mr. Thomas, actually proved,	}	£ 660
		£1,260

Amount secured to wife and children, by Mr. Heriot's deed of August 1795,

House valued at	£ 500
Negroes at about	350
Value of the property in Mr. W's. deeds to Mr. Thomas for the grand children,	180
	£1,030
	£1,260
	£1,030—

Leaving a balance of the sum of £230 on the side of Mrs. Heriot; which would be

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applicable \*to the payment of the lots No. 13 and 14, conveyed by the assignees of Mr. Heriot in blank, but intended for the children, and valued at \$710 or £165. That this advance of £660. was intended by Mr. Thomas, not to be gratuitous to Mr. Heriot, is apparent from his message to Mr. Heriot, proved by Dr. Thomas, and by the clause in Mr. Thomas' will made in the year 1807, by which

he deducted £660 from the share of his estate intended for his two grand-sons, the Heriots, sons of Mr. and Mrs. Heriot, (and defendants in this suit,) on account of such advance, for which he considered them secured by the deeds under consideration.

It was given in evidence, or rather admitted in the defendant's answer, that there was a conveyance from the sheriff, in April 1800, of some lots opposite Georgetown to Mr. E. Thomas, in trust for Heriot's children. But not a tittle of evidence was given to shew that Mr. Heriot had been the purchaser, or had been the paymaster. This deed, therefore, is not impeached.

The next question, relates to the deeds found among the papers of Mr. Heriot, executed by his assignees, conveying certain lots in Georgetown, to wit, No. 13 and 14, without the name of any grantee. Very little evidence was given on this point. It was said that Mr. Heriot declared he had bought in the lots for his children at the sales of his property. No proof was furnished that the lots were his, or had been paid for by him out of his funds or the children's funds, or whether ever paid for at all. I am left so entirely in the dark for want of evidence, that I cannot make any decree which can affect this property, more especially as I find a balance of £230, in Mr. Heriot's hands, of the funds arising from the sale of Mrs. Heriot's land and Mr. E. Thomas' advance to him, which was applicable to this or any other purchase for the children, and actually exceeded the value of these lots.

It is therefore ordered and decreed, that the bill be dismissed so far as regards the property comprehended in the deeds which have been under our consideration. As to the rest of the property of Mr. Heriot, it is

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decreed that the executors do account for the same in the course of legal administration; and apply so much as may remain after satisfying debts which have priority to the payment of the debt to Mr. Withers, for which Mr. A. Taylor is surety, and such other creditors as stand in equal degree.

Henry W. Desaussure.

From this decree there was an appeal on the following grounds:

First,—That the marriage settlement of 10th May, 1792, under which the defendants claim is void by reason of its not being recorded within the time limited by law.

Second,—That the conveyance of William Heriot of the lot, No. 318 and seven negroes, of the 29th August, 1795, is void against creditors for all beyond the actual consideration proceeding from Mrs. Heriot.

Third,—That all the subsequent conveyances and purchases to the benefit of the wife and children of Mr. Heriot ought to enure to the benefit of his creditors inasmuch as it appears that these purchases were made by Mr. William Heriot, and the transfer to

his children was unsupported by any legal consideration which ought to protect them against creditors.

Blanding, Comp. Sol.

May, 1814.

The appeal was heard at Columbia, by the Chancellors Desaussure, Gaillard, Waties, James and Thompson.

After the argument, the court pronounced the following decree:

We have considered this case with attention, and we are of opinion, that the conveyances of property for the benefit of Mrs. Heriot's children were supported by considerations of sufficient value to maintain them against a subsequent mortgage creditor. But the marriage settlement stands on a different footing. That deed was executed on the 10th May, 1792, and recorded on the 4th March, 1795, in the register's office in Georgetown district. The law requires marriage settlements to be recorded within three months,

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and in the secretary's office. \*If it had been so recorded, there would have been no question of its validity, however indebted the husband might have been at the time, for the settlement was of the wife's property, and the consideration was marriage.

But it was insisted at the trial in the Circuit Court, and the circuit judge was induced to be of that opinion, that the settled property being the wife's, and the deed being recorded long before the debt was incurred, which was the foundation of the complainant's suit, and the recording being at the place of residence of Mr. Taylor, sufficiently established the settlement. The court is however of a different opinion, the circuit judge concurring. The grounds relied upon to prevent the operation of the law in this case, which requires the settlement to be recorded in the secretary's office within three months, are not of sufficient weight. The property being the wife's does not vary the case. The marital rights and the obligations of the husband will attach to the wife's property, unless there is interposed a settlement executed and recorded conformably to law. And this liability of the property brought in marriage by the wife, extends as well to debts incurred after the marriage as before. The argument that the deed of settlement being recorded before the debt was contracted in the register's office, where Mr. Taylor resided, was sufficient to put him on his guard, and was sufficient notice to him of the existence and effect of the settlement, cannot be maintained. It is true that the registering acts to guard against double sales and mortgages have been so construed in equity, notwithstanding these positive provisions, as to give effect to the last recorded deed, against the first recorded deed, where it is clearly made out in proof, that the holder of the first recorded deed, knew at the time he



was taking it, that another deed was in existence, conveying the same property to a third person. And this rule is founded upon the manifest equity of preventing a man from converting that which was intended as a shield to guard him from fraud, into a sword to wound others, and to support his own fraud. And so Lord Hardwicke has expressed

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ly decided in *Leneve v. Leneve*, 3 Atk. 646, 650, 1, 2. See also *Sheldon v. Cox*, Ambler, 624, and *Newland on Contracts*, 509, 510. It is true that Lord Alvanly in the case of *Tolland vs. Stainbridge*, 3 Ves. jr. 478, expresses regret, that the registry act had been broken in upon by parole evidence; but he acknowledged it as the settled doctrine. If this doctrine, growing out of, and applied to the registering acts, for guarding against frauds in double sales and mortgages be applicable to the law for registering marriage settlements, (to which they have considerable analogy, but upon which the court does not now mean to give any opinion) still the doctrine must be taken with all its limitations. And Lord Hardwicke, who established the doctrine on clear principles, has also fixed the limits. In the case of *Hine v. Dodd*, 2 Atk. 275, he lays it down, that equity will not relieve against the legal estate, which the subsequent purchaser has obtained, by registering his deed, unless in a case of apparent fraud, or clear and undoubted notice; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament, and this has been followed in the case of *Tolland and Stainbridge*, 3 Ves. 448. Now in the case under consideration, there is no pretence of fraud on the part of Mr. Taylor, and there is no proof of clear and undoubted notice. Suspicion of notice arising from recording the deed in an office at his place of residence, is not sufficient of itself to make out that clear and undoubted notice, necessary to entitle the party to relief or protection, and there are no additional circumstances of sufficient weight to support the mere suspicion of notice growing out of the recording of the settlement in Georgetown. The marriage settlement therefore in this case cannot protect the property comprehended in it against the claims of creditors.

It is therefore ordered and adjudged that so much of the decree of the circuit court as establishes the validity of the marriage settlement, and protects the property comprehended therein from the claims of Archibald Taylor and others, be reversed, and that the circuit court be directed to order a reference

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to the commissioner to examine \*and report what that property at present consists of, and to state the rights of the creditors therein, according to their legal priorities, and to

make such further orders and decrees therein as justice may require.

And it is further order and adjudged, that the rest of the decree of the circuit court, relative to the other deeds in question, be affirmed, and that each of the parties pay their own costs of suit.

HENRY WM. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES,  
WILLIAM DOBEIN JAMES,  
W. THOMPSON.

November, 1815.

Afterwards it was stated to the Court of Appeals, that there had been a mistake in the statement made to the court, that the marriage settlement of August, 1795, had been recorded in the office of the register of mesne conveyances for Georgetown district; for it appeared on further examination since the decree, that the same was recorded in the office of the secretary of state, as the statute provides, but was not recorded until the 4th March, 1795, which was long after the time prescribed by statute; whereupon, on the motion of the solicitors it was ordered, "that the case be remanded to the circuit court for the correction of the said error; and that the opinion of the court be taken on the legal effect of that correction."

Afterwards an order of reference was made by order of the circuit court, to ascertain the state of the facts, as to the lots No. 13 and 14. And the commissioner made the following report:

I have been attended by the solicitors as well on part of the complainant as of the defendants, and find that lots No. 13 and 14, which were sold at the sales of George Heriot's property, were purchased by Wm. Heriot, for the sum of seven hundred and ten dollars. That in payment for the said lots, an account of William Heriot, against George Heriot, to the amount of three hundred and

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ninety-eight dollars and forty-two cents, \*was received and discounted; and for the balance Wm. Heriot gave his two bonds, with Robert Heriot security. That after the death of Wm. Heriot, his executors found the titles among his papers, but the name of the grantee was left in blank. That the said two lots were included in the mortgage given by Wm. Heriot to the complainant, of the 24th June, 1807.

At the time Mr. Wm. Heriot received the titles, he said that he did not wish to leave his own name inserted in them, but that he intended them for some one of his family.

And by consent of the parties, I further report that there is real estate belonging to the said Wm. Heriot, which is necessary to be sold for the payment of his debts, and that

the same is bound by judgments obtained against the said Wm. Heriot, in his lifetime.

Robert Heriot, Commissioner.

The cause again came to a hearing in the Circuit Court at Georgetown, in which Chancellor Desaussure again presided. After argument, the Chancellor pronounced the following decree.

This case has now been brought on, and argued on the ground that the deed being recorded in the proper office, (to wit, the secretary of state's,) before the transaction with Mr. Taylor, though not within the time prescribed by the act of the legislature, is good and valid, at least as far as relates to Mr. Taylor, and all subsequent creditors. And it was insisted that the deed being recorded, though not within the legal time, was presumptive notice to Mr. Taylor.

By our statute, a deed of settlement must be recorded in the secretary's office within three months, to entitle property to its protection—otherwise the deed is void as to creditors.

The deed in question was not recorded within the limited time. Then it is void by the very terms of the act, unless the creditors had actual notice of the settlement, and acted in defiance of it; and it is not quite certain that this would be sufficient. But

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there is no pre\*tence of such actual notice. The whole argument is founded on the presumption of notice, arising from the deed being put on record, though after the legal time. But this presumption is clearly not of itself sufficient to prove such a notice, as might bar the creditor.

I am therefore of opinion that the property comprehended in the mortgage to W. Taylor, remains liable to his demand, notwithstanding such deed of settlement.

Another point in the cause made before me, relates to the two lots of land, No. 13 and 14, purchased by Mr. Heriot, and put down to him as purchaser; but the titles were given to him without the name of the grantee being filled up. It is reported by the commissioner, that Mr. W. Heriot paid for those lots by discounting a demand which he had personally against the estate of the seller, for the greater part of the purchase money; and by giving his bonds for the balance. This report negatives the idea that he paid for the lots with any part of the trust fund. And his parole declarations cannot be set up to establish a trust against the apparent facts of the case. The lots must therefore be liable to the mortgage given of them by Mr. W. Heriot to Mr. Taylor.

It is therefore ordered and decreed, that the property comprized in the deed of settlement, not properly recorded, and the lots No. 13 and 14, be subjected to the mortgage to Mr. Taylor, and sold to satisfy the same on the usual terms.

From this decree there was no appeal.

#### 4 Desaus. 242

Columbia.—Heard by Chancellor James.

MARY MEANS v. D. R. EVANS, and Others,  
Executors of J. Means.

(February, 1812.)

[Wills ⚡3.]

The act of Feb. 1791, provided that personal property acquired after making a will should not pass thereby.

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\*In 1805, a testator made his will, and disposed of all his real and personal estate, by several devises, and by a residuary clause.

In 1808, an act was passed repealing the above provision of the act of 1791. The testator died in 1811, without any republication of his will.

The personal property which he had acquired after making his will in 1805, passed under the residuary clause of his will.

[Ed. Note.—Cited in *Bell v. Towell*, 18 S. C. 100.

For other cases, see Wills, Cent. Dig. § 3; Dec. Dig. ⚡3.]

[Wills ⚡437.]

[A will must be construed according to the law in force when the testator died.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 951; Dec. Dig. ⚡437.]

John Means being seized and possessed of a considerable real and personal estate, made and duly executed his last will and testament on the 14th day of August, 1805, whereby he devised and bequeathed several legacies to his wife and others; and afterwards bequeathed the residue of his estate among his children.

After making his said will, the testator acquired considerable real and personal estate; and died in the year 1811, leaving his said will in full force, but without any republication.

Mary Means, the complainant, the widow of the testator, filed her bill, to have a partition, and account of the personal estate; claiming a third part of the property acquired after the execution of the will, under the provisions of the act of February, 1791, for abolishing the rights of primogeniture, and for the more equal division of the real and personal estates of intestates; by which it is enacted, that no property, real or personal, acquired after making a will shall pass thereby; but that the same shall be distributed as in a case of intestacy.

The executors of John Means admitted in their answer, the facts stated in the bill, but submitted, that by the act of December, 1808, the abovementioned provision of the act of February, 1791, respecting personal property, was repealed; so that personal property acquired after making a will might pass thereby, as it was before the passing that act. And that John Means dying after the enactment of the repealing law, (to wit, in 1811,) the personal estate acquired by him after making his will, would pass under the residuary clause in said will.

The cause came to a hearing before Chan-



sellor James, who after argument, delivered the following decree.

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"The testator, John Means, made his will on the 14th August, 1805, and died afterwards in the year 1811. Between the time of making his will and his death, he acquired considerable personal property, as in the bill and answer mentioned. The only question for the consideration of the court, is, whether he died intestate as to said property, under the act abolishing the rights of primogeniture, passed in February, 1791; the said will being made previous to the act of 1808, respecting that clause of the act of 1791, which enacts "that no lands or personal estate, which shall be acquired by any person after the making of his or her will, shall pass thereby," and so forth. Complainant contends that the will must take effect from the time of making thereof; and defendants that it can have no effect till the time of the death of the testator. It is true that in all instances a testator has a controlling power over his will until the time of his death, and that the bequests contained therein, cannot take effect until such time; yet as to many purposes in law, a will shall relate to the time of making it; and the words of the act of 1791, are imperative, "that no such after acquired property shall pass by the will; and the one in this case having been made prior to the act of 1808, I cannot see, even if the legislature did intend it should have a retrospective effect, how this court could decide that it should have such an one.

Both acts were passed by bodies having equal powers, neither of which can thus control the other. A case had indeed been cited from 7th Bacon, taken from Viner, where it was held, that the will of a Papist, in Ireland, was avoided by a subsequent statute, made in that kingdom. But although I am in the habit of paying all due deference to British decisions, when founded on good reasons, yet no reason has here been given, and I know too well the degraded condition to which Papists are reduced in that country, to pay much respect to the old cases decided against them.

Therefore, so far as I have been able to give this case consideration, I am of opinion that under the act of 1791, the testator died intestate, as to the after acquired proper-

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\*ty in the bill and answer mentioned, and that the relief prayed for by the complainant must be granted.

(Signed)

W. D. James.

From this decree, there was an appeal, which was heard by the Chancellors Desausure, Gaillard, Waties and James.

May, 1812.

After argument, the three former delivered the following decree:

In this case the circuit court decreed that

the personal property acquired by the defendant's testator after the making his will, did not pass under the residuary clause in it, but that the complainant was entitled as his widow to a distributive share of such property under the act of 1791. By this act personal as well as real property thus acquired is made subject to distribution as in a case of intestacy. But the act of 1808, repeals the act of 1791, with respect to personal property, and declares that any person acquiring such property after making his will, shall not be considered as having died intestate as to such property. In the present case the will of the testator was made after the act of 1791 had passed, and before the passing of the act of 1808, and he died in 1811. The question then is, whether this will shall be governed by the former or by the latter act. We are of opinion that it comes within the operation of the latter. It is clear by the common law, that personal property acquired after the making a will is allowed to pass under a residuary clause, if there is nothing in the will which indicates a contrary intention. For although as to some purposes a will shall be made to relate to the time of making it, yet as to all other purposes, it is considered as the expression of a man's wishes at the time of his death, and the last act of his life. If then the law of 1808, repeals that of 1791, as to the disposition of personal property, it restores the common law rule of construing wills with respect to it. But the act of 1808, is not satisfied with leaving this point to construction only; for it expressly declares, "that as to personal property acquired by a person after making his will, he shall not be

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considered as \*having died intestate," which is saying in other words that such property shall pass by his will. The decree therefore of the circuit court is reversed.

(Signed)

HENRY W. DESAUSURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

Chancellor James differing in opinion from his brethren, delivered the following decree:

As this is a case of considerable importance, and I have the misfortune to disagree with my brethren in the construction they have given to the will in question, I now beg leave to offer my reasons for dissenting from them.

In the 14th clause of the act for abolishing the rights of primogeniture, the words are, "that no lands or personal estate, which shall be acquired by any person after the making of his or her will shall pass thereby, unless the said will be republished; but every such person shall be considered as having died intestate, and the same shall be distributable according to the directions of this act."

In 1791, this act was passed; in 1805, the testator John Means, made his will, and afterwards acquired considerable personal prop-

erty, but never republished his will. In 1808, the above cited clause of the act of 1791, was repealed: and in 1811, the testator John Means died. The will therefore was made and not republished during the time the above clause of the act of 1791, was of force, and the testator's widow, the complainant, claims a distributive share of the after acquired property, by virtue of said clause.

The question made for the Circuit Court was, whether the will came under the operation of the act of 1791, or the repealing clause of the act of 1808. I had no hesitation in deciding that it came under the act of 1791, which had operation until it was repealed, and upon a careful revision of the case I continue of the same opinion.

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\*My brethren have decided, that the will was ambulatory, and had relation to, and effect only at testator's death; and then that the act of 1808 had restored the common law, which must govern.

My intention now is, to examine into the merits of that decision. There had formerly been some doubts how the common law stood, as to personal property acquired after the making of a will; by some of the older authorities, it has been held "that the construction is to be made as matters stood at the time of making the will;" so that after acquired property, not being in the contemplation of the testator at the time of making his will, could not pass thereby; but subsequent decisions appear to confine such construction down to specific things, then in possession of a testator, when his will was made, and which in their nature were not fluctuating."

It is not material now to enquire into the merits of the different opinions respecting the common law on this subject; it is enough for us to know that doubts did exist; and that therefore it was necessary to clear them up. For this purpose, the clause of the act of 1791, has always appeared to me to have been enacted. It does not profess to repeal the common law, or any other law upon the subject; it only declares what is hereafter to be considered as the law. All doubts about the matter were henceforth to be quieted, and the legislature enacts what was to be the rule in *perpetuum rei testimonium*. That the act was intended to declare the law, and not to repeal it, will be further seen when we come to consider what was the mischief then complained of, and the remedy proposed to cure it. The mischief was that the rights of primogeniture existed, and the estates of persons dying intestate were not equally distributable. To cure this evil, the legislature contemplated an equal division among the heirs. In cases of absolute intestacy, this was easily effected, by passing a law for that purpose. But they wished to extend their views further. Where wills had been lately made, fully expressive of the intention of the

testator, and providing for all his children, though unequally, the law makers could not

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well interfere; \*but there were also cases of implied revocation, and partial provision for children, concerning which the common law did not speak so plainly, as to settle all dispute. Such were, whether marriage alone, or the having a child alone, after the making of a will, was such a change of testator's circumstances as would raise a presumption in law, that he intended to revoke his will. Such also was the present case, nearly allied to the above, where testator had made a will, kept it by him for a long time after the making thereof, had acquired property, had had children, and died without republishing his will. Here there appeared to be room for legislative interference, because he could not have had after acquired property in contemplation when he made his will, because though the rule of construction of the common law was pretty well settled, yet it was under many nice distinctions (understood not always by legal men) and even under such constructions, as have lately obtained, some of the children were often left unprovided for; and lastly, because it was not to be supposed that a testator would have left any of his children who had not offended him, without provision.

Such must have been the reasoning of the framers of this act, and such their grounds of interference. Now real estates acquired after making a will in favor of the heir, did not pass thereby; the legislature too, by a clause, had already put real and personal estate upon the same footing, as to distribution; and it was but to go one step further to place them on the same footing, as to intestacy. This promised to make the rule as to real and personal property uniform, to settle all former doubts about the common law, and to cure the mischief of leaving children born after making the will unprovided for. But children were not the only sufferers.

In this country, much of the success of the husband in acquiring property, depends upon the prudence and economy of the wife; but where, as in the present case, a will had long been in the husband's desk, and much property had been afterwards acquired, it was to be expected, that unless the will was republished before his death, his widow would be

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left with a portion of his \*estate, unequal to its extent, and her merits; and disproportioned to what the husband would have left her himself, in case of republication; we see therefore that much mischief existed, both as to widows and children; and it was to this mischief that the legislature wished to apply a remedy. If in the latter instance of widows, the remedy has not operated quite so equally as they wished; still that is no good reason it should be forced to cease in its



operation, before it was changed for a better by the same wise head that at first prescribed it. Thus it appears that the clause of the act 1791, above cited, was declaratory of, and did not repeal the common law, and that it was in its nature a remedial law.

Let us next examine whether the legislature have declared their intention in words that are plain and clear. "No lands or personal estate which shall be acquired by any person after the making of his or her will shall pass thereby," and so forth. The words, "the making," are formed from a present participle and literally apply to the present, and not to the future time. In common parlance, when they are spoken of a will, they signify the signing, sealing, and publication of it. Another common meaning of these words is, the creation of a thing; in which sense, and I believe every other in the English language, they relate to the first existence, and not to the future operation; to the cause, not to the effect. So much for the definition of the words used by the legislature, and when using them, to make themselves well understood, they would certainly apply them in the popular acceptance. All this is plain. How then can these words, speaking so clearly in presenti, be construed not to operate till in futuro. The act was passed, and the will was made while it was of force. But say the advocates for the construction assumed, the testator did not die till after the act was repealed; the will did not have effect till after the death of the testator; and then the repealing law attached upon it, and must control it. But how the repealing law? Because it revived the common law. I think I have shewn that the act of 1791, was only declaratory of the common law; but even admitting

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that it re\*pealed it, still it must operate down to the time, when it was itself repealed, and governs the case. Then the only remaining argument is that the will did not have effect till the death of the testator. But the position is only in part true. Among other instances that might be adduced, a will from the time of making it, fixes the specific property bequeathed, then in testator's possession; it also frequently ascertains the objects of his bounty, and as a consequence thereof, leaves those unprovided for, who coming into life afterwards, are not named in the will.

Thus in the very instance contemplated by the legislature, and acted upon by them, a will would have effect from the time of making it, and not from the death of testator. Then the will having effect, and the clause of the act of 1791 also having effect, the latter must govern. So that the intent of the law makers is evident, and the words expressive of it are plain and clear. If not, let an attempt be made, in any form that may be proposed, to engraft words of the construction, which is

advocated, upon the clause of the act of 1791, and the absurdity will be manifest. Yet if the legislature intended that their law should square with such a construction, it would be easy to engraft the latter, upon the stock of the former. But again, this is a remedial act, and it is the duty of the judges, so to construe the clause, as to suppress the mischief, and advance the remedy. We have seen what was the mischief, and what the remedy, and the complainant has been pointed at, as the object of the latter. Now the decree of the Circuit Court would have extended the remedy from the time of passing the act, until its repeal; a period of about seventeen years; but by the construction given, a will made the day after passing the act of 1791, may be brought under the operation of the act of 1808, which repeals it. This, besides taking from complainant her remedy, is lessening the number of cases greatly, to which it would otherwise have extended. All which is contrary to a well known construction of statute law.

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\*For the above reasons, I am of opinion, that the decree of the Circuit Court ought to have been sustained.

(Signed)

W. D. JAMES.

Stark for complainant—Hooker and Blanding for defendant.

See 7th Bacon, 312, 313; Ambler, 451, 550; 2 Atk. 86, 577; 3 Atk. 551; 1 Vez. 32, 225, 186.

#### 4 Desaus. 251

#### Case XLIV.

Columbia.—Heard by Chancellor James.

LAURENCE RAMBO v. DANIEL RAMBO.

(February, 1812.)

[Equity ⇐233.]

Where a bill charges fraud, and advantage taken of the complainant, the defendant shall not protect himself by a general demurrer, but shall be obliged to answer; though the acts of the complainant may not be altogether clear of suspicion and doubt. The justice of the case cannot be got at on a demurrer, and the demurrer admitting the facts charged, admits the allegations against the defendant, and must be overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 509; Dec. Dig. ⇐233.]

The bill was filed in this case to set aside certain deeds executed by the complainant, and conveying certain property, without any valuable consideration, and for a special purpose, and to be valid only in the event of the complainant's death.

The defendant put in a general demurrer. On argument, Chancellor James sustained the demurrer by the following decree:

In this case it has been frequently said that the Court of Equity will not favor demurrers. But this is not always true. Where demurrers are put in for the purposes of delay, this

court views them with an unfavorable eye: but in many cases, such for instance where there is no equity stated in the bill, or there is no equitable jurisdiction, demurrers will always shorten cases, and they are received here with considerable favor. In the present instance that mode of proceeding appears to

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\*be proper, for I am of opinion that there is no equity in this bill. We will first consider the absolute bill of sale which has been made by the complainant of his negroes, and next the award that has been returned respecting his real estate. Complainant states that his inducement to make such a bill of sale, was to protect his property from the claims which any iniquitous persons might set up against him in case of his death, of the existence of which unjust claims he had become apprised.

This is a flimsy reason indeed. Can it be supposed for an instant that if the laws of the country could not protect his property, that it was to be done by the potency of a bill of sale? In case of his death, the same son to whom the property was made over by the bill of sale, would have become one of his heirs, and would have been just as able to defend himself as heir, as grantee of the negroes. This cannot be the real inducement for making such a deed. In looking a little further into the bill, the true reason may be discovered. We find "that he was indebted to James Turnbull, in the sum of \$3,300 for five negroes, of which he states he had paid \$1,000, and that he had given his bond and mortgage of the said negroes for the payment of this money previous to the making of the bill of sale. That the said James Turnbull afterwards as he states, pretended that he was still indebted to him on the said bond, and that he clandestinely took possession of the five negroes which had been purchased of, and mortgaged to him.

This statement is absurd upon the very face of it. When the complainant acknowledges that \$2,300 of the money with interest was still due, where was the necessity of Turnbull's setting up any pretences for the recovery of his just debt? Or how could he act clandestinely in seizing the property which had been mortgaged to him? This court is not to be deceived by such flimsy allegations. From the above and subsequent parts of the bill, it appears that the complainant was indebted more than he could pay, and a strong suspicion arises that this bill of sale was a fraudulent one. Such suspicion too, is further confirmed by the circumstance which

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complainant relies upon for relief, namely, that he kept possession of the negroes, and hired them out after the bill of sale was made, which is a strong badge of fraud. Therefore upon the whole of this case, it appears that the complainant has come into court with un-

clean hands, and that he is not entitled to the relief prayed for.

Were it necessary to trace this business any further, it is evident from complainant's own statement, that he received from his son Daniel, a note of hand for \$5,000, as he says, a nominal consideration for the ten negroes mentioned in the bill of sale, which note he afterwards indorsed to his son Samuel.

Whatever might have been the object of the complainant in taking the note, as it was given for a valuable consideration, it might have been recovered. And if he indorsed it away afterwards to Samuel, without value received, it was his own folly, and his son Daniel is not responsible for it. He that trusts most must lose most.

Next as to the award complained of. It appears that besides the debt due to James, Turnbull, the complainant was so far further indebted that his lands were sold by the sheriff, and purchased in by H. D. Ward, who as an act of friendship, suffered complainant and his sons to redeem the debt which he paid for the lands, by working upon them with the negroes. That after the debt was worked out, and H. D. Ward was about to make titles, he found there were accounts between the father and his sons, and he determined to make titles to whomsoever of the parties was not indebted to the other. For this purpose he recommended an arbitration which was agreed to by them. A majority of the arbitrators returned their award in favor of the sons, and Mr. Ward made titles to them.

Now there is nothing unfair or fraudulent in this. All appears to be the act of honest men, wishing to do justice between the parties, and to settle a family quarrel. Where then is there room for the interference of this court? I can see none. Wherefore upon the whole of the reasons above stated, I am

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of opinion that the demurrer must be sustained, and complainant's bill be dismissed with costs.

W. D. James.

From this decree an appeal was made on the following grounds:

First,—Because, the bill contains on express charge that the bill of sale spoken of was executed upon the condition, that it was to be void in case the complainant returned from South-Carolina to Georgia.

Second,—Because it was without consideration.

Third,—Because the defendant never claimed any right under it, until several years after it was executed.

Fourth,—Because there was fraud in keeping the note concealed, and eventually pretending it was lost.

Fifth,—Because even if the bill of sale should be decreed to be void, notwithstanding the above reasons: yet the complainant had a right to receive the consideration money



for the negroes, the note having been endorsed in trust for himself only conditionally.

Sixth,—Because the award was not according to the submission.

Seventh,—Because there was fraud in procuring the award.

Eighth,—Because the complainant had a right to an award in his favor.

Ninth,—Because the bill contained equity which defendant ought to have been compelled to answer.

May, 1812.

The appeal was heard by the Chancellors Desaussure, Gaillard and Waties.

The court after argument delivered the following decree:

The court have considered this case, and are of opinion, that the complainant stated such a case in his bill, as entitled him to a full and distinct answer. The bill charges fraud, and undue advantage taken of the complainant. These charges are grave and ought to be answered. The demurrer is an admission of the facts charged; and the

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court is not prepared to say that in such a case it cannot give relief. It is obvious that an examination into the justice of the case could not be obtained on the demurrer.

It is therefore ordered and adjudged, that the decree in the circuit court be reversed, and that the demurrer be over-ruled.

#### 4 Desaus. 255

##### Case XLV.

Laurens.—Heard by Chancellor Thompson.

WILLIAM ABRAMS et al. v. ELIZABETH WHITMORE, Administratrix.

(February, 1812.)

[*Husband and Wife* ⇐29.]

A trustee is not absolutely necessary to be named in a marriage settlement, in order to give it validity.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 161; Dec. Dig. ⇐29.]

The only question that presents itself for the consideration of the court is the validity of the marriage contract referred to by the plea of defendant.

For the complainant it is contended that it is void, for the want of the intervention of a trustee; but the court is of opinion that the nature of the instrument is not such as to require it; it not having any operation until the coverture was dissolved, and of course could not merge in the marital rights.

The contract was entered into with all imaginable fairness, for a valuable consideration, and cannot be infringed by this court.

It is therefore ordered, that the bill be dismissed with costs.

#### 4 Desaus. \*256

##### \*Case XLV.

Ninety-Six District.—Heard by Chancellor Thompson, and afterwards by Chancellor Gaillard.

PETER MORAGNE, Devisee of Peter Moragne, v. LE ROY DU CERCUEIL, DELANY CARROL and BENJAMIN GLOVER.

(February, 1812.)

[*Judgment* ⇐435.]

This court will relieve a person who has contracted to purchase a tract of land, (for which the vendor gave a bond to make titles) against a fraud practised by the vendor and others, to defeat the equitable title; notwithstanding a verdict and nonsuit at law, against the purchaser, who could not avail himself at law, of his equitable title. The statute of 1744 (Public Laws, page 190,) does not stand in the way of such relief. A subsequent purchaser, pendente lite, or with sufficient notice to put him on the enquiry, cannot protect himself against the equitable title.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 785; Dec. Dig. ⇐435.]

Rents and profits decreed; and a conveyance to the complainant.

The complainant filed his bill in this court, to obtain relief against a fraud practised on him, as he alleged, by the defendant du Cercueil, in the sale of a tract of land, for which the latter gave a bond to make titles, to Peter Moragne, the elder: and also against other defendants. A general demurrer was filed to the bill, which was sustained by the judge then holding the circuit court.

May, 1812.

An appeal was made from the decree, and the court of appeals made the following order.

The merits of this case have not been gone into. The complainant's bill was demurred to, on the ground, that he had had a verdict at law and nonsuit against him, which under an act of assembly constituted a legal bar to his recovery. In sustaining the demurrer, the court put itself out of possession of the case, and precluded inquiry into the fraud charged by the complainant. He states that the lease produced by Carrol on the trial at law, which defeated his claim, was made to defraud him.

The bill must be answered: the decree is reversed.

HENRY WM. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

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\*The cause being sent down to the circuit court, the defendants put in their answer to the bill.

The following case was made by the pleadings.

The bill was filed on the 1st January. The answers of Delany Carrol and Benjamin Glover, (two of the defendants to said bill)

were filed 4th January, 1814, and the other defendant, Francis R. L. du Cercueil not having answered the bill, an order was obtained on the 16th February, 1814, that the bill be taken *pro confesso*, as regarded him.

The bill among other things alleged, that on the 8th September, 1797, Peter Moragne, the elder, obtained a penal bond from du Cercueil, conditioned for titles to 900 acres of land, when required. And at the same time gave his bond to du Cercueil for 100*l*. the consideration of said bonds to be paid when du Cercueil executed good and lawful titles to him for said lands. That titles not being made according to the condition aforesaid, Moragne brought an action of debt on the title bond against du Cercueil and obtained a verdict thereon, in the following words: "We find for the plaintiff, two hundred pounds, and costs of suit, to be released on the defendant's making sufficient titles to the plaintiff, and paying four dollars and costs of suit." Du Cercueil then executed a release to Moragne for the land, and paid the costs, and Moragne received this title in satisfaction for the verdict, and paid the purchase money to du Cercueil. This was on the 28th October, 1800. On the 10th March, 1798, Delany Carrol rented part of said land from Moragne. After this, Carrol refusing to pay rent, or deliver up the possession, Moragne brought an action against him to try titles, &c. in which a verdict passed for the defendant. Moragne then brought a second action of the like nature, against Carrol, in which he was nonsuited. This nonsuit was occasioned by the neglect of the attorney. An application was made to the Constitutional Court, to set this nonsuit aside, and refused.

The bill states that the lease under which Carrol claimed, was made to defraud the complainant. That Glover the other defend-

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ant purchased the land subsequently to the deed from du Cercueil to Moragne, and with full knowledge of the fraud, &c.

The answer of Delany Carrol, as also of Glover, deny the fraud charged in the bill, and the former relies on the verdict and nonsuit obtained at common law, as forming a legal bar to any claim Moragne has to said land, and the latter that he was an innocent purchaser for a valuable consideration without notice.

The cause came to a hearing before Chancellor Gaillard, who pronounced the following decree:

The complainants claim a tract of 924 acres of land purchased by the father, Peter Moragne, on the 8th September, 1797, from du Cercueil, who gave him a bond to make titles to him on the payment of the purchase money. Titles not being made, Moragne commenced an action on the bond, and obtained a verdict for 200*l*. with costs of suit, "to be released, (the verdict says) on

the defendant's making sufficient titles to the plaintiff, and paying four dollars, and costs of suit." The verdict was obtained on the — day of — 1800, and on the 28th October, 1800, du Cercueil, to be exonerated from the payment of the money, conveyed the lands to Moragne. The legal title was then vested in him, but previous to this, on the 5th November, 1798, du Cercueil had given a lease for 500 years, of the lands to Delany Carrol. Moragne knew nothing of this lease. Carrol was acquainted with the purchase made by Moragne from du Cercueil on the 8th September, 1797. The nature of it was explained to him by Gilbert and John Moragne: and so satisfactory was the explanation to him that he rented (as appears by the lease, and the evidence of Gilbert and John Moragne) part of the lands from Peter Moragne (the purchaser from du Cercueil) on the 10th March, 1798. Carrol being in possession of the lands, Moragne brought an action against him to recover them, and a verdict was given in favor of the defendant. A new action was brought, and a non-suit suffered at March term, 1804. It is not known on what grounds Carrol succeeded in obtaining the verdict, the gentleman who brought the action for Moragne

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being dead; but it has been suggested that the claim of Moragne was defeated by the production of the outstanding lease for 500 years to Carrol, dated prior to the release from du Cercueil to Moragne, which vested in him the legal title. In the whole of this transaction there is *mala fides* both on the part of du Cercueil and Delany Carrol. The lease from du Cercueil to Carrol was made with a view to defeat the equitable title to the land which Moragne had under du Cercueil's bond, dated in September, 1797, and Carrol knew it, for Leouard Carrol, (a witness) says he was present, when his uncle Delany Carrol, and the witness' father said to du Cercueil, they had heard that he had made title to the land to Moragne, and that he answered, that if he had done so, he would give them new leases for 500 years.

The lease for 500 years to Delany Carrol, was executed afterwards. The nonsuit which has been relied on, was suffered under these circumstances. A copy of the grant was offered in evidence by Mr. Bowie, (Moragne's counsel) under an act of the legislature, passed in 1803. Mr. Bowie had seen the bill which was drawn by the late judge Trezevant, before it passed into a law. In this bill it was not necessary that the copy of the grant should be accompanied by the affidavit of the plaintiff; but the law, (which was passed) required that his affidavit should accompany the copy of the grant. Mr. Bowie says that the first knowledge he had that this affidavit was necessary, was communicated to him at the trial by the judge from a newspaper, in which the act



was printed. The verdict and non-suit, it is contended, constitute a legal bar to the claim of the complainant under the act of assembly, passed in 1744. (Public laws, page 190.) To permit this nonsuit suffered under the circumstances attending it, to be tacked to the verdict, and then to consider the verdict and nonsuit, as precluding inquiry in a case so replete with fraud as this is, would be monstrous, and I feel no hesitation in saying, that the legal defence which Carrol has thrown around him to protect him, in what his counsel calls his fortification, can avail him nothing. Fraud is no foundation on which to build

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rights. It is \*said that a court of common law has concurrent jurisdiction with this court in cases of fraud; and that this case has been tried by a jury. This is true; but it is also true that the merits of this case never were fully before the jury, and that this court is more competent to detect and reach fraud than a court of common law. Another defendant (Glover) took a mortgage of the lands from Delany Carrol, to secure between \$4 and \$500 which Carrol owed him. The mortgage is dated on the 20th January, 1808, and was soon after recorded. The land was sold in 1809, by the sheriff, as the property of Carrol and bought by Glover for \$20, subject to this mortgage. The sheriff's titles are dated the 3d of July, 1809. Mr. Glover claims the land as a purchaser without notice. The bond from du Cercueil to Moragne to make titles was recorded in the clerk's office in this district on the 6th May, 1798. Two suits at law had been brought by Moragne against Carrol, for the lands, and after the nonsuit, Moragne filed a bill in equity, which was pending when he died in 1807; and John Moragne says he was at Mr. Glover's store one day when Carrol was present; that when Carrol was gone, Glover mentioned something about a mortgage, and asked about a suit which had been commenced for the land. Moragne told him it would never be dropped until they obtained either the money or the land. Mr. Glover told him, he either had a mortgage of the land, or was about to take one from Carrol. This conversation passed soon after Peter Moragne's death, between Christmas and Spring.

Part of the debt, perhaps the whole of it, from Carrol to Glover, was due sometime before the date of the mortgage. There was enough to put Glover upon enquiry. I consider him as a purchaser with notice.—There is an outstanding lease (for fifty years, of part of the 924 acres of land conveyed by du Cercueil to Moragne, dated in 1793,) from du Cercueil to Allison, which is unimpeached. The complainants are entitled to the 924 acres of land, purchased by their father from du Cercueil, subject to the lease to Allison for fifty years. Glover must release

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to them his right acquired by his \*purchase at sheriff's sale. And it is referred to the commissioner to report the amount of the rents and profits of the land from the 28th October 1800, from which time they are allowed to the complainants; and Delany Carrol must pay the costs.

Theodore Gaillard.

The defendants appealed from this decree, and prayed that it be reversed, and a decree entered for the defendants, on the following grounds:

First,—Because the verdict and nonsuit obtained by the defendant, D. Carrol, at common law, constituted a legal bar to Moragne's claim, and all those who claim under him, and the Court of Equity cannot relieve against a legal bar.

Second,—Because Glover was a purchaser for a valuable consideration without notice.

Third,—Because when Moragne made his election to bring an action against du Cercueil on the title bond, he waived his remedy by bill for a specific performance of the contract, and could not again resort to it: and that the present bill is nothing more than a bill for the specific performance of the contract with du Cercueil for the land.

Fourth,—That however this may be, the court erred in decreeing an account of the rents and profits, which equity never will do, until the complainant ascertains his title at common law, for trespass will not lie for them until then.

Yancey for defendants.

May, 1814.

The appeal was heard at Columbia, and was argued by Mr. Yancey for the appellant, and Mr. Bowie for the respondent.

Mr. Yancey, for appellants, relies expressly on the act of the legislature of 1744, p. 190. Insists that even if verdicts are obtained by frauds, yet by the act no exceptions being made as to fraud, such verdict must stand. 2 Comyn's Digest, p. 187.

Equity will never give relief against the provisions of the statute, nor against an express maxim of law.

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\*The party slept on his rights very long; though he might have proved the fraud at law, by the witnesses who proved it in equity. There was plain and adequate remedy at law, and the party cannot come here.

The allegation that the counsel did not know that the act of assembly required an affidavit is not sufficient. Equity does not aid if the party suffers by the mispleading of his attorney, 2 Vern. 325. If a man has lost his right as to a legal bar he can have no remedy—2 Atk. 240.

As to Glover he was a purchaser for valuable consideration without notice. The lis pendens was at an end; the verdict and non-

suit had been obtained, at the time of Glover's purchase.

Glover when he saw Moragne barred by a verdict and nonsuit, had a right to purchase or take a mortgage.

Glover bought when no suit in Equity was pending; a bill had been filed but abated, and before a new bill was filed he bought. The suit to operate as *lis pendens*, must be in full force.

No body proves notice to Glover but Moragne, who says that he told Glover that the suit in equity would never be dropped till they got the money or land. But this is contradicted by Glover's answer, for he swears he had no notice, and that he knew nothing of the circumstances, motives, &c. to the deed. He knew of no suit depending. The contradiction of Moragne not sufficient to put down the effect of Glover's answer.

Glover had a right to buy the land, even if he had notice; for the contract was to make titles. It was executory—and verdict was obtained on the bond to make titles, for the penalty to be void on making titles. But the consideration was of no value; the verdict stood for the money. The suing on the bond for the non performance of the contract, was an election of his remedy, and he could not resort to the other;—and Carrol and those claiming under du Cercueil, might readily be mislead to believe that the party had resorted to the penalty of the bond, and had abandoned the equity right to have a specific performance.

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\*But it is said that the bond to make titles was put on record, and that Glover might have found it there, and this was considered by the judge as a circumstance which might have put Glover on his guard. But this ought not to have weight, because bonds to make titles, are not directed by any law to be recorded.

The court decreed that a conveyance should be made to Moragne, or in other words decreed specific performance. The decree directs an account of rents and profits. But this is erroneous; for the legal title must be established, before there can be any decree or verdict for mere profits. As to recovering rents and profits, insists it cannot be done, till the possession is recovered at law—1 Atk. 525.

*Equitas sequitur legem*—law must be imperative. See 3 Atk. 224, for the ground on which the Court of Equity will relieve against verdicts at law.

Mr. Bowie, for respondents, considers the point that the verdict and nonsuit was not a bar, (as fraud was alleged in the bill,) to have been settled by the former decree of the court of appeals, which reversed the decree of the circuit court, for sustaining the demurrer.—3 Atkins, 203, *Basset v. Basset*.

Where the court of law gives a too strict

construction to a statute, which produces injustice, equity will relieve. Moragne came to this court to get rid of the fraudulent leases which stood in the way of his remedy. The remedy at law was not complete and adequate.

As to Glover's case, the testimony of John Moragne proves notice. At that time Glover had not a mortgage or deed. See *Fonbl*, for the doctrine, that what puts a man on enquiry, is sufficient.

As to the recording the deed, it is true it was not bound to be recorded. But the register's office is the place to search, and if he had searched, he would have found the bond, and deed too. The title to the land from du Cercueil to Moragne was in 1800, and Glover's mortgage in 1801.

After the argument, the court of appeals, present Chancellors Desaussure, Gaillard,

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Waties and James, \*unanimously ordered and adjudged, that the decree of the circuit court should be affirmed, for the reasons given therein.

#### 4 Desaus. 264

##### Case XLVI.

In the Circuit Court of equity for Cheraw District. Heard before Chancellor Waties.

PHILIP PLEDGER and SARAH, His Wife,  
v. the Administrators of BENJAMIN  
DAVID and others.

(June, 1812.)

[*Deeds* ⇐143.]

A widow having children by her deceased husband, and being entitled to a third part of his estate real and personal, and to a real estate of her own, conveyed the whole of her interests in said estates, to her children, reserving only one third part for her own use during her life; she afterwards married and had other children. The deed is good, and operative, at least as a deed to stand seized to uses, though informal and subject to some technical objections; and though prejudicial to her younger children.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 454; Dec. Dig. ⇐143.]

The bill in this case is brought to have a partition of the estate of Benjamin David, and an account of the rents and profits received by the defendants, James Pennery and Josiah David; to obtain an allowance for the maintenance of the defendants, James, Benjamin, Sarah and Elizabeth David; and also to have an account of the rents and profits of a plantation, which is claimed by the complainant in her own right.

The only question in the case is, what share of the property set forth in the bill the complainants are entitled to.

It appears that the complainant Sarah was, before her marriage with Mr. Pledger, the widow of Benjamin David, and entitled



as such to one third of his real and personal estate; also, to a real estate in her own right. But it also appears, that before her present marriage, she conveyed by deed to the defendants James, Benjamin, Sarah and Elizabeth David, her children by her first husband, the whole of her interest before mentioned, reserving only one third part thereof for her own use during her life.

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\*It has been contended that this deed is not valid, because it grants an estate in futuro, and puts a freehold in abeyance; also, that the habendum is repugnant to the premises, the estate in one being a fee simple, and in the other only for life.

I should have been glad if these objections had been well founded, for I understand that by this extraordinary act of bounty to the children of the first marriage, the children of the second will be unprovided for, and the mother herself will be left without a competent support. But the court cannot for these reasons set aside the deed. It is not, indeed, as formal as it ought to have been; but the intention is too manifest to be mistaken, and this will cure any informality. The complainant Sarah plainly intended to convey her whole estate to her children James, Benjamin, Sarah and Elizabeth David, except the use of the third part reserved for her life, and the deed must be considered as a covenant to stand seized to these uses. If so considered, there can be no room for the objection that the freehold in the land is in abeyance, for the covenantor has the seizin of it; and I cannot see any repugnance between the premises and the habendum, for the whole interest, except the portion for life is plainly described and conveyed by both; in the first it is expressly said, that "a fee simple is intended to be conveyed," and in the last it is declared to be to the use of the children and their heirs.

I am of opinion, therefore, that the deed is valid, and that the complainants are only entitled to the use of one third part of the property conveyed by it, during the life of the complainant Sarah; and that the defendants James, Benjamin, Sarah and Elizabeth David, are entitled to the absolute use of two thirds thereof, and the remainder over in the other third part thereof after the death of their mother. The defendants James Pouncey and Josiah David, must account to the complainants for the rents and profits of this third part. The complainants are also justly entitled to a reasonable allowance for the maintenance of the defendants, James, Benjamin, Sarah and Elizabeth David.

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\*It is therefore decreed that a writ of partition do issue, and that the real and personal estate of Benjamin David, deceased, and also the tract of land claimed by the

complainant Sarah in her own right, be divided and allotted among the parties in the following manner, to wit, one third part thereof to the complainant Sarah during her life, and the remaining two thirds to the defendants James, Benjamin, Sarah and Elizabeth David, in equal shares. It is also ordered, that the defendants James Pouncey and Josiah David, do account before the commissioner for the rents and profits of the whole of the property aforesaid, which have been received by them respectively, and that they do pay to the complainants one third of any balance, which may be due by them on the said account. And it is further ordered, that the commissioner do report what annual allowance the complainants are reasonably entitled to, for the board, lodging and clothing of the defendants James, Benjamin, Sarah and Elizabeth David. Let the costs of suit be paid out of the shares of the last named defendants.

THOMAS WATIES.

#### 4 Desaus. 266

##### Case XLVII.

Columbia.—Heard before Chancellor Desausure.

JOHN BYNUM and ANDREW WALLACE,  
Executors of Joseph Walker v. BOSTICK and WALKER.

(June, 1812.)

[*Slaves* ⇨13.]

Slaves cannot take property by descent or purchase.

[Ed. Note.—Cited in *Blakely v. Tisdale*, 14 Rich. Eq. 101.

For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. ⇨13.]

[*Slaves* ⇨22.]

A bequest of a slave to a trustee, with directions to liberate, is an attempt to evade the provisions of the statute, which prescribes a precise form and process of emancipation, and is void.

[Ed. Note.—Cited in *Frazier v. Frazier's Ex'rs*, 2 Hill, Eq. 315.

For other cases, see *Slaves*, Cent. Dig. § 93; Dec. Dig. ⇨22.]

[*Wills* ⇨85S.]

A legacy to a slave, failing from incapacity to take, sinks into the residuum of the estate, and is applicable to the payment of debts, &c.

[Ed. Note.—Cited in *Blakely v. Tisdale*, 14 Rich. Eq. 101.

For other cases, see *Wills*, Cent. Dig. §§ 2173-2183; Dec. Dig. ⇨85S.]

The principal question made in this case, was whether the devises and bequests of real and personal estate, made by the testator, Joseph Walker, to trustees, in trust for his negro slave Betsey, and her three children, are valid devises, and can take effect.

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\*The condition of slaves in this country is analogous to that of the slaves of the an-

cients, the Greeks and Romans, and not that of the velleins of feudal times. They are generally speaking not considered as persons, but as things. They can be sold or transferred as goods or personal estate; they are held to be *pro nullis, pro mortuis*. Almost all our statute regulations follow the principles of the civil law in relation to slaves, except in a few cases, wherein the manners of modern times, softened by the benign principles of christianity, could not tolerate the severity of the Roman regulations. They cannot be tortured; they cannot be put to death at the caprice of the master with impunity. But in most other respects they are considered as property. By the civil law slaves could not take property by descent or purchase; † and I apprehended this to be the law in this country. Many cases of beneficent provision for slaves, are allowed to take effect *sub silentio*, by the humanity of those interested. But when the law is appealed to, it must take its course. In this case an attempt was made by the testator to set the woman and her children free, which might place them in a capacity to take the estates devised. But he has failed in his attempt to do so. For the statute of this state on that subject expressly forbids any emancipation in any other way than by deed executed in the lifetime of the master, a certain time before his decease, in a prescribed form, and this has not been complied with in the case under our consideration.

A bequest of a slave to a trustee, with directions to set the slaves free according to law, as this testator has done, seems to me to be an attempt to evade the law, which cannot be supported. But if it could, in general, it could not in this case, for the woman and all her children, except one, had been mortgaged by the testator to secure a just debt; and the creditor has since the testator's death enforced his rights, which were paramount, and sold the woman and her children to pay the debt, and they are now slaves to the purchaser.

As to the unmortgaged child, it was sold with its parent, which must have been with

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the consent of the \*executors, doubtless to keep the infant with its mother. The executors had a right to do so, and the child is then in legal servitude, and is incapable as well as the mother and the other children of taking under the will. The devises and bequests to trustees for these slaves, thus failing, the property intended for them will fall into the estate, and be applicable to the payment of the debts of the estate, (which is stated to be much encumbered) prior to the application of other property devised or bequeathed to other persons. The commissioner reported that it was necessary

†Taylor's El. Civil law, 429. Coop. Just. 411.

to sell the property mentioned in the bill of complainant; and no exceptions having been made to his report, it is ordered and decreed, that the real and personal estate mentioned in the bill in this case, be sold at auction by the commissioner, on a credit of one year, with interest, and that he take bond with security and a mortgage for the purchase money, and that the commissioner do advertise the sale thereof in the State Gazette, three times before the sale, and that the costs be paid out of the estate.

(Signed) HENRY WM. DESAUSSURE.

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#### Case XLVIII.

Orangeburg.—Heard by Chancellor Desaussure.

J. STROMAN and Wife, (date Snell.) v.  
CHARLES ROTTENBURY and Wife.

(June, 1812.)

[Trusts ⇐183.]

A person holding slaves in trust, or for the use of another, is bound to account for the actual profits of their labor;—and if he does not, the commissioner will be justified in charging him with the usual rate of hire.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 237; Dec. Dig. ⇐183.]

[Deeds ⇐123.]

A deed by a parent, providing, in consideration of love and affection, for his beloved grand-children by his daughter comprehends only the grand-children then born; and not others born afterwards.

[Ed. Note.—Cited in *Kitchens v. Craig*, 1 Bailey, 119; *Holeman v. Fort*, 3 Strob. Eq. 73, 51 Am. Dec. 665; *Mellichamp v. Mellichamp*, 28 S. C. 130, 5 S. E. 333.

For other cases, see Deeds, Cent. Dig. § 426; Dec. Dig. ⇐123.]

[This case is also cited in *Rainsford v. Rainsford*, Rice, Eq. 369, on the application of the £10 rule for hire of slaves.]

The complainants charge that a certain Jacob Horgor, (now deceased,) did in his life time execute a deed, on the ——— day of

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——— 1792, whereby, in consideration of the love and affection he bore to his beloved grand-children by his daughter Catharina, and for divers other good causes and considerations, he gave, granted and confirmed to his said grand children, three negro slaves, to wit, Cæsar, Nancy and Seely; to be delivered after his decease by his executors, into the hands of his daughter Catharina, for the use of her said children; to have and to hold to and for the uses of the said grand-children, &c. The deed was proved by the subscribing witness on the 5th of October 1792, and recorded on the 5th of February 1794.

The bill charges that the said Catharina is the mother of the complainant, wife of J. Stroman:—and that at the time the said deed was executed, the complainant and her



brother Jacob Snell, were the only grandchildren of the said Jacob Horger by his daughter Catharina. That on the death of their father, their mother intermarried with Charles Rottenbury, by whom she had other children:—That the said negroes were delivered after the decease of their grandfather to their mother, and her said husband Charles Rottenbury—and they have increased to the number of eight, and have been kept and employed, and the profits of their labor received by the said Charles Rottenbury. That the complainant has applied to the said Charles Rottenbury for the proportion to which she was entitled, and for an account of the rents and profits; with which he has declined to comply.

The answer put in issue the points made by the bill.

At the hearing of the cause, the complainant produced in evidence the deed mentioned in the bill; and the last will and testament of Jacob Horger was offered in evidence by the defendant. It was dated the 3d of April, 1791, and made various dispositions of the testator's property, among his wife and children, including his daughter Catharina. Also a codicil to the said will, dated the 9th January, 1793, by which the testator declares that the legacy given by him to his daughter Catharina, shall go to the children of the said Catharina, and not to her; and also,

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that whatever gift he has given to the \*said Catharina by any writing, he now bequeaths the same to the children of his said daughter.

It was agreed that the deed in question was executed when the daughter Catharina had but two children, Jacob Snell and the complainant, who is the wife of John Stroman: that she afterwards married the defendant, Charles Rottenbury, and had issue by him. After the death of the testator, Mr. Horger, the executors delivered the negroes mentioned in the deed, to Mrs. Rottenbury, and she and her husband have had the use of them for many years. Charles Rottenbury purchased from Jacob Snell, one of the two children of Catharina, his share in the said negroes for \$250, by deed, dated 26th July, 1811.

It had been referred to the master to examine the accounts between Stroman and wife and the defendants, relative to the said negroes, and he had reported that the parties having produced no accounts when summoned to attend him, he had made a valuation of the annual hire of the negroes, for five years, previous to the 1st of March, and had allowed \$42.85 per annum for each of the full grown hands, amounting to \$857.10, the half of which sum being \$428.55 is due from Charles Rottenbury and wife to the said John Stroman.

On first taking up of this cause, the counsel for defendant did not object to the rights

of the complainants, and had no objection to the partition of the negroes, but they complained that the report of the commissioner was made up without sufficient evidence; and that too much was allowed for the labor and hire of the negroes:—And they insisted that where a party held negroes, involuntarily as a trustee, he should not be made chargeable for hire and labor at a supposed rate, but should be held accountable merely for what had been actually made, however small that might be. They afterwards said, that Rottenbury and his wife had had doubts whether their children, though born since the making of the deed, were not entitled to equal shares under the deed. The commissioner, however, stated, and his statement was acquiesced in, that when the par-

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ties attended before him \*on the order of reference, the defendant produced no accounts or witnesses, and did not allege that he had any; and when the complainant produced a witness to prove the ages and qualities of the slaves, so as to establish their capacity for labor, the defendant Charles Rottenbury admitted the statement made by the complainant to be correct, and that he need not swear his witness:—whereupon he made a report on the fair and usual hire of such negroes.

I cannot hesitate to confirm this report; for the defendants filed no account—they produced no witnesses—they furnished no data to guide the commissioner—and he was obliged to resort to the course he pursued, or he could not make any report at all.

After some time spent in the discussion of the cause, the defendants' counsel made a new ground, that the donor's bounty ought not to be confined to the two children, who were born at the time the deed was executed. That by a sound interpretation of the deed, the donor must be considered as having had in view all the children of his daughter Catharina, and not those who were in existence at the time of executing the deed.

Some reliance was placed on an obscure clause in the codicil to the testator's will, to shew that the testator meant the negroes comprehended in the deed of gift to go to all his grand children by his daughter Catharina, and not to the two alone who were born when the deed was executed.

There was no question as to the validity of the deed. The estate of the donor and testator was not in debt;—and there were no creditors to be affected by the deed of gift. Therefore its being a voluntary deed could not invalidate it. Both parties claim under it, and agree that it is to have operation. The only contest is about the construction of it: and this construction can only be made from the face of the deed.

On recurring to the deed itself, it appears to me obvious, that the donor had in view

the two grand children by his daughter Catharina, then living, and no others. He says, "In consideration of the natural love and

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affec\*tion which I have and bear to my beloved grand-children of my daughter Catharina, I have given, granted, &c. unto the said my grand-children, of my daughter Catharina," &c.

These words are in the present tense and do not look to the future. If the donor had intended to comprehend the children who might be born afterwards, it would have been very easy to have used words expressive of such intention: but he has not used such words. I must therefore conclude that he had no other grand children in view than those born and known to him, for whom he avows a formed affection, which he could not have had as to unknown children. Besides; this is the ordinary rule as to the construction of deeds. A deed speaks at the time it is made; a will as to the future.

With respect to the codicil, it was used in two ways: First, as an instrument to alter the deed. Second, as evidence of the testator's real meaning in the deed.

As to the first ground, it is impossible that the codicil can alter the deed; whatever rights that gave, were fixed and immutable, and not subject to be operated upon by a codicil.

As to the second, it is not proper to resort to extraneous sources for lights to guide in the construction of a deed, unless it be very doubtful and obscure, and then with great caution.

In this case the deed is clear, and speaks a distinct explicit language, which cannot be rendered clearer, but may be darkened by construction. Yet the court is called upon to abandon the clear meaning expressed in the deed, and to seek another construction in the ambiguous language of an obscure codicil.

The result is, that I am of opinion that only the two children of the daughter Catharina, who were born at the time of the execution of the deed, can take under it. And that Mr. and Mrs. Rottenbury are bound to deliver up to them the negroes in question. But as Mr. John Snell, one of these children, has sold his proportion to Charles Rottenbury, and he has made no complaint or

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\*claim, (though such purchase by a father-in-law of a young man made at a very low price, was highly improper and unwarrantable,) the court will make no order as to his part.

As to Mrs. Stroman's share, it is ordered and decreed that a partition be made of the whole number of negroes derived from the said deed, and that one half thereof, having relation to number and value, be delivered to the complainants, Mr. Stroman and his

wife; also that the defendants pay to complainants the sum of \$428.55, being the amount reported to be due them by defendants, together with the costs of suit.

Henry W. Desaussure.

From this decree an appeal was made on the following grounds:

First,—That the limitation of the negroes after the reservation in the deed mentioned is void.

Second,—That if such limitation should be good, yet all the children of Catharina are equally entitled, in as much as the gift was not intended to vest immediately.

Third,—That the defendants (being trustees) could only be answerable for the actual profits of said negroes; and therefore the report of commissioner allowing customary hire was erroneous, and ought not to have been confirmed.

Egan, defendant's solicitor.

The appeal was heard at Columbia, by Chancellors James, Thompson, Desaussure, Gaillard and Waties, who unanimously affirmed the decree of the court, and dismissed the appeal.

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\*Case XLXIX.

Columbia.—Heard by Chancellor Desaussure.

HENRY SNELGROVE and others v. WILLIAM SNELGROVE and others.

(June, 1812.)

[Wills ⇐116.]

A principal devisee of real estate, cannot be a competent subscribing witness to the will under which he claims, because he is interested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 287; Dec. Dig. ⇐116.]

[Wills ⇐123.]

The penner of the will, who by being named an executor, writes his own name on the face of the will, and is present at the execution of it, is not a subscribing witness under the statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 321; Dec. Dig. ⇐123.]

[Vendor and Purchaser ⇐220.]

A purchaser from the devisee under the ineffectual will, is not protected, unless he brings himself clearly within all the rules on the subject.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 462; Dec. Dig. ⇐220.]

[Wills ⇐758.]

In cases of partial intestacy, a child advanced in the lifetime of the testator, is not bound to bring such advances into hotch pot, in order to be let into a distributive share of the undisposed estate.

[Ed. Note.—Cited in Taylor v. Taylor, 1 Rich. 552; Douglass v. Brice, 4 Rich. Eq. 323; Seabrook v. Seabrook, 10 Rich. Eq. 512.

For other cases, see Wills, Cent. Dig. § 1957; Dec. Dig. ⇐758.]



[Wills ⚡866.]

A bequest of 5s. and no more, to a child, does not exclude him from a share of the undisposed estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2203; Dec. Dig. ⚡866.]

[Wills ⚡782, 800.]

The widow to whom the whole real and personal estate was devised during life, is entitled on the discovery of the imperfection of the will as to real estate, to take the bequest of the personality, and her third part of the real estate in fee, under the statute of 1791; accounting for the rents and profits, whilst she held the whole real estate under the will. Her representatives are also entitled to do so.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2024, 2075; Dec. Dig. ⚡782, 800.]

[Estoppel ⚡54.]

[An heir will not be precluded from claiming property devised by a void will by having stood by in ignorance that the will was void, and permitted the devisee to sell without objection.]

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 129; Dec. Dig. ⚡54.]

[Vendor and Purchaser ⚡240.]

[Cited in *Crocker v. Dillard*, Speers, Eq. 21, 27; *Summers v. Brice*, 36 S. C. 212, 15 S. E. 374; *Robert v. Ellis*, 59 S. C. 147, 37 S. E. 250, to the point that a bona fide purchase without notice must be pleaded in order to be available; and the plea must set forth the substance of the conveyance, dates, etc., the seisin of the vendor, the payment of the purchase money, and want of notice.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 601; Dec. Dig. ⚡240.]

[Wills ⚡116.]

[A devisee is not rendered competent as a subscribing witness to the will by having sold his interest without warranty.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 297; Dec. Dig. ⚡116.]

[Wills ⚡316.]

[After a decision upon the validity of a will, in the court of equity, an issue of devisavit vel non was awarded, upon the motion of a party to the suit.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 742; Dec. Dig. ⚡316.]

[Wills ⚡782.]

[Where a testator devises to his wife all his real estate for her life, and after her death then over to others, the widow must elect between the devise and her dower.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2022; Dec. Dig. ⚡782.]

[Ejectment ⚡13.]

[Cited in *Donald v. McCord*, Rice, Eq. 340, to the point that an equitable title may not be set up against a legal title.]

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. ⚡13.]

[Wills ⚡116.]

[Cited in *Taylor v. Taylor*, 1 Rich. 540, to the point that "credible," in the statute of frauds, means competent, refers to time of attestation, and that the attestation of a devise is a "mere nullity."]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. ⚡116.]

Henry Snelgrove, the father of the complainant and defendant, made his last will

and testament on the 14th day of May, 1798, whereby he devised and bequeathed to his wife, Honor Snelgrove, all his estate, real and personal, during her natural life, for her sole use, to be disposed of at her discretion, the better to raise her small children; to continue in peaceable possession of the same during her natural life. And at the death of his wife, the testator desired that his estate should be disposed of by his executors in the following manner:

To each of his daughters, Susannah, Mary, Elizabeth, Margaret and Rebecca, and to his son Henry, five shillings and no more.

He then proceeds thus: Item; I give and bequeath to my well beloved son William Snelgrove, all my lands and tenements, &c. to have and to hold to him and his heirs forever; and also two negroes and some other personal property. But "if it should please

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God to call my \*son William Snelgrove from this life without issue, all that he should die possessed of shall be equally divided between my four under named daughters, Hannah, Levicinia, Naonee and Dolly."

All the rest of his negroes, stock, furniture and every thing not otherwise disposed of by his will, he directs to be sold by his executors, and the money to be divided between those four daughters; but if one of them should die without issue, the money is to be divided amongst the survivors.

The testator then proceeded to name Daniel Clary, Edward Snelgrove and John Gregory the sole executors of his will, and revoked all proceeding wills.

To this last will and testament, George Wise, John Wise and William Snelgrove were subscribing witnesses.

The testator died, leaving the above mentioned will in full force.

It was proved before the ordinary in common form by George Wise, and the widow Honor Snelgrove took possession of the whole estate, real and personal, and enjoyed the same during her life, and upon her death, her son William Snelgrove took possession of the real estate as devised to him, and the personal estate was divided according to the testator's will. William Snelgrove also made sales of part of the real estate to John Erger and ——— Coon, who have been in possession of the parts purchased by them for some time, and have cultivated small portions thereof.

After some time it was discovered by some of the children who had been cut off under the testator's will with 5s. that though the will had been executed in the presence of three subscribing witnesses, one of them was William Snelgrove, the principal devisee under the will; and learning that he was not a competent witness to establish the will, they determined to contest his rights to the land, and filed this bill to establish their

rights and for an account of the rents and profits during the time he held the same.

William Snelgrove the principal devisee of the land, pleads the statute of limitations,

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and insists upon his possession of the land; and answers that the will was duly executed by the testator in the presence of three witnesses, who subscribed their names thereto; but admits that he himself was one of the three subscribing witnesses. He answers further, that the will was written by Daniel Clary, by the direction, and in the presence of the testator, and that Daniel Clary was present at the execution of the will. And he insists that Daniel Clary having written his own name in the body of the will where the testator appointed him executor, this is in substance, though not exactly in form, a subscribing the will as a witness thereto, within the statute.

The defendant, William Snelgrove, further insisted that complainant H. Snelgrove, was portioned off by his father, and received nearly his share of the father's substance, and could not come in for a distributive share of the land. And he insisted further that some of the children, to whom 5s. had been devised, had received the same, and gave receipts therefor, which was an acquiescence in the will, and bound them. And finally that Honor Snelgrove, the widow, would be entitled (if the will was invalid as to the real estate) to one third of the lands under the act of 1791, and that her share would be divisible among the children of Honor, who would be entitled to that third, to the exclusion of the other children of the testator.

The defendants, Erger and Coon stated, that they were fair purchasers of part of the land in question, for valuable consideration, without notice of complainants claims; and have been in possession of the lands purchased for some years, and cultivated part thereof.

Three of the defendants, (to whom the testator had bequeathed 5s. and no more) submit the matter to the court, and say, that if the will shall be adjudged not to have been duly executed, and therefore void as to the land, they will be contented nevertheless to abide by the will of their father, and to renounce and release their rights to William Snelgrove, the devisee. Others of them insist on their rights.

Upon the trial the following testimony was given.

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\*Mr. George Wise, witness for complainants, was subscribing witness to the will of Henry Snelgrove, also John Wise and William Snelgrove, the defendant in this suit. He knew formerly, Henry Snelgrove, the son, one of the complainants in this suit. He resided at a distance, not near his father. Mrs. Honor Snelgrove, the widow, survived her husband some years, four or five years,

and kept possession of all the estate during her life. The children of the testator, by the last wife, Honor, were Mrs. Eliza Gregorie, R. Kelly, Mary Livingston, Wm. Snelgrove, Hannah Turner, Lavisia Snelgrove, Naomie Snelgrove and Dolly Lester.

Henry was a child of the second marriage, and Mary of the second marriage. Susanna was of the first. Witness thinks there was some conversation before signing the will, but does not remember the particulars. None of the children of the first and second marriages were present at the execution of the will. Some of the last marriage were present; William and Hannah certainly. The will appeared to be fairly and openly done, and executed without any influence exercised over him. Clary was present and saw the execution of the will, but was not called upon to sign as a witness, nor did he sign it as a witness. Clary was named executor, but has never qualified.

Mr. John Wise examined. Witness was present when Henry Snelgrove signed his will. Witness subscribed the will with George Wise and Wm. Snelgrove. No other person signed it as witness, or was called to do so. Witness confirms his brother's testimony. The will had no other subscribing witness than the two Wises, and William Snelgrove, the principal devisee.

Hannah Turner's testimony was offered by defendant. This was objected to, as she and her husband are defendants; interested in the contest, and liable to costs which may be imposed in the case. The real estate is devised to William Snelgrove; and Hannah Turner is one of the legatees of the personal estate. But Colonel Chappell answers the objection, by stating that she has disclaimed all right to the land, and is protected as to

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the \*costs by agreement of defendant. Besides, it would be swearing against her interests: First, as to the real estate: secondly, as to the personal: third, as to hotch pot: fourth, as to costs.

Mr. Starke—As to the release of her interests in the land: If she has released her rights to her brother, she may be bound by covenants. The release executed by Mrs. Turner and her husband was produced. It was a mere relinquishment of her rights. The court admitted the testimony of Mrs. Turner provisionally. Interrogatories to Mrs. Turner. She answers, that Daniel Clary wrote the will at the request of her father, and was present at the execution of the will. Honor Snelgrove gave up the property under the will to her son, William Snelgrove; but does not say when William Snelgrove claimed the land as his own.

Mr. Charles Banks.—William Snelgrove sold to Coon some years ago, not so long as four, or about four years ago from this time. Saw Mr. Gregory and his wife sign a



receipt for the legacy of 5s. It was a mere receipt for the legacy of 5s. Little or no conversation at the taking of the receipt.

The first question which arose in this case, was as to the execution of the will. It was contended that Wm. Snelgrove, though principal devisee of the land, was a good subscribing witness to support the will under the statute of frauds. Because the attestation of two other witnesses who were disinterested, and the absence of all pretence of fraud in obtaining this will, took away all ground of apprehension; and because the interest of William Snelgrove was in remainder and contingent, and might never have attached, as he might have died in the life-time of the testator, therefore, he might well be admitted as a subscribing witness to satisfy the statute.

The statute of frauds prescribing the manner of the execution of last wills, devising real estates, declares, that the same shall be in writing, signed by the person devising, or by some person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the devisor, by

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three or four credible \*witnesses, or such will shall be utterly null and void.—The act of 1734, (See Public Laws 139,) re-enacts the same regulations, and refers to the statute of frauds. And the act of 1789, (see Pub. Laws, 491,) re-enacts the same provisions precisely, though with a slight inversion of the terms. Thus the wisdom of this statutory regulation has been recognised at various and distinct intervals.

With respect to the question, who are credible witnesses, we must resort to the rules of the common law. They decide that all persons of whatever religion or country, who acknowledge the being of God, and a future state of rewards and punishments, may be received and examined, except such as are infamous, (that is, convicted of some infamous crime) or interested in the event of the cause. All others are competent witnesses, though the court will, from other circumstances, judge of their credibility. The word credible, used in the statute, has given occasion to great controversy. But all the contending opinions agree, that credible involves competency, and many of them insist that it includes more. The invariable maxim at law is, *nemo testis esse debet in propria causa*. Apply this to the case under consideration.—Mr. William Snelgrove is one of the three subscribing witnesses to a will, which devises to him the whole real estate in question. He not only has an interest, but he has the sole interest in setting up this will. He would be a witness in his own cause. But this he cannot be by the rule of law. He is incompetent, and his signature is as a nullity. The will then rests for support upon two subscribing witnesses. But the statute requires three; and the practice of

this court is rigorously to require, that all three of the witnesses should be examined—1 Vezey sen. 284. I am not at liberty to dispense with the statute. It was urged that his interest was contingent, and might have lapsed; but it was a vested interest, to take effect with certainty at the expiration of a life estate which intervened. And as to the possibility of its lapsing, that was a mere possibility, and has not occurred. So that he had an interest at the time of his signing the will as a witness, which has remained unaltered until he is called upon to prove the will.

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\*It was said that the case of Ansty and Dowsing, reported in Strange 1253, which decided that no legatee or creditor, where the legacies and debts were charged by the will on the real estate, could be competent witnesses to such will, because interested in support of the will, established too strict a doctrine: And was followed by a statute which restored the credit of such legatees and creditors. And that by a later decision, (the cause of which arose prior to the statute, though determined after,) three witnesses who were creditors were admitted to be sworn, and held credible, though their debts were made chargeable on the real estate by the will. Windham v. Chetwynd, 1 Burr, 414, 430.

I can only say, that the decision of Ansty and Dowsing, seems to me exactly conformable to the rules of the common law. If the subscribing witnesses were interested, they were incompetent. And how did the statute remedy the inconvenience? Why, by declaring void all legacies, and thus taking away their interest.

As to the decision in Burrows, I do not hold it to be so conformable to the rules of law, as the case of Ansty and Dowsing. And Lord Camden, it is well known, differed decidedly from Lord Mansfield on that doctrine.—Roberts on Frauds 421; 7 Bacon, 329 to 336.

But of all the cases decided on this point, that of Hilliard and Jennings, reported in Comyns Reports, 91, and 1 Lord Raymond, 505, and by several other reporters, [See 7 Bacon, 329; 8 Viner, 132, but very badly in Carthew] is that most perfectly like the one now before the court. Indeed it may be said to run on all fours. There the testator devised all his land to A. B. who was one of the three subscribing witnesses. And all the ingenuity possible was exercised to shew that A. B. might be a good subscribing witness to this will under the statute; but it was solemnly decided, that the devisee could not be a witness, as he was to take by the will. And in my opinion this doctrine can never be shaken.

But admit the full force of the case of Windham v. Chetwynd, in 1 Burrows, 414,

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and what does it amount \*to? It admits pe-

cuniary legatees and creditors, who in case of the failure of personal assets, may, by the operation of the will, come for payment on the real estate devised, to prove the will. Persons with indirect, and often small interests, were allowed to be sworn to support the will. But this is very different from the case before the court. I am asked to let in, not a small pecuniary legatee, or a creditor who has a good personal estate to look to, as a witness to prove the will, but the devisee of all the land in question, which is the very subject of the controversy. This would be a palpable subversion of every rule of the common law on the subject of evidence, which I cannot consent to. Not one of the cases relied on by the defendant ever went so far.

It was insisted, that even if Mr. Snelgrove could not be admitted to prove this will on his own behalf, he might be admitted to do so for innocent purchasers to whom he has sold these lands for a valuable consideration without notice. And the case of *Baugh v. Holloway*, was cited to establish this point—1 P. Wms. 557.

It might be sufficient to say, that upon examining the case, both in P. Williams and 2 Equity Cases Abridged, it appears the point was not decided, but the parties were sent to law. It is true that Sir Robert Raymond observed, that it had been determined by Lord Holt, in *Hilliard v. Jennings*, that in such a case, the will as to this devise was only void; And then A. the devisee and subscribing witness, would be a good witness as to the rest of the will. But Lord Chancellor Parker said nothing as to this point, as stated by Sir Robert Raymond; and did not decide the point at all. But of what avail would that decision be to the defendant, William Snelgrove, in the case under consideration? He is sole devisee in fee of the lands of testator. And if he can only be let in to prove the will, by the devise to him being void, he might as well lose the devise by not proving the will, as by giving up his devise to be admitted a witness. Quacunqve via data he must lose it.

As to William Snelgrove being admitted to prove the will, provided he had sold out his

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interests, without *covenant or warranty*, as is said in *Swinburn* may be done, I answer, that I doubt that law. It has no common authority. The case of *Hilliard and Jennings*, referred to, does not support it. It was the incorrectness of Carthew's report which misled. See 7 Bacon 329, 330. Besides, by the decision in *Tucker v. Gordon*, [4 Desaus. 53.] it appears that this court has decided, that whenever a man sells land, though without *covenant or warranty*, and the buyer is evicted, he may recover back the purchase money. Thus Snelgrove would still remain interested, if he had made such sale. But in truth there is no evidence that he made sales without *covenant or warranty*;

and if he had done so, it was only of part of the land; and he was still interested in the remainder. Consequently he was an incompetent witness. He cannot prove the will by halves. If he proves it at all, he proves it in toto, as well for what he holds, as for what he has sold. And as to what he has sold, he must refund the money paid him, if the title is bad. He has then a direct interest to support the will in all its parts.

It was further alleged, that Mr. Cleary had written the will in question in the presence of the testator, and by his direction, and he being named therein as executor of the will, he necessarily wrote his own name in the course of preparing the will; and that was done in the presence of the testator, who afterwards signed the will in his presence. And it was insisted that this was a sufficient attestation and subscription by Mr. Cleary, to satisfy the statute of frauds; and that he ought to be considered the third subscribing witness to the will within the statute.

The evidence upon which this state of facts rested, was derived from Mrs. Turner. Her testimony was objected to, as she was one of the daughters of testator interested in the will, a legatee of the personal estate, and a defendant who might be liable to costs.

I admitted her testimony provisionally, and I am satisfied that I did right. In swearing to support the will, she swore against her interests as far as regards the land, for it is to carry it all to William Snelgrove, the devisee.

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\*If the will were set aside, she would come in for a distributive share. She has, however disclaimed all share; and her testimony can have no effect as to the personal estate, the will as to that is clearly established and cannot be disputed. As to the costs, she is protected by Snelgrove's agreement; and none could fall upon her in such a case. The court would not subject her to any. It would have been very desirable to have had her examined personally in court, as to the particulars of her testimony. We must, however, accept it, as we have received it by the consent of the parties; and suppose that it states fully and accurately all that passed.

The question then is, can we consider Mr. Cleary, under these circumstances, a subscribing witness to this will under the statute?

I have considered this question very fully. It was to my mind a new one; but I cannot say that I have any doubt. It is evident that the testator did not look upon or consider Mr. Cleary as a subscribing witness to his will. He called three others to perform that function.—He employed Mr. Cleary as his amanuensis. And the appearance of Mr. Cleary's name on the face of the will is accidental. He chose to name him one of his executors; and of course Mr. Cleary in writing the names of the executors wrote his own



name. But I cannot consider this as attesting and subscribing the will as a witness within the meaning of the statute. The cases say, and good sense concurs, that the subscribing witnesses are placed about the testator, as his guardians to prevent imposition, and to secure to the public the due execution of one of the most important acts of a man's life, often performed in extremis, when the fountain of life is nearly exhausted, and the judgment nearly expired. It is a species of confidential office, created by the law *pro hac vice*. I cannot consider the accidental circumstances, which placed Mr. Cleary's name in his own hand writing on the face of the will as executor, in the presence of the testator, and the accidental circumstance of the testator's afterwards signing in his presence, as

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constituting him a subscri\*ing and attesting witness. The two Wises, the subscribing witnesses who were sworn, did not speak of him as a witness; they say that Cleary was not called upon as a witness, nor did he subscribe as a witness: they spoke of William Snelgrove as the third subscribing witness. I cannot, therefore, admit William Cleary as a subscribing witness to this will under the statute. Consequently the will has only two lawful subscribing witnesses, and is by the sentence of the statute null and void as to the real estate; which, therefore, becomes divisible among the widow and all the children of the testator; unless there should be found some other bar to the complainant's title. Nevertheless, the party dissatisfied may try this question at law if he pleases.

With respect to the title of the purchasers of those portions of the real estate, which some of the defendants bought of Mr. William Snelgrove, I am inclined to think that the plea of being purchasers for valuable consideration, without notice, does not exactly come up to their case.

I do not here lay any stress upon the doctrine of the real owners standing by fraudulently, and seeing a person without a good title selling the estate to a third person, ignorant of the existence of a better title, for a valuable consideration, without cautioning the purchaser; for there could be no doubt if such a case were made out, what would be the decision of the court. But there is no allegation or suspicion of such fraud in this case. The silence of the brother and sisters of William Snelgrove, if they knew of his intended sales, arose from a mistaken apprehension that the will of their father, devising away the estate, was duly and effectually executed.

And it has not been proved that they knew of the intended sales by their brother William Snelgrove. It is true, that the mistake or misapprehension of the party entitled, but who thinks himself not entitled, shall not prejudice a fair purchaser for valuable consideration without notice. But this is where

the person so ignorant of his right has joined in the conveyance. As in *Malden v. Menin*, 2

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*Atkins*, 8, where it is laid down \*that where a purchaser has given full value for an estate, the mistake or ignorance of some of the parties to a conveyance of their claims under a marriage settlement, shall not turn to the prejudice of a fair purchaser. In the case before us, the children of Snelgrove, the testator, did not join in the conveyance of their brother William, to the purchasers in question. Where the mistake is without any default of the heirs, a purchaser will not be protected even after long possession. For in the case of *Squire v. Pershall*, 8 *Viner*, 169, Pl. 13, the discovery of the insanity of the testator, has occasioned the setting aside of a will, even after twenty years possession under it, and that too against a purchaser.

The case of *Broderick v. Broderick*, reported in 1 *P. Williams* 239, but far better and more fully stated in 4 *Viner*, 534, is a strong case to illustrate the course of the court in these cases. In that instance, a devise was defectively executed by the subscribing witness signing out of the presence of the testator, contrary to the statute. The devisee under the will representing to the heir at law generally, that the will was duly executed, obtained a release from him of the land, worth £4000, on which he gave a small sum to the heir of the devisor. And afterwards for a further small sum, got the heir at law to join him in conveying the land to a third person, who in fact was only a private trustee for himself and reconveyed to him. The devisee sold part of the premises for a valuable consideration to a third person, who had no notice of the invalidity, except that he had heard it mentioned in common discourse. Afterwards the heir at law discovering that the will was not duly executed, filed his bill for relief. And the Chancellor decreed that the release should be set aside, and that the purchaser should re-convey to the heir at law, though he had paid his money. But as he was not privy to the fraud, (only having heard casually of the will being unduly executed) that he should have his purchase money and interest repaid him, upon his accounting for the rents and profits.

Thus we see that though no fraud was practised in this case in obtaining the will,

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only that the three sub\*scribing witnesses had gone into another room, out of the presence of the testator, for more convenience to attest the same; yet the non-disclosure of this circumstance to the heir at law was considered such a concealment as amounted to a fraud, which overreached the will, set aside the release, and affected even the purchaser, who had heard a rumour of the manner of the execution of the will. This is a case of great import and effect, and applies pretty

strongly to the case before us in many of its features.

The imperfection of this will arose from another cause, but the effect is the same. No release however has been executed, and therefore the court is called upon for a less exertion of its power.

If I had more doubts than I have on the other grounds, there is one which seems to be conclusive. The defendant has not as I have been informed, pleaded as usual and as is required, that he was an innocent purchaser for valuable consideration without notice. He has answered merely, and that very loosely. I would not be too rigorous in the infancy of our Circuit Courts, in applying the strict rules either of practice or of pleading in such a case. But the substance must be regarded.

Allowing then, contrary to the authorities, that the answer should stand for a plea in such a case as this, the requisites of a plea must be complied with. Sugden, 507. Sel. C. C. 51: 1 Ans. 14.

From the decided cases, these seem to be indispensable to support the plea. In the first place it must be sworn to. Sugden, 507, 8, Pre. Cha. 480, Marshall v. Frank.

If the defendant answers to any thing which he should plead, (in this case) he overrules his plea, though he may answer any thing in subsidium of his plea. 1 Ans. 14, Blacket v. Langlands; Sel. C. C. 51. Gilb. 58.

The plea must state the deeds of purchase, setting forth the dates, parties and contents briefly and the time of their execution, for that is the peremptory matter in bar. 3 Atk. 302, Aston and Aston; 2 Vez. 107, 396. 9 Vez. jr. 24, Walwyn v. Lee.

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\*Such a plea must aver that the person who conveyed or mortgaged to the defendant was seized in fee, or pretended to be seized; and was in possession, if the conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage deed. 2 Atk. 397. Ib. 630; Story v. Lord Windsor. 3 P. Wms. 279, 281; Head v. Egerton. 1 Vern. 246; Trevannian v. Mosse. 3 Ves. jr. 226, 9. Ib. 32. Ambler, 421.

The plea must aver a conveyance and not articles merely; for if there are articles only, and the defendant should be injured, he may sue at law upon the covenants in the articles. 3 P. Wms. 281. 1 Atk. 571.

The plea must distinctly aver that the consideration money mentioned in the deed was bona fide and truly paid, independently of the recital of the purchase deed; for if the money be not paid, the plea will be overruled, as the purchaser is entitled to relief against payment of it. A consideration secured to be paid, is not sufficient. 2 Atk. 241. 3 Atk. 304, 814.

It is doubted if the particular consideration need be stated in the plea. The cases

have been contrary. 2 Freem. 43. 2 C. C. 156. 1 C. C. 34. Hard. 510.

But if it be stated, there can be no objection to it, as if it be bona fide and valuable, it need not be adequate to support the purchase and the plea. Ambler, 764, 767. Finch, 102.

The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deeds and payment of the consideration money. And the notice so denied must be of the existence of the plaintiff's title, and not merely of the person who could claim under such title. 1 Vern. 179. 2 Atk. 631. 3 Ib. 304. 2 Eq. C. 685. 1 Atk. 522, which overruled. 2 Vern. 159, Brampton v. Banker; 3 P. Wms. 243.

The notice must be positively and not evasively denied, and must be denied whether charged in the bill or not. 2 Eq. C. abr. 682. 3 P. Wms. 244. 6th resolution in 2 P. Wms. 491.

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\*If particular instances of notice or circumstances of fraud are charged, they must be denied as specially as charged. 3 Atk. 815. 2 Ves. jr. 187. 4 Bro. C. C. 322. 2 Ves. 450.

The special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to it for insufficiency. 1 Vern. 185. 2 C. C. 161.

But notice and fraud must also be denied in the plea; otherwise the fact of notice or of fraud will not be in issue. 3 P. Wms. 91, 5; Dutchess Kingston, Mitf. 216, n. 5 Ves. jr. 426.

If a purchaser's plea of valuable consideration be sent down for trial, and falsified by verdict at law, and a decree is thereupon made against purchaser, and he carries an appeal to the House of Lords, it will be dismissed of course. Colle's Parl. Cases, 361.

The title of a purchaser for valuable consideration without notice, is not a sword to attack the possession of others. Amb. 292. 3 Ves. jr. 225. It is a shield to defend the possession of a purchaser. Whether it will protect his possession from a legal as well as an equitable title, may be said to be doubtful. The cases have been contradictory on this point.

In Rogers and Searl, 2 Freeman 84, Lord Nottingham had been of opinion that the plea was not good against a legal estate. And in Williams v. Lambe, Lord Thurlow says expressly that he thought where a party (complainant) is pursuing a legal title, the plea did not apply, it being a bar only to an equitable and not to a legal claim. 3 Bro. C. C. 264. On the other hand, in Burlace v. Cook, Lord Nottingham was of opinion that the plea was good to protect a purchaser against a complainant seeking to set up a legal estate. 2 Free. 24. And in Parker v. Blythmore, the Master of the Rolls threw out the same opinion, though he did consider it necessary to



decide it, as he thought the plea maintainable on other grounds. 2 Eq. C. abr. 79; Pla. 1. And in *Jerand v. Saunders*, Lord

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Rosslyn decreed that \*the plea would stand against a legal, as well as an equitable title. 2 Ves. jr. 454.

It is evident that this doctrine remains unsettled, for it does not appear that the cases have ever been collated, sifted, and a final conclusion drawn from such comparison. It is obvious from an inspection of the cases generally, that in most of them where the plea has been supported, it has been against an equitable and not a legal title.

Mr. Sugden, in his judicious collection of the doctrine and authorities upon this subject, says "that to argue from principle, it seems clear, that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favor of that doctrine certainly preponderate, we may perhaps venture to assert that it will protect against both."

I am not entirely satisfied that this is a correct conclusion. The inclination of my mind is the other way. It should be remembered that the plea protects, by the court refusing to aid the complainant in setting up a title. Now when the title attempted to be set up is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court. It seems no longer to be optional. As there is however so much contradiction and doubt, I could wish this point would be carried up to the Court of Appeals, in any case where it fairly arose, and was the very point decided.

To apply all that has been said to the point under consideration, it is obvious, that if through indulgence, which I am willing to do, we should admit the answer of the purchasers to stand for a plea; that the answer does not comply with the various regulations, which we have seen from the authorities must be pursued. The answers have not set forth the dates, parties and contents of the deeds of purchase, nor especially the time of their execution, which is essential. The answers have not set forth that the person from

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whom the defendants purchased was \*seized in fee, and was in possession, nor even from whom he purchased. The defendants have not set forth what kind of deeds they had, whether absolute conveyances, or only articles or agreements to convey, in which last case the plea would not protect. The answer has not stated that the consideration money was bona fide and truly actually paid, which is essential to support the plea. The answer has not denied so explicitly as it should do (though it has done so generally) notice of the

plaintiff's claim, or of the existence of his title. And finally the title of the complainant attempted to be resisted by the defendant's answer (meant and considered to stand in the place of the plea) is a legal and not an equitable one. On all these grounds, I am of opinion that the purchasers from Wm. Snelgrove cannot be protected as purchasers for valuable consideration, without notice, and bringing themselves within the rules necessary to give effect to that defence.

The next point in this case was a question of hotch pot. It was insisted, if I understood the counsel correctly, that with respect to the real estate, of which the testator died intestate (by the imperfect execution of the will,) the same was distributable among all the children of the testator. But that those who were advanced in the testator's lifetime, or who got peculiar advantages by his will, as far as that is valid, must bring the property so acquired into hotch pot, or they must be excluded from any distribution of the land. And that our act of 1791 is more comprehensive in that respect than the English statute of distributions.

The doctrine of hotch pot, is generally a clear one. It is founded on the statute of distributions, by which it is provided that no child of the intestate (except his heir at law) on whom he settled in his lifetime any estate in lands or pecuniary portion equal to the distributive shares of the other children, shall participate with them of the surplus. Toller 375, 379. 2 Bla. 516, 517. But if the estate so given or secured him by way of advancement or provision be not equivalent to their shares, then such part of the surplus

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shall be allotted him as will \*make it equal, if such child chooses to come in. Among the various points which have been settled by judicial decisions on this statute, one is, that a legacy shall not be brought into hotch pot, as to that part of the personality of which the testator died intestate. The Lord Chancellor King, aided by three judges in the case of *Edwards and Freeman*, resolved this point. And all the elementary writers concur in it. Indeed this agrees with the very words of the statute. But it is insisted that our act of 1791 goes further than the statute of distributions, and directs that a child, however provided for by the father, and whether by will or otherwise, must bring the value of such provision into hotch pot, before he can have the benefit of any undisposed residuum. I have examined the words of our act of 1791, and I do not perceive that there is any essential difference between them and the statute of distributions, only that the exception in favor of the heir at law is omitted in our act; and that the act of 1791 provides that all property, real as well as personal, acquired after making the will, shall be distributed as directed by that act. The words advanced by the intestate in his lifetime, which are

those applicable to this question, are to be found in both statutes. I should therefore presume the same construction would be given to them. And we have seen it decided above, that a legacy shall not be brought into hotch pot. I must therefore consider the legacies of personal estate which are given by Mr. Snelgrove's will, as not liable to be brought into hotch pot by the legatees, who may claim distributive shares of that part of the real estate which has descended to all the children on account of the imperfect execution of the will.

I am not aware, for there was no proof on the trial, that any of the children were apportioned off or advanced by the father in his lifetime. But the fact is alleged in the pleadings, and was assumed in the argument. And it was insisted that they are bound to bring such advancement into hotch pot, before they could claim the benefit of a distributive share of the land which descended.

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\*I have looked a good deal into the books on the subject. They are remarkably barren on the point. In the 3d volume of the new and excellent American edition of Bacon's abridgement, p. 77, we find in the text, the following words: "If a father dies intestate as to part of his personal estate, a child advanced by him in his lifetime is not to bring such advancement into hotch pot in order to have a distributive share of such part whereof he died intestate." This is directly to the point in question, and the compiler refers to *Prec. Cha.* p. 170, for the decision in support of this position. I have not that book, but the same case (*Vachell v. Jeffries*) is stated in 2 *Eq. C. abr.* p. 435, 6, and there the point decided does not come up to the point in question.

I do not find any other English decisions upon this point, except a very late one by the Master of the Rolls, reported in 14 *Veaz.* 317, 322, 3, *Walton v. Walton*. There Sir W. Grant said the provision in the statute of distributions applies only to the case of actual intestacy, and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them by the will. Therefore the child advanced by the father in his lifetime, is not obliged to bring his share into hotch pot. This decision turns somewhat on the executors taking what personalty is not bequeathed. But there has been a solemn decision in this country. In the case of the Executors of *Sinkler v. Legatees of Sinkler*, [2 *Desaus.* 127,] wherein a decree was given in May, 1802, the fourth point decided was, that a child advanced was not bound to bring such advance into hotch pot in a case of partial intestacy.

We come now to the consideration of another question in this important case, abounding so much with matter.

It is contended by the defendants, that Mrs. Honor Snelgrove, the widow and their mother, upon the failure of the will as to the real estate, became entitled to one third part of the real estate in fee simple under the act

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of 1791, \*and that her children are entitled to that third in exclusion of the other children of Mr. Snelgrove.

The first objection to it is, that the act of 1791, requires the widow to have done some positive act, accepting this provision in lieu of dower. And that she not having done so, her heirs cannot afterwards claim it.

But this I think would be too rigorous a construction of the act. The first part of the act gives the widow of an intestate, one third part of his lands in fee, and afterwards meaning to guard against the claim of dower, being set up in addition to this liberal statute provision, it says the same shall be in lieu of dower if accepted. By which it was meant to say merely that she should take either at her option, but not both.

This is the language of the law as to the claim of dower when inconsistent with the will. A great number of cases might, and do daily arise, as sudden deaths, or embarrassments of the estate which might delay the election for some time, wherein it would be very hard to say that the heirs of the widow should not elect, although she in her lifetime did not decide, or if from misapprehension, she chose that of which she was ousted. I think the right is generally a transmissible one, subject to such regulations as to prevent the abuse of it, notwithstanding the phraseology of the clause of the act of 1791, which makes this regulation.

The next objection to this claim is, that Mrs. Honor Snelgrove has actually accepted the provisions of the will of testator, and has thus barred herself of the legal provision of the act of 1791. In point of fact there can be no doubt that she did accept the provisions of the will, and held and enjoyed during her life the whole real and personal estate devised and bequeathed to her by her husband's will. But this is not conclusive on the main question, for several difficulties spring up:

First,—Were the devises and bequests in this will a substitute and a bar to the provisions of the act of 1791, in favor of the widow? And did they raise a case of election?

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\*Second,—If they were, does her acceptance bind her and her representatives, when it is found that the will is invalid as to the real estate, and neither gave her the right to enjoy the whole real estate for life, nor carried it after her death to her children.

It does not necessarily follow that every devise or bequest to a wife by a husband, is a bar to her claim either of dower or of



her claim under the act to such of his real estate, whereof he may die intestate.

I am not aware at this moment of any decisions in our own courts under the act of 1791, directly on this point; but I think the analogy to dower is very strong; and there the doctrine is that the right which a dowress claims under the will of her husband, are not necessarily inconsistent with her claim of dower. 7 Bacon, Ame. edit. 445, 6. 2 Vez. 572. 3 do. 249. 6 do. 615. And this court in the case of the executors of the executor of Munro v. Koger and al. [2 Desaus. 295] said expressly that it was not inclined to deprive a woman of her legal rights, under the idea of her having made an election.

An intent in the testator that a wife shall not take both her dower and under the will must be made out, either by express words used by the testator, or by the striking inconsistency of her claims of dower with the provisions of the will, before she can be put to her election. But in most cases she is put to her election, doubtless because such appeared to be the testator's intention. Apply this doctrine to the provisions of the act of 1791. They are intended to be and to stand in the room of dower. But the widow would not be barred of dower by any bequest in a will, unless positively excluded by the will, or necessarily by the inconsistency of the provisions. Suppose a testator makes a will of his personal estate, and gives his wife a moderate pecuniary legacy, and then dies intestate as to his real estate. I presume in such a case she may then claim her rights in the real estate under the act of 1791, or her dower as she pleases, and take the legacy also.

But whilst I am disposed to admit this to be the general doctrine, I must say it appears

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to me that the \*dispositions of the will in this case do contain provisions in favor of the widow inconsistent with the claim of dower or under the act of 1791, for the testator devises and bequeaths to his wife after a few trifling legacies, the whole of his real and personal estate for life. This certainly superceded all claim of dower, and furnishes a strong presumption of intent in the testator, that he meant this provision to be in bar of all the claims of the widow of every kind. Besides the immediate subsequent disposal of the whole real and personal estate to other devisees shews his intention more strongly than the implication arising from the inconsistency of the provision made by the will from that made by the law.

Upon the whole, I am of opinion that the wife could not have claimed under the will and under the act of 1791, if the former had been duly and effectually executed, so as to have secured to her the rights devised to her.

I am also of opinion that she has done enough to shew that she intended to accept under the will, if the same were valid, for

she took and enjoyed the whole estate during her life exactly as the will devised it to her; and as far as such acceptance can bind her, it bound her and her representatives.

But the knottiest point remains. The defendants insist very forcibly that her acceptance was founded on a misapprehension of the validity of the will. And as that has failed with respect to the real estate, she was not bound by it, and may now claim under the will as to the personal estate, and under the act of 1791, as to the real.

That this court will correct mistakes and protect parties from the effect of their own errors, especially where no blame is imputable to the widow, for the error was common to all the parties. Thence they insist that the court will let in such of the defendants as are children and heirs of Mrs. Honor Snelgrove to claim a third part of the real estate as her property under the law of 1791, whilst she holds the personal estate under the will. I have examined most of the cases which have been decided on this subject, with attention. In most of the cases

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\*where the wife had two provisions in view, one her dower at law, and the other under her husband's will, they are generally deemed inconsistent with each other by necessary inference, and that therefore she must be put to her election, and cannot have both. Bridgman's Digest, Baron and Feme, No. 10. See Amb. 466, Arnold v. Kempstead. Ib. 682. Villareal v. Lord Galway. Ib. 730, Jones v. Collier. 1 Bro. C. C. 445, Boynton v. Boynton, 3 Vez. Jr. 249, Straham v. Sulter. 2 Ib. 572, French v. Davis.

But even then it is certain that the widow in all cases of election shall be permitted to consider which provision is most to her advantage. 2 Eq. C. abr. Corns v. Farmer. 1 P. Wms. 147. 1 Vez. 314. 4 Bro. C. C. 500. 3 Vez. jr. 837. 5 Vez. jr. 515.

And there are cases where the widow shall not be precluded by having received one portion if she should afterwards discover that the other is more beneficial. 3 Bro. C. C. 255, Wake v. Wake.

She is compelled however to make her election within a reasonable time, and be bound by it. Dicken's Reports, 463. Ardesoif v. Bennett.

In this case a feme covert who was heir at law, took a legacy of 5000*l.* under testator's will, and she was held to have elected under the will. 3 Bro. C. C. 88, Butricke v. Bradhurst.

But to come to the cases more immediately applicable to the question before us.

The first case of consequence was that of Noy's v. Mordaunt, decided by Lord Keeper Cowper, in 1706. 2 Vern. 581. In that case a father disposed his estate by will among his children, and gave to one fee simple lands, and to another entailed lands, or un-

der a settlement. The court decreed that it is upon an implied condition, that the child taking the lands in fee simple under the will, should release and acquit to the other whatever rights he had under the settlement.

The same doctrine was supported by Lord Chancellor Talbot, in 1735, in the case of *Streetfield v. Streetfield*, Ca. Tem. Talbot,

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176. And again by Lord Talbot \*in *Jenkins v. Jenkins*, which turned on an implied condition. 2 Vez. jr. 12, 13.

Until these last cases all the decisions down from *Noys v. Mordaunt* had been cases of devises of real estate alone. Had the rule gone no farther, but been confined to real estate, there would have been no difficulty. But Lord Talbot by them decided that where the will comprized both real and personal estate, he would put the party to an election. But in neither of these cases was there any question of defect of the instrument.

Then came the case of *Hearl v. Greenbank*, decided by lord Hardwicke in 1749, and was the first case where the difficulty sprung up, in consequence of the will relating both to real and personal estate, but defectively executed, as is the case now under our consideration. 1 Vez. sen. 299, 307. 3 Atk. S. C. 695, 715. In that case, testator devised his land to a person not his heir at law, and a legacy to his heir at law. The will was not executed according to the statute of frauds, and was therefore void as to the real estate, though good as to the personal. The court decreed the payment of the legacy to the heir at law, without obliging him to give up the land. He did not consider it a case of election.

Lord Hardwicke noticed the case of *Noys v. Mordaunt*, and the subsequent cases and the principle established by them, which he said was right. But he said this case differs from all those; for here the will was void. There was no will as to the land; and there was no case which obliged the legatee under such circumstances to make an election, and give up the land to get the legacy.

There was no condition expressed on the face of the will that he should not have the legacy unless he gave up the land, and the court would not raise up an implication under such circumstances.

The next case which arose, was that of *Boughton and Boughton*, decided by Lord Hardwicke in 1750. 2 Vez. sen. 12, 13, &c.

In that case a contingent legacy was given to the heir at law, and the testator devised

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away lands from \*the heir to other persons. There was an express condition in the will, that if any of the children disputed his will in whole or in part, as to the real or personal estate, the child so disputing should forfeit all advantage under his will. The will was not executed in the presence of three subscribing witnesses according to the stat-

ute, and was therefore void as to the real estate, but good as to the personal.

The Lord Chancellor examined the subject fully, and was clearly of opinion, that the legatee who was the heir at law, could not take the benefit of this personal legacy, without waiving any rights to the land claimed by descent. He considered this different from the case of *Hearl and Greenbank*, for here is an express clause forbidding the heir to take the legacy unless he complied with the will. He could not get over the express clause. In *Hearl and Greenbank*, he had refused to raise by implication, a condition (which was not expressed) that the heir should abide by the will in order to get the legacy, when in fact there was no will, at least no well executed will, which could carry the land. But here, there being an express condition annexed to a personal legacy, the court must consider every part of that, whether relating to real estate or not; you must read the whole will relating to the personal legacy, let it relate to what it will, which is a substantial difference.

The court decreed, that the heir should be put to her election, and being an infant and incapable to make the election, the court decreed that the devisee under the imperfect will, should receive the rents and profits of the real estate devised, till the heir at law should come of age and make her election.

Afterwards came the case of *Newman v. Newman*, decided by Lord Thurlow, in 1783, which is very briefly reported in 1 Bro. C. C. 186. In that case the wife was entitled to a settled estate. The husband by his will gives her an interest in another estate, and all his personal property, in bar of her other claims. But the will was not duly attested to pass real estate. The question was, whether the widow could take the personal estate under

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\*the will, together with her other claims, or must elect between them, although the real estate could not pass by the will.

It was decided first by the Master of the Rolls, that she could not take both, but must elect. But he postponed her election till an account could be taken of the personal estate, that she might know which would be most advantageous to her.

On appeal to the lord Chancellor, it was argued, that as the testator meant to give her the real as well as personal estate in exchange for her claims; but as from the imperfect execution of the will, she could not take the whole provision intended for her, she should not be bound to make her election, but should take the legacy and the settled property. Her opponents resisted this and relied on *Boughton v. Boughton*. 2 Vez. sen. p. 12, 13. The Chancellor affirmed the Master's decree, saying that the words extended to all her claims. Though this decree is stated most briefly, it is evident from this last expression of the Chancellor, that the clause



of the will declaring that the devises and legacies were in bar of all her claims, was the reason that the widow and legatee was put to her election. And this brings the case of Newman and Newman exactly to that of Boughton v. Boughton, where lord Hardwicke placed his decree, putting the party to his election, expressly on the ground of the clause barring the devisee and legatee, who should not comply with his will.

In 8 Vez. 492, 496, this case is stated to have been decided by Lord Kenyon, then Master of the Rolls, exactly in conformity to Lord Hardwicke's decrees in *Hearl* and *Greenbank*, and *Boughton v. Boughton*; Lord Kenyon said the doctrine was too firmly settled to be shaken, though he thought the distinction very nice.

And finally the subject again came before the court in the case of *Sheldon v. Goodrich*, reported in 8 Vez. jr. 481, 496. The Lord Chancellor Eldon again decided that no case of election was raised against an heir at law, claiming a legacy under a will, and a real estate devised away from him by the will,

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but which was imperfectly \*executed under the statute, unless there was an express condition annexed to the will, the legatee may take the legacy under the will and claim the real estate also. Lord Eldon said he agreed with Lord Kenyon, that the distinction (first made by Lord Hardwicke) was such as the mind could not well fasten on, but it was better that the law should be certain, than that every judge should speculate upon improvements of it.

I am of the same opinion, and shall not attempt to improve the law by my speculations, but shall follow the land marks I have to guide my mind, in a very difficult subject.

Mrs. H. Snelgrove as one of the heirs under our act of 1791, was not excluded from claiming her proportion of the land, the devise of which was imperfect, by any express words of the will, attached to her acceptance of the personal estate for life, the bequest of which was good.

The supposed acquiescence attributed to Mrs. Snelgrove by her holding the real and personal estate under a mistaken apprehension that the will was valid, will not bind her. All the cases say, that an election (even where a party is put to an election) made under mistake shall not bind.

In our own court, that point has been decided in the case of the Executors of Munro against Koger and al. decided in April, 1805, as I have stated above.

The court said that it was by no means inclined to deprive a woman of her legal rights under the idea of her having made her election, merely by a bare acquiescence. But it should be made to appear that she was perfectly conusant of her legal rights, and that she had done clear and positive acts, indicating her having made her election.

One objection offers itself to the mind, which deserves observation. It has been urged that she has had the full benefit of the will, as to the real as well as to the personal estate, and held both during her life, conformably to the will. And that her representatives ought not afterwards to be let in to claim her third of the real estate in fee simple.

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\*To this it is answered that this arose out of the error of all parties, and was not a fair election made by her when conusant of her rights. That she did not and could not hold the land under a will, not duly executed, but as an intruder, or under an impression of right.

She could have been ousted of two thirds of the land by the children and heirs of testator at any time if they had pursued their rights. But they neglected them, and she and her representatives should not suffer by their neglect; nor will the other parties suffer by this decision; for her estate will be liable to the payment of the rents and profits of two thirds of the real estate during the time she held the same improperly.

Upon reflection, I believe I have not expressed any opinion, as to another objection made to the claim of some of the children to a distributive share of the real estate which is undisposed of by this ill executed will.

Henry Snelgrove, the father, bequeaths in that will 5s. and no more apiece to several of his children. There are no other words of exclusion in the will.

It was contended that the bequest of 5s. and no more, amounted to an absolute exclusion of these children, so that they could not take a distributive share in any undisposed residuum of their father's estate, to wit, in the landed estate, which is now divisible among the heirs at law, in consequence of the imperfect execution of the will of the father. That these words "and no more," were a negative upon these children, having any part of the estate of the testator, and would operate upon the real estate as well as the personal, upon what was not actually devised or bequeathed, as upon what was imperfectly devised. The only authority of any importance which I have been able to find directly on this question (but which still does not go the whole length of our case) is that of *Vachel vs. Jeffries*, or *Breton* as it is called in some of the books. This case is stated in many of the abridgments, and very imperfectly in most of them. In 11 Viner, p. 194, 5; and in 2 Eq. C. abr. 437, it is stated erroneously. In 8 Viner, 345, and 2 Eq. C. abr. 435, it is correct. But it is most

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fully, clearly and distinctly reported in 1 Brown's Parl. Cases, p. 167, under the title of *Vachel and al. vs. Breton. Jeffries and al.* It appears that the testator bequeathed legacies to two of his children whom he owned, and also 5s. apiece, and no more, to two children

whom his wife had, after a separation between them, and whom he calls his wife's children. Part of his personal estate was undisposed of by the will. Two questions were made as to this surplus; one as to the right of the executor to the undisposed surplus, according to the English law. It was decided against the executor. But we have nothing to do with that. The other question was as to the right of the two children, to whom 5s. and no more was bequeathed, to come in for equal shares of this residuum with the other two children of the testator.

The Master of the Rolls decided that this residuum should be distributable among all four of the children. On appeal to the House of Lords, the case was fully argued, and the counsel insisted that the words 5s. and no more were negative, and excluded the two children from any part of the surplus. This was denied, and it was said that as the two other children had specific legacies and plate bequeathed to them and no more, they could only take as being entitled as next of kin to their share of the residuum. The House of Lords reversed the decree of the Court of Chancery, and declared the two children to whom 5s. and no more were bequeathed, should not take any part of the residuum. This case undoubtedly seems to be an authority for the defendants against the claim of the children of Mr. Snelgrove, to whom 5s. and no more was bequeathed.

But I am strongly inclined to believe that though little notice is taken in the report of the situation of those two children, whose illegitimacy was so distinctly glanced at by the testator, it had much influence in this decree; otherwise the other two children of acknowledged legitimacy must have been excluded also; for they also had legacies to which the words "and no more" were attached. Yet they were let in to the enjoyment of the residue, to the exclusion of the other two.

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But if this \*case was more decisive than it is, it differs from ours in this essential particular. That will was a perfect will, and the residuum was personal property. In our case the will is imperfect as to real estate, and the residuum in question relates to real estate. The words of this will of personal estate (ambiguous at best) cannot operate to debar acknowledged children from their share in the residuum of real estate, which the law casts upon them.

It is therefore ordered and decreed, that a writ of partition do issue for dividing the lands of the late Henry Snelgrove, the elder into two parts; one part to contain a third of the lands, having regard to quantity and quality, to be set apart as the share to which the late Honor Snelgrove was entitled under the act of 1791, which shall be allotted to, and held by William Snelgrove, one of the defendants, and such of the children of the

late Mrs. Honor Snelgrove, as may not renounce and release their proportions thereof to the said Wm. Snelgrove. And the other two third parts to be allotted to, and divided among all the children of the late Henry Snelgrove the elder.

And it is further ordered and decreed, that the representatives of the late Mrs. Honor Snelgrove, (being parties to this suit) do account for the rents and profits of two third parts of the lauded or real estate of the late Henry Snelgrove, the elder, from the death of the said Henry, until her death. And that they pay over the same to all the children of the late Henry Snelgrove, and their legal representatives, reserving their own proportion.

And that William Snelgrove, the defendant do account for the rents and profits of one third part of the said real estate, from his mother's death to this time, and pay over the same to the children of Mrs. Honor Snelgrove and their legal representatives; reserving his own share. And account for the rents and profits of two third parts of said real estate, from his mother's death to this time; and pay over the same to all the children of the said Henry Snelgrove, deceased, and their

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legal re\*presentatives, equally to be divided among them, reserving his own share.

And also that the said W. Snelgrove do pay to the purchasers of those parts of the said real estate, which he sold, the amount of the sums paid by them for the same, on their making reconveyances of the same.

Ordered that it be referred to the Master to examine and report upon the accounts of rents and profits.

Costs to be paid out of the estate.

After the opinion of the court was delivered, the counsel for the defendants requested that an issue should be directed, to be tried by a jury, to ascertain whether the last will and testament of Henry Snelgrove, deceased, was duly executed, according to the statute in such case made and provided, for the disposition of real estates; whereupon the following order was made:

In this case one of the principal questions which arose, was whether the last will and testament of Henry Snelgrove deceased, was duly executed by the testator in the presence of three subscribing and credible witnesses, according to the statute; and the defendant's counsel having applied to the court to direct an issue to be tried at law, I do therefore order and direct that an issue be made up in the usual form, between Henry Snelgrove, one of the complainants, and William Snelgrove, one of the defendants, to try whether the last will of Henry Snelgrove, deceased, bearing date the 14th day of May, 1798, was duly executed by the testator, in the presence of three subscribing and credible witnesses, according to the statute prescribing the mode of executing last wills and testaments, devising real



estates. And that the said issue shall be tried in Lexington district, wherein the land in controversy lies.

HENRY W. DESAUSSURE.

The parties afterwards compromised.

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\*Columbia.—Heard before Chancellor Desausure.

SAMUEL DUNLAP and Others v. ROBERT DUNLAP and Others.

(June, 1812.)

[Wills ⇨123, 125.]

A will executed in the presence of two subscribing witnesses, is not such an execution under the statute as will pass real estate, although the penner of the will was present at the execution; and a codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will, as to the real estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 260, 321; Dec. Dig. ⇨123, 125.]

[Executors and Administrators ⇨149.]

Sales of real estate made by the executors under the supposition that the will was duly executed, rescinded.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 602, 603; Dec. Dig. ⇨149.]

An exchange of real estate, made by the testator in his lifetime confirmed.

[Wills ⇨487.]

The testator having directed that his real estate should be subject to his debts, this is such an expression of his intention to exonerate his personal estate, specifically bequeathed, from his debts, that it shall be exempted, though the will was not so executed, as to pass real estate.

[Ed. Note.—Cited in Pell v. Ball's Ex'rs, Speers, Eq. 524.]

For other cases, see Wills, Cent. Dig. § 1027; Dec. Dig. ⇨487.]

[Executors and Administrators ⇨272.]

The real estate which descended, in consequence of the imperfect execution of the will, shall therefore be applied to the payment of the debts, to protect the personal estate bequeathed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052-1057, 1059, 1065, 1068; Dec. Dig. ⇨272.]

[Perpetuities ⇨4.]

[Cited in Lyon v. Walker, 8 Rich. 311, to the point that slaves were given, by a will, to the wife of the testator and her heirs; but if she should die without issue, or remarry, then the slaves were given to the brothers of the testator named in the will; and if the negroes should be unwilling to be removed, the brothers were to sell them and divide the proceeds among themselves. Held, that the will contemplated a failure of issue at the death of the wife, and that the limitation over was not too remote.]

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⇨4.]

[Perpetuities ⇨4.]

[Where a legacy was given to A. to be disposed of as he should think proper, and upon his dying without issue, then over, it was held that the testator contemplated a failure of is-

sue at the death of A., and that the remainder was valid.]

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 28; Dec. Dig. ⇨4.]

[Perpetuities ⇨4.]

[When there is a limitation over, to take effect in either of two events, one of which is too remote, and the other not, if the latter happens, the limitation will take effect.]

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 5; Dec. Dig. ⇨4.]

[Wills ⇨199.]

[By a will, personal property and the proceeds of real estate were given to the wife of the testator and her heirs, and upon her death without issue, then over to others. The wife died during the life of the testator, and he afterwards, by a codicil indorsed upon the will, recited the disposition of the real estate and the death of the wife, and gave the real estate to others. Held, that this was such a republication of the will as to render valid the limitation over of the real estate.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 498; Dec. Dig. ⇨199.]

[Wills ⇨316.]

[Where the question is as to the due execution of a will, the parties interested are entitled to a trial of the question by jury.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 742; Dec. Dig. ⇨316.]

[Wills ⇨486.]

[Extrinsic evidence is admissible to show that a testator, at the time of executing a codicil, knew that his wife, to whom he had given a legacy by his will, and whose death was recited in the codicil, left no issue.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1016; Dec. Dig. ⇨486.]

[Wills ⇨836.]

[Cited in Warley v. Warley, Bailey, Eq. 406; Pell v. Ball's Ex'rs, Speers, Eq. 523; Hull v. Hull, 3 Rich. Eq. 92, to the point that real estate will not be charged with the debts of a testator, to the exemption of specific legacies, unless such an intention is expressed in the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2153; Dec. Dig. ⇨836.]

[Wills ⇨852.]

[Cited in Bell v. Towell, 18 S. C. 102; Key v. Weathersbee, 43 S. C. 424, 21 S. E. 324, 49 Am. St. Rep. 846, to the point that, where a legacy is given over to others, upon the death of the first legatee, it does not lapse by the death of the first legatee during the life of the testator.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2167; Dec. Dig. ⇨852.]

The bill states that David Ellison Dunlap, late of Columbia, was at the time of his death, seized of a square of land in the town of Columbia, containing four acres, and lying between Walnut, Laurel, Sumter and Marion streets. That the said David E. Dunlap, and his wife Susannah Potts Dunlap, were at the death of the said wife, jointly seized of three half acre lots in the said town, viz. Nos. 70, 71 and 72, on Taylor street.

That Mr. Dunlap and his wife died on the 10th day of September, 1804, but Mrs. Dunlap died first, both without issue. That by Mrs. Dunlap's death, one half of her right in the three lots on Taylor street, vested in

Mr. Dunlap, and the other half in Robert Ellison, her father.

The bill is brought by part of the heirs at law of Mr. Dunlap, for a partition of the lands, or some equivalent remedy.

The heirs at law of Mr. Dunlap, who are entitled to the whole of the square, and to

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three-fourths of the lots \*on Taylor street, are as follows: Three brothers and one sister of Mr. Dunlap, and five children of a deceased brother, and seven children of a deceased sister.

Robert Ellison, who inherited from Mrs. Dunlap, one fourth of the three lots on Taylor street, is dead, and his heirs are his widow and five children.

The bill states that Mr. Dunlap made a will of his personal estate, but died intestate as to his real estate, and made Robert Dunlap and William Ellison and others, executors, but that these two only qualified.

That these executors pretending to some authority to sell the lands of Mr. Dunlap, did sell the lots on Taylor street for sums of money unknown to the complainants, and that those lots are in the possession of Peter Suau and Manoel Antonio, under pretence of ownership, or some right to hold them.

The executors are called on to set forth what part of the lands they have sold; for what prices and at what times. Messieurs Suau and Antonio are called on to shew by what right they hold; whether they have a real right to any portion of the land; to account for use and profits, and to declare if they have any thing to shew why the prayer of the bill should not be granted.

The complainants in an amendment of the bill, set forth that they are informed that the aforesaid executors have also sold the above mentioned square of land to William Howe and Samuel Dunlap, the younger, and that these purchasers have sold it to the honorable Abraham Nott, and the object of the amendment is to make his honor judge Nott and those of whom he purchased, parties to the bill.

The bill also claims a division of a half acre lot on Plain street, in the possession of J. M. and Lucas Creyon, but it is discovered since the filing of the bill, that Mr. Dunlap made a verbal exchange of that lot, attended with such strong equitable circumstances in confirmation of the exchange, that it is not thought proper to pursue the claim relative to that lot.

The answer of William Ellison and Robert Dunlap admits that David Ellison Dunlap

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at the time of his death \*was seized of one square of land in Columbia, but denies that he was seized of lot No. 27; admits that he was seized and entitled jointly with his wife to lots 70, 71 and 72, and on her death to one half of her part of said lots. These defendants admit that the said David E. Dun-

lap, made his last will and testament, and did believe that it was duly executed to pass the real estate, and submit to the court, whether such ought not to be its effect for reasons which they assigned. The defendant, William Ellison does not know, and therefore neither admits nor denies that the persons named in the bill in that respect, are the heirs at law of said David Ellison Dunlap; admits that the persons named in that respect are heirs of Susannah Dunlap. Defendant Robert Dunlap, admits that the persons so named in the bill, are the heirs at law of David E. Dunlap, and the persons so named are heirs of Susannah Dunlap.

These defendants admit that they alone qualified as executors, and delivered over to the persons named in the will, the legacies specifically bequeathed to them, and sold the rest of the personal estate, which amounted to \$984 6 cents; that the debts and expenses amounted to \$3,380 40 cents, exclusive of a debt to the commissioners of Columbia, part of which remains due. The personal estate not being adequate to the payment of the debts and expences of the estate, defendants resorted to the real estate (as they thought they had power to do) and sold to John Shultz, lots Nos. 70, 71 and 72, and a tract of land near Columbia, for \$1,714 28 cents. The lots were estimated, defendants believe, at \$700. Debts being still due by the estate, defendants, in 1811, sold the square to Samuel Dunlap and Wm. Howe, for \$1,200. Defendants submit, that as the evident intention of the testator to be collected from his will, was to exempt the personal estate specifically bequeathed from the payment of his debts; the real estate is the proper fund to be so applied, after exhausting the whole personal property, except the specific bequests, even though the will be not valid as to the realty. Defendants trust that the court will support the sales of real estate,

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and confirm the titles of the \*purchasers, when they will pay over any balance in their hands to the persons entitled.

The answer of William Howe and Samuel Dunlap, the younger, purchasers of the square of land in Columbia, from the executors, admits all the facts admitted by the answer of the executors. It admits the purchase of the square by them for \$1,200, in 1811, and that this was the highest price that could have been procured. Defendants allege that contract was made some time before titles were executed; and when executed, admit that they sold the square to the honorable Abraham Nott, for \$1,500. That they gave their bond to said Abraham Nott, conditioned to make titles to him, when the first payment was made. Defendants thought the executors had the power to sell. They purchased because Robert Dunlap was in advance for the estate, but was indebted to them in the



sum of \$400, which discount would cut off a part of the purchase money.

The answer of John M. Creyon, admits that David Ellison Dunlap was seized and possessed of lot No. 27, but exchanged half of the same for half of an adjoining lot, and sold the lot thus constituted, to John Marshall, and as this defendant believes, received payment for the same.

John Marshall sold and conveyed the same to this defendant, and received payment. Afterwards William Ellison, by deed of bargain and sale conveyed to this defendant the lot he had procured by exchange from David E. Dunlap.

The answer of Abraham Nott alleges that soon after the death of David E. Dunlap, William Ellison and one Dunlap, executors of said David, offered him for sale the square of land mentioned in the bill, but doubting their power under the will to sell, he refused to purchase. That in the year 1807, Samuel Dunlap and William Howe, offered him for sale the same square of land mentioned in the bill, and which they had purchased from the executors. That he informed them of the defect which he understood existed in the will of the said D. E. Dunlap. But they informed him he might purchase with

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perfect \*safety, that the said sale was made with the consent of all the heirs, and that they would join in confirming the contract. Giving credit to this representation, and finding that seven years had elapsed, and complainants had not preferred any claim, this defendant purchased the said lot from Howe and Dunlap, for \$1,500, payable at stipulated periods, and took a bond from them to make good titles, on or before the payment of any part of the purchase money. Defendant submits, whether the sum so stipulated be not the full value of the land, and prays that his purchase may be confirmed, or that his notes may be delivered up.

There was no dispute about the facts in this case, and no evidence was adduced on the trial of the cause, except Mr. Simon Taylor's statement. It was agreed that the late Reverend David E. Dunlap, made his will on the 9th September, 1804, by which he devised and bequeathed all his real and personal estate to his wife and her heirs, (except such parts as are otherwise disposed of) after payment of his just debts and funeral expenses. But if she should die without issue, or again marry, then he directed that the three negroes, Job, Moses and Prince, should be the property of his three brothers, Robert, Samuel and William. And the testator requested of his said brothers, should the said negroes be unwilling to be removed, that they would allow them to be sold, and the money arising from the sale to be equally divided among his brothers. Should his wife die without issue, then he directed the wench Rachel and her issue and his

household furniture to be given to his sister-in-law, Sarah E. Ellison. He bequeathed to his sister, Mrs. Stevenson, a negro woman named Pembo. He then ordered the remainder of his real estate, consisting of lots and squares in Columbia, and a plantation adjacent to it, to be sold in whole or in part, at the discretion of his executors, with his cattle, hogs and horses, to defray his funeral expenses and to pay all his just debts; Provided the same should be necessary. He ordered a debt due him by Col. Moore, to be applied to the payment of two debts, to Mess. Purvis and P. Moore, and

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\*Co. After some other small legacies, he named several friends to be his executors.

This will was executed in the presence of two subscribing witnesses.

It was further agreed, that Mrs. Dunlap, the wife of the testator, died on the 10th September, 1804, without leaving any issue; and the testator immediately, on the same 10th September, made and executed a codicil to his will, by which after reciting the dispositions of his will as to his real estate, and that he had intended the surplus if any to go to his wife, but that it having pleased God to take her away, he (by the said codicil) gave and bequeathed to his brothers and sisters by name, and the children of a deceased brother and sister, all the aforesaid balance of money, or residue or remainder of the said real estate, to be divided among them and their heirs. And he bequeathed several other small legacies.

This codicil was executed in the presence of two subscribing witnesses, one of whom had not been a subscribing witness to the will. The testator died soon after making the codicil aforesaid.

It is agreed, and Mr. Simon Taylor proves the fact, that he wrote the will and the codicil abovementioned, at the request, and by the direction of the testator, and saw him sign and acknowledge them as his last will and codicil. And that he saw the subscribing witnesses sign the same as witnesses in the presence of each other, and of the testator. And the said Simon Taylor attached the codicil to the will, in the presence of the testator. But Mr. Taylor did not subscribe either the will or codicil.

Some of the executors named in the will qualified thereon, and supposing the will and codicil duly executed, they sold to several persons different parts of the real estate on credits; and either gave titles, or bonds to make titles; and took bonds from the purchasers for payment of the purchase money.

They also delivered the specific legacies of personal property to the legatees. They also sold the personal estate, not specifically bequeathed, and applied the proceeds towards the payment of the debts. But there

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re\*maina a considerable sum still due by the estate to sundry creditors.

It appears by the pleadings, and it was agreed, that one of the lots of land mentioned in the bill, was exchanged by the testator in his lifetime for another lot, and possession reciprocally given, though no titles were executed: And that the testator sold the lot which he acquired by the exchange: And also that the person with whom he made the exchange, sold the lot which he acquired to Mr. Creyon, and gave him titles, and he has remained in possession ever since. The complainants very properly consider these circumstances as establishing such an equitable, if not legal title, in Mr. Creyon, as entitles him to hold the same undisturbed by them.

The answer of the executors who are defendants in this case, seemed to make it a point in the case, that the will was duly executed, as to the real estate, notwithstanding there were only two subscribing witnesses. And some reliance was placed on the facts proved by Mr. Simon Taylor, as establishing a sufficient execution of the will under the statute of frauds. But the counsel very properly laid little stress upon this point. For admitting the truth of every word stated by Mr. Taylor, (and there can be no doubt of the truth of his statement,) still the question arises, to what does it amount? That Mr. Taylor was present, and saw the execution of the will, and might have become a subscribing and attesting witness under the statute; but that in point of fact, he did not become so; he did not subscribe the will at all. Now the statute is so clear and peremptory on this point, that it is impossible to get over it. Nay, if Mr. Taylor had after the execution of the will in his presence actually subscribed the will as a witness, but in another room, and out of the presence of the testator, this subscription would not be sufficient.

The will so imperfectly executed cannot pass real estate. Such is the law, and I must be governed by it. I therefore lay this point out of the case, and proceed to the consideration of the other questions which arise.

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\*Some reliance was also placed in the pleadings on the fact that there were two subscribing witnesses to the will, and two to the codicil, which was written on the back of the will. It was insisted that one of the subscribing witnesses to the codicil, being a different person from the two who subscribed the will; there were three witnesses to this consolidated will and codicil; more especially as the codicil referred to the will, and affirmed it by an irresistible implication as to the sale of lands. All which amounted to a due execution of the will under the statute. And that the court would favor this construction to support a fair will, and to give effect to the intention of the testator. I was at first struck with this argument, particularly when I adverted to the cases

which have established that if there be three subscribing witnesses to a will, it is not necessary that they should be present together; nor that they should subscribe the will at the same time: Provided, they witness the execution by the testator (by actual signing or acknowledgement) and subscribe it in his presence; nay, that an interval of four years between the signing of the witnesses, has not prevented the will from being valid, the requisites of the act being complied with. 7 Bacon, 308, 9. 2 Atk. 176. Sanders' notes. 2 Vez. sen. 455, 6 S. C. Jones v. Lake.

But upon reflection, and upon authority, I am satisfied that this will cannot be supported, as executed conformably to the statute. The same point came before lord Chief Justice Holt, and the three other judges of the king's bench. Upon examining the cases as stated in 8 Viner, 130, and as more fully reported in 1 Shower, 65, 69, 88, under title of Lee v. Libb, the circumstances appear to have been precisely those, which are in the case before the court. For the will had two witnesses, and the codicil had two witnesses, one of whom was different from the two in the will. The codicil referred to the will and affirmed it, as far as not altered by the codicil; but gives some things differently from the will, as in the case before us.

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\*It was admitted by the court that there were three witnesses to the intent of the testator, but only two to his will in writing; and that there were two witnesses to the codicil, one of whom was to the will, and the other not; so that there wanted one witness to the will in writing. And the court unanimously decided that this was not a good execution under the statute. 8 Viner, 130. 1 Shower, 65, 6, 9, 88, Lee v. Libb.

I am of the same opinion, and will add that if one of the witnesses to the codicil was allowed to substantiate the will, by proving the codicil, which refers to the will, he would not support the will as executed, but would alone support the codicil which varied it. Besides the act requires that the party sign the will in the presence of three witnesses, which has not been done.

I feel very great regret that I am not at liberty to set up and establish this will. No one can doubt of the testator's intention, that this will should be effective as to the real estate, and a judge must always regret that he is obliged, by a strict adherence to the letter of a statute, intended to secure the due execution of wills, to prevent the intentions of the testator from taking effect. I feel bound to adhere to the statute, as well in this case as in others, though the circumstances are the strongest I have ever known. If I could escape from the dilemma, I would most willingly; but I dare not violate what I consider the literal provision of the statute, and the decided cases which form the land



marks of property. If the parties or their counsel are not satisfied with this opinion, I should be disposed to direct an issue at law, to try the due execution of this will, if that measure be desirable to the parties. For they have a right in cases which turn upon the due execution of a will to have a trial by jury.

This court has not authority definitively to declare what is, or what is not a man's last will. 2 Vez. sen. 459, 460. 3 Bro. P. C. 358. *Kerrick v. Bransby*, 5 Vez. jr. 647. *Ex parte Fearn*, note a. 13 Vez. jr. 297, *Pemberton v. Pemberton*. Or if the counsel have any doubts upon this point, I shall be very glad to have it carried up to the Court of Appeals and settled there.

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\*The next question is, whether these legacies did not lapse by the death of Mrs. Dunlap, in the lifetime of the testator.

It is certainly a general rule, that if a legatee dies before the testator, the legacy shall be lapsed, and sink into the residuum of the testator's personal estate, however the legacy may be given to the legatee, his heirs, his executors, administrators and assigns. 4 Bac. 387. 2 Fonb. 368, 9. 1 Bro. C. C. 84.

But there are various exceptions to this rule, and amongst others, one exception is, where the legacy is given over to others, after the death of the first legatee, for in such a case, the legatee in remainder shall have it immediately. *Toller's law of Executors*, 304. 2 Fonb. 369.

But it is objected, that though this be true, the limitation over must be within the rules on that subject, or else the limitation will be void, notwithstanding the lapse by the death of Mrs. Dunlap, in the lifetime of the testator; and that the legatees in remainder cannot take.

The learning upon this subject is exceedingly complicated, and it cannot be denied that there have been contradictory decisions.

The devise in the will in this case, is as we have seen of all the testator's real and personal estate, to his wife and her heirs forever. But if she died without issue, or again marry, then he ordered that the three negroes, Job, Moses and Prince, should be the equal property of his three brothers, Robert, Samuel and William; and he requests, if the negroes desire it, that his brothers would sell them, and divide the money among them.

The first words of this clause of the will would undoubtedly have carried an estate tail, if it had been a question of the devise of real estate merely. Consequently, according to the established rule, those words would have given an absolute estate in the personal property bequeathed to the legatee. And if the clause had not contained other words, the limitation over must have been declared void,

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as being founded and depending on \*an in-

definite failure of issue. *Fearne on Devises*, 116, 144, &c.

But the subsequent words qualify it in such a manner as to raise the question, whether the testator really meant the limitation over to depend on an indefinite failure of issue, and whether the qualifying words do not alter the case materially.

The rule that the devise over, after a dying without issue, is in general void, is subject to various exceptions, which are illustrated by many important decisions. *Fearne*, 179.

The great exception is that, wherever the devise is to one, and his heirs or issue, with an executory devise over, limited to take place on an event which must happen within the compass of a life or lives in being (and 21 years and ten months after) such limitation over is good. *Fearn*, 181, 186.

And with respect to executory devises of personal estates, the strong leaning of the Court of Equity, is to lay hold of any words in the will, to tie up the generality of the expression of dying without issue, and to confine it to the dying without issue living at the time of the person's decease; which would be within the prescribed limits, and therefore good. *Fearn*, 186.

A bequest of a term for years, for raising portions on either of two contingencies, of which one is within the allowed limits, will be good on that event occurring; and the court said it would not enter into the consideration, how far the other branch of the contingency might have been supported. It is of no importance in a case where the restrictive circumstances appear to prevent its being a devise, depending on an indefinite failure of issue, whether the personal estate was limited to the devisee or legatee generally, (as in *Hughes v. Sayer*) or for life, (as in *Target v. Gaunt*) or to such legatee and his heirs, or heirs of his body, or issue, or children, (as in various cases decided,) for the restriction is equally valid under any of these circumstances, and gives effect to the limitation over. *Fearn*, 154, 224, 5; 230. 2 *Blac. Rep.* 704.

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\*The case of *Kelly v. Fowler*, determined on appeal to the House of Lords, is a strong case to shew the avidity with which the court lays hold of any circumstance however slight to support these limitations of personal estates. The limitation over appeared to be on a dying without issue generally. For the testator bequeathed all his property to his daughter, but if she married without the consent of his executors, or died without issue, the property should return to his executors, to go as he directed, viz: Certain pecuniary legacies to different persons, and 20 cows and a horse to his daughter, and the remainder to be equally divided among his sisters' children. It was decided by the Chancellor in Ireland, and affirmed by the House of Lords, upon the opinion of the judges, that the limi-

tation over was to take effect on the death of the daughter, without issue, then living. Consequently was a good limitation, and must be permitted to take effect. Fearn, 236, 7, 8, 9.

The circumstance of one of the contingencies, the alternative of the daughter's marrying without the consent of the executors, (which must happen, if at all, in her lifetime) and of the return of the estate to the executors, and the nature of the chattles (cows and a horse) given to the daughter in the event of her marrying without consent, was not suitable to the supposition of an indefinite failure of issue; every thing seems to have led to this conclusion and decision.

And two of those circumstances occur in the case before us: the limitation over was of negroes, and on the wife's marrying again, besides another important circumstance, which will be noted hereafter. So where the bequest is to a daughter, and if she die without issue of her body, the limitation over is to two, equally to be divided: the court declared the limitation over to C. and D. is good. The direction is to divide, and therefore personal to C. and D. The division to be made between C. and D. shews that the testator looked to such division in their lifetime, and therefore did not mean an indefinite failure of issue. Circumstances of equal import oc-

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cur \*in the case under our consideration. Fearn, 242, 245. 1 D. and E. 593, Lyde v. Lyde.

In these cases it will be found that Lord Chief Justice Wilmot (Fearn, 245) is of opinion that the most trifling circumstance is sufficient to indicate or imply an intention to use such words in their restricted sense, to wit, issue then living. And Mr. Justice Buller agrees with him, and adopts his very words in a subsequent case. Fearn, 242, 252, 260.

The case of *Sheppard v. Lessingham*, reported by Ambler, 122, and stated by Fearn, 266, &c. is a strong case to shew that the construction ought to be made to answer the intention, wherever the intention does not aim at restraining the alienation of property longer than is admissible by law in the ordinary course of enjoyment of it. In that case there were two clauses differently penned, one of which was not too remote according to the ordinary construction, and the other too remote. But the intention seemed to be the same in both, and Lord Hardwicke declared that the same construction was to be put on both; and the limitations in both were supported on the ground of intention. The maxim *noscitur a sociis* was applied to the two clauses, and took the latter limitation out of the rule. Fearn, 270, 1, &c. 2 Vez. 118, *Exel v. Wallace*. Also Fearn, 454.

See too, *Longhead v. Phelps*, Sir Wm. Blackstone's Reports, 704, where it is decided, that where there is a trust for raising portions on either of two contingencies, and

one of them is within the prescribed limits, it will be good in that event, or if that contingency happens. Fearn, 154, 5; 216, 457.

In applying these principles established, or illustrated by the decided cases which have been noticed, we shall not have much room for doubt in the cause under consideration.

There are many circumstances to satisfy our minds, that the testator did not mean to ground the limitation on an indefinite failure of issue of his wife. In the first place there is a contingency with a double aspect. The limitation over is to take effect either on

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the wife's dying \*without issue, or on her again marrying. One of these contingencies taken by itself, seems to come within the rule, and it is too remote. The other clearly not, for it must happen during her life, as if she ever married again, it must be in her lifetime.

And we have seen by the decided cases that where one of the contingencies is not too remote, and the other is too remote, that the limitation shall be supported. But not to rely too strongly on this ground, (as the contingency which has happened, to wit, the dying without issue, is that whereon the limitation over is now claimed,) we shall be led to the same conclusion by the other circumstances in this case. The property bequeathed and limited over to the three brothers, was three negro men. Now the very nature of the property shews that the testator could not have contemplated an indefinite failure of issue. Besides, he desires that his three brothers (if these negroes desired not to be removed) should sell them and divide the money. All these are acts indicative of the testator's looking to the limitation taking effect, if at all, not on an indefinite failure of issue, (which might pass the limit of the lives of all these persons) but to what must occur in the compass of a number of lives then in being. For the persons living were to perform these acts.

Another argument might be drawn from the peculiarity of the wording of these limitations; but as it would be more refined than the foregoing, and is not necessary to bring us to the conclusion at which we have arrived, I shall not go into it.

I am then satisfied that the limitation over of the three negro men, to the three brothers of the testator, is not too remote; and therefore that this is a good legacy to them, which did not lapse by the death of Mrs. Dunlap before the testator, because of the limitation over.

I am much more doubtful of the legacy of the negro wench Rachel and her family, and the household furniture to Mrs. Ellison. The limitation over is put upon the naked dying without issue, of the wife of testator, which is clearly too remote. But as the words, "to be given to my well beloved sister-in-law,



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S. E. Ellison, to \*be disposed of as she may think proper," do not seem to look beyond Mrs. Ellison, and the disposition spoken of to be made by her, seems to be a personal act which could not reasonably be expected to be performed by her, if grounded on an indefinite failure of issue, and as the court seizes the smallest circumstance, to prevent bequests of personal estate from failing by the operation of a mere technical rule, I will venture to say, that even this limitation, worded as it is, is not too remote; but shall have effect. But in this opinion I am not by any means confident.

The argument, however, in favor of these limitations over, does not rest here: It was contended that Mr. Dunlap, the testator, after the death of his wife, executed a codicil, which was in effect a republication of the will, adapted to the new state of things arising from the death of his wife; which republication would confirm and give full effect to the clauses of the will, bequeathing the legacies therein, stripped of the intervening estate given to the wife, which had lapsed so far as they related to her, by her death in the testator's lifetime.

To this it was objected, that the codicil could not be said to confirm the will; for the codicil says nothing and gives nothing of the personal estate, (except a few new legacies) and the gift to Mrs. Dunlap had, in the meanwhile, lapsed, and the limitation was too remote; so that the republication amounted to nothing and confirmed nothing.

It may be strongly answered that the codicil referred to the will—speaks of the death of the wife—new models part of the will—makes some new bequests, and leaves others untouched as they stood on the face of the will. What is the plain language of this conduct of the testator? It is this, My wife is dead without issue. The proceeds of the sale of my lands, which I had ordered by my will, to be sold, I intended for my wife; but she being dead, I therefore give the same to some others of my friends. As to those legacies given to my brothers, to take effect on the death of my wife, I leave my will as it stood, because, as she is now dead, they

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will doubtless \*be immediately entitled to those legacies, now that the intervening estate of my wife is gone.

It is pretty obvious that the testator did not mean to die intestate as to any part of his estate, for at the awful moment when his wife lay dead, and his own death was rapidly approaching, he makes this codicil to bequeath what he thought would be undisposed of in consequence of her death; to wit, the residue of the sales of his real estate. Yet he leaves these specific personal legacies undisturbed. I think a strong inference arises that he meant them to go in the way he had originally expressed, but of course relieved

from the intermediate estate given to the wife.

But it is said we cannot argue in this way, because we are not at liberty to receive evidence that the wife died without issue, and that the husband knew this, and therefore framed a new will accordingly.

It might be sufficient to say, that the pleadings in the cause state that fact as part of the case upon which the court is called to decide. I am aware that there are decided cases which say that the court cannot receive evidence of a fact to assist in explaining the testator's will—*Brown v. Selwyn*, Cases Temp. Talbot, 240; *Maybanks v. Brooks*, 1 Bro. C. C. 84; *9 Vezey*, jr. 575.

These cases go to shew that parol evidence shall not be received to prove that the testator knew of the death of legatee at the time of making his will, as an argument that he intended that\* the legacy should be transmissible to the legatee's personal representatives. But these cases do not come up to this; and none of them deny but that the court may receive parol evidence to solve, nay, even to raise an ambiguity in a will. The cases on this point are numerous, complicated and sometimes at variance. But it is not necessary to go into them on this occasion, for I do not think parol evidence necessary to make out the case; though if it were necessary, I think I should admit it here. What are the facts? A man has made a will and given his property chiefly to his wife, with limitations over in case of her death without issue. She dies in his life-

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time, and he makes a codicil varying \*the will in some particulars. Can it be supposed for a moment that the husband was ignorant, whether his wife died without issue? I cannot presume it. I must and I do suppose that he knew intimately the state of his wife's family and his own, which were the same. Proof is unnecessary. It is impossible to doubt in such a case that a man knew the state of his own family. And in every case the relative situation of the parties is always brought to the view of the court, as essential to enable it to elucidate the truth.

The effect of the republication in this case alone, seems to have been contested. It appears that there was not much doubt at the bar, that the execution of a codicil referring to a will, amounts to a republication.—And there can be no doubt of it now, after the case of *Acherly and Vernon*, reported in 1 P. Williams, 783, which first introduced constructive re-publications. After the statute of frauds the court fluctuated a long time; sometimes it held that a codicil though distinctly referring to a will, was not a republication.—1 *Vezey*, 489; *Ambler*, 550, 571. Sometimes that it was a republication—1 *Veaz*, 437; *Amb*, 487.

The case of *Barnes v. Crow*, reported 4

Bro. C. C. 2, and 1 Vez. jr. 486, decided independently of other considerations, that the execution of a codicil in all cases should be an implied republication of a will. This affords a certain rule, and has been followed ever since; except where as in the case of *Stathmore v. Bowles*, it appeared distinctly on the face of the codicil, that the testator did not mean to republish the will. But whether we adopt the doctrine to the extent it has been carried in England, or not, there can be no doubt the codicil was a republication of the will in the case before us, in such a shape as to affect the personal estate, for it was not only annexed to, but actually written on the back of the will, and refers to it; and even this, according to lord Camden, was sufficient to make it a republication of the will; though he did not think a codicil not annexed was a republication of a will.—*Ambler* 572, 3, 4, *Attorney General v. Downing*.

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\*I must therefore decide that the codicil in the cause now under discussion, was a republication of the will.—But it must not be forgotten, that this codicil imperfectly executed as to the real estate, though a republication of the will, could not give effect to the dispositions made of the real estate by that will, which was itself, imperfectly executed.

Another question made in this case was, whether the specific legacies shall be exempted from the debts, and the real estate brought to the aid of the personal estate to give effect to the exemption.

It was said, in argument, that this was not only not practicable under this imperfect will and codicil, but that the testator did not intend it; for he had given the specific legacies subject to the debts.

This however is not correct. For whatever doubts might have at first arisen as to the intent, from the first words of the will, the subsequent words shew the real intent of the testator, to be that his real estate consisting of lots in Columbia and lands adjoining should be sold, to pay his funeral charges and all his just debts.—Nothing can be clearer then, than that the testator meant all his debts should be paid out of the sale of these landed estates, aided by the sale of his cattle and horses, &c.

But it is objected that the will and codicil being both imperfectly executed, so as not to pass lands, this charge of the debts on the real estate must fail, even if the charge would have exempted the personal estate, and then the ordinary rule of law must prevail, which assigns the personal estate as the proper and primary fund for the payment of debts.

A great deal of dispute and doubt formerly existed on the question, what amounted in a will to an exoneration or exemption of the personal estate from the debts of the testa-

tor. In lord chancellor Talbot's time, he laid down the rule to be, that the personal estate is the natural fund for the payment of the debts; and which, as against creditors, the testator cannot exempt without their consent. But against the devisee of land he may, by appropriating his land as a fund for

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the payment of \*his debts. But he said there ought to be express words or a plain intent to exempt the personal estate.—3 P. Williams, 323, 4, 5, *Hazlewood v. Pope*, and cases there cited in note (2); 1 Bro. C. C. 454, *Ancaaster, v. Mayer*.

But the personal estate would not be exonerated by the mere charge of the debts on the real estate; express words or plain intention upon the whole will are necessary.—9 Vezey, 447, *Watson v. Brickwood*; 6 Vezey jr. 567, *Bridges v. Philips*; 11 Vezey, 179, 186, *Hancox v. Abby*.

A provision for the payment of the debts out of the real estate is not sufficient—8 Vezey 295, 306, *Milner v. Slates*; *Ibid.* 125, *Harwood v. Oglander*.

In the case of *Leland v. Shaw*, decided by lord Redesdale, and reported by Schoals and Lefroy, 2 vol. 538, the subject is luminously treated, and that eminent judge declared, that the case of *Webb v. Jones*, decided by the master of the rolls, (Sir Lloyd Kenyon,) in 1786, was the only one in which it has been held that personal estate, has been exempted from the payment of debts and funeral expenses, without express words for the purpose, or such as to raise a presumption that the testator meant to make the personal estate the subject of a specific bequest, and therefore not liable to debts; because specifically given as a legacy.

And the difference between a direction to sell a real estate out and out, (either disposing of the residue by the will, or leaving it to go to the heir) and charging such real estate with the debts, has been long exploded as to its effect in exempting the personalty from the debts.—*Cas. Temp. Talb.* 208, *Stapleton v. Colville*; *Ambler* 38, *Inchiquin v. French*; but see also 3 Atkins, 566; 2 Bro. C. C. 257; 3 Vezey, jr. 114, for another distinction not necessary for us now to pursue.

It will still turn on the question of intent to change the nature of real estate to personal, and to follow the fate of the personal.

In applying this law to the case before the court, there can be no doubt that there is

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sufficient on the face \*of the will and codicil to shew the clearest intent in the testator, to change the real into personal estate, and to make it the fund to pay the debts. He orders it to be sold, and directs the proceeds of it to be applied to the payment of his debts; and bequeaths the balance, if any, as money, to certain legatees. And these being specific legacies, I have not a shadow of



doubt that if the will could be carried into effect, these legacies would be exempted.

This brings us to the last question. As the will is not duly executed to pass real estate, and no sales of the real estate can be made, but that must descend according to the act of 1791, must these specific legacies be made liable to the debts, and the lands be entirely exonerated?

It was argued that the specific legacies are exempt of course from the debts, and that the lands must be applied first to the payment of the debts. First,—Because they are specific, and are never liable to debts till all her funds are exhausted. Second,—Because the testator manifestly intended that it should be so; and that though the will and codicil are not executed so as to pass real estate, they may operate as evidence of the intention of the testator, to exonerate the personal estate so specifically bequeathed; which will leave the real estate liable to the debts, by operation of law, which subjects real estates to debts in this country, even without a plea of *plene administravit*, as it is said has been decided at law by the constitutional court. And that as executors may thus cause lands to be sold circuitously, they may do it directly to give effect to the intention.

It is true, that by the general rule, specific legacies are exempt from the debts, whilst other property remains sufficient to pay the debts. But this relates only to personal assets, and not to real estate. This rule is drawn from the English law; and to be sure the reasons for making this discrimination between real and personal estate, do not exist in so great a degree here as in England. The descent to the eldest son is broken by our act of 1791, which places all the children on an equal footing, as to real as well

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as personal estate. And lands \*are made more directly subject to debts here, by the act of parliament of 5 Geo. 2 c. 7, (*Grimke* 250,) which has been recognized in practice in this country. It is also true, that the judges have at times said, the various acts have nearly reduced real to the same footing with personal estate. But the act subjecting lands to the payment of debts, was never supposed to have levelled real to an equality with personal estate, in the administration of the assets of a deceased person. In the case of *Wilkinson v. executors of Wilkinson*, decided in our own court in 1791, we find the judges expressly declaring that the personal property is the proper fund for the payment of debts in the first instance. And in *Hartly, Stuart and others, v. Carson executor of Carson*, [1 *Desaus*. 500,] decided in 1796, we find the judges in this court deciding, “that the act of 1791, abolishing the rights of primogeniture, related entirely to cases of intestacy, and has left the laws for the administration of assets just where they

were. It would, therefore, be too bold for this court to level all the laws and practice of the country in the mode of the payment of debts to what might be conceived to be the principle of the law abolishing the rights of primogeniture, by placing real and personal estates on the same footing in all cases. And it does not even appear that this was the intent or spirit of that law.” This is directly to the point, and this law has never been shaken. And when we remember that notwithstanding the approximation of real and personal estate in many respects, the act of wills still maintains the same marked distinction between them, as to the disposition of the one or the other, we cannot but agree with these learned judges, that it does not appear to have been the intention of our legislators to place them in all respects on the same footing. This is a question of great importance, and as the situation of real and personal estate is very different in this country, from what it is in England, and there is a great diversity of opinion at the bar, it might be as well to carry it up to the court of appeals.

Now the order for the payment of debts in the administration of assets is well settled.

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The first fund is \*the personal property not specifically bequeathed; then land devised (by an effectual will) for payment of debts, and not merely charged with the payment of debts; then descended estates; then lands charged (by an effectual will) with payment of debts.—*Harwood v. Oglander*, 8 *Vez.* 125 and prior cases.

But it is contended, that the will and codicil though not duly executed to pass real estate, manifest the intention of the testator to exempt the specific legacies; and leaves the real estate to the payment of the debts, to which it is subjected by law; and this court will give effect to such intention.

It would be a great satisfaction to the court if it could protect and exempt these legacies from the debts according to the manifest intention of the testator. But how do we come at the intention of the testator? By reading his will. But we are not at liberty in this case to read the testator's will as it relates to the real estate, because it is not duly executed according to the statute. We may, indeed, as the clauses are blended and inseparable, give a formal reading to those parts which relate to the real estate; but we cannot give effect to them; else we should violate the statute law. They must be considered a nullity, a dead letter.

Then how does the case stand? Here is a will good only as to personal estate. It gives certain specific legacies. These must be preferred, and all the rest of the personal estate must be exhausted, before we can touch these specific legacies, to assist in payment of the debts. But the real estate is not liable except on failure of the personal, un-

less the testator expressly makes it so, by a will duly executed, so as to affect the real estate, which is not the case here.

Some reliance was placed by the counsel for the defendant on this ground, that as the statute Geo. 2d, ch. 7. has made real estate liable to the payment of debts, and as some decisions in the constitutional court have settled, that they may be sold under judgments obtained against executors or administrators without a plea of plene administravit, shewing that the personal estate is

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\*exhausted, that executors and administrators may sell lands directly, as well as to suffer them to be sold in this indirect way.

I cannot, however, agree to this. The former is the act of the law; the latter would be their own act, for which they have no warrant, not having any estate in the land as they have in the personal estate. All their sales of the lands of this estate not perfected, so as to enable the purchasers to plead that they are purchasers for valuable consideration without notice, are void and of no effect. They cannot make a good title to the purchasers.

With respect to Mr. Crayon, the case is very different. There an exchange of lands had been made by the testator in his lifetime with another person, and possession mutually given; and the testator sold the land he acquired by the exchange: and the other person with whom he was dealing sold to Mr. Crayon what he had acquired by the exchange. I consider this as a complete transfer of the property, so that the same should not be shaken.

Upon the whole, we have come to the following conclusions.

That the legacies bequeathed over on the events of the wife of testator dying without issue, or unmarried, did not lapse on her death in the lifetime of testator, on account of the limitation over. That the limitation over was not too remote, but was good and effectual.

That these legacies were protected from the debts of the estate, as long as there remained any personal estate, not specifically bequeathed sufficient to pay the debts. But that notwithstanding the plain intention of the testator to make the lands subject to the payment of the debts, in case of the personal estate, by ordering the real estate to be sold, and the money so applied, that intention cannot prevail; because the will was not duly executed according to the statute. And finally, that the law has not yet placed real and personal property upon an equality as to payment of debts in the course of administration.

It is therefore ordered and decreed, that

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the whole \*personal estate of the testator, beginning with that not specifically bequeathed be applied to the payment of the debts

of the testator. And on failure of that, the deficiency shall be made good out of the real estate of the testator. That to effect this, the real estate be sold; and the amount sales be applied to payment of the balance of the debts; and the surplus, if any, be equally divided among the representatives of the testator under the act of 1791.

That Mr. Creyon's title be confirmed.

It is also further ordered and decreed, that the sale of the lots in Columbia, made by the executors, under an idea that the will was duly executed, be set aside and declared null and void. And that the notes given by Judge Nott, be delivered up to him, to be cancelled.

Henry W. Desaussure.

From this decree an appeal was made.

The defendants give notice, that they shall appeal from the decision of the Court of Equity in this case, and on the hearing of the appeal, shall submit the following grounds:

First,—That the will of the testator, D. E. Dunlap, was duly executed to pass his real estate.

Second,—That under the will, the specific legacies are exempted from the payment of debts, until the real estate descended, is exhausted; and that the decree directing the application of the personal estate, specifically bequeathed for that purpose before a resort to the real estate is incorrect.

Third,—That the decree is incorrect in ordering a reversion of the sales of the real estate made by the executors.

A. Blanding, defendant's solicitor.

At the hearing of the appeal, the first and third grounds were given up by the counsel for the appellants; and the second ground was argued.

After the argument, the court delivered the following decree:

Several grounds of appeal were made in this

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case \*but some of them have been abandoned, and the only one insisted on is, that the decree has subjected to the payment of the debts of the testator, personal property specifically bequeathed by him, before lands which have descended to his heirs.

The question then is, whether the specific legacies, or the lands shall be first liable to the payment of the testator's debts.

It is clear from all the authorities on the subject, that although the personal estate generally, is liable in the first instance to the payment of debts, yet that a testator may, if he pleases, protect therefrom, any part of such estate, as against his heirs, or other representatives, either by specifically bequeathing the same, or by plainly manifesting his intention, that his lands shall be charged with such payment. 1 P. Wms. 203, 678, 729. 1 Bro. C. C. 462.

In this case it appears that the legacies are not only specifically given, but that the



testator has fully expressed his intention to charge his real estate with the payment of his debts. It is true that the will cannot operate as a disposition of his lands, because it was not executed conformably to the act, and this charge on the lands may therefore be said to be void; but this charge nevertheless amounts to a plain declaration of the testator, that the legacies given shall be exempt from the payment of his debts, and the will as to the legacies is valid and operative. It follows then, that the lands of the testator, which have descended to his heirs, must first be applied to the payment of his debts, before the specific legacies can be broken in upon. The decree therefore on this point must be reversed.

W. JAMES,  
W. THOMPSON,  
HENRY W. DESAUSURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

Mr. Blanding and Mr. Heath for the appellants.

Mr. Hooker, for the respondents.

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\*Case LI.

Columbia—Heard by Chancellor Desaussure.

CLIFTON, Administrator of Jane Ann Campbell, v. Executors of HAIG, Executor of WISE, and CHARLES WILLIAMSON, Sheriff of Richland.

(June, 1812.)

[*Aliens* ⚭1: *Executors and Administrators* ⚭465; *Perpetuities* ⚭4.]

A subject of Great Britain, though born before the declaration of Independence, is an alien, and cannot hold lands in this state. He may take lands, but he takes for the benefit of the sovereign. A testator devised the residue of his real and personal estate to his daughter, and the issue of her body, lawfully begotten, for ever. But in case of the death or failure of issue of his said daughter, then, and in either of these cases, he devised and bequeathed the same to his nephews, S. W. and T. B. to be equally divided between them. The limitations over are not too remote. A devise for life, and a pecuniary legatee, have a right to an account, to ascertain when her rights accrued, and to recover what is due her.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 1; Dec. Dig. ⚭1; *Executors and Administrators*, Cent. Dig. § 1990; Dec. Dig. ⚭465; *Perpetuities*, Cent. Dig. § 28; Dec. Dig. ⚭4.]

[*Executors and Administrators* ⚭418.]

Executors keeping an estate in their hands for many years, under pretense of debts, cannot allege against the demand for an account that it is a stale claim; nor that the complainant comes too soon.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1659; Dec. Dig. ⚭418.]

[*Husband and Wife* ⚭11.]

A legatee, whose husband dies before the payment of her legacy, is entitled, and not her husband's representatives; especially as they

were separated by agreement, and he renounced all his interests in her property. And her second husband also separating himself from her, and permitting another person after her death to administer on her estate, such administrator is entitled to sue for, and recover what is due to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 51; Dec. Dig. ⚭11.]

[*Executors and Administrators* ⚭473, 474.]

Executors residing abroad, or who never acted on the estate, are not necessarily made parties to the suit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2042; Dec. Dig. ⚭473, 474.]

[*Parties* ⚭50.]

The court will order proper parties at any stage of the cause.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 76; Dec. Dig. ⚭50.]

[*Equity* ⚭296.]

Leave given to amend the prayer of the bill, after hearing.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 584; Dec. Dig. ⚭296.]

[*Executors and Administrators* ⚭454.]

A sheriff having in his hands a balance, after payment of the debt, for which he sold land under execution, ordered to pay it over to the commissioner, to abide the decree of the court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1926; Dec. Dig. ⚭454.]

[*Equity* ⚭118.]

Securities to the sheriff's bond were made parties, after decree in the principal cause. They demurred. Demurrer sustained.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 554; Dec. Dig. ⚭118.]

[*Aliens* ⚭7.]

[A devise of real estate to an alien will vest the property in the devisee, subject to escheat.]

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 13; Dec. Dig. ⚭7.]

[*Equity* ⚭427.]

[Under a prayer for general relief, no relief can be granted inconsistent with the specific relief prayed.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1013; Dec. Dig. ⚭427.]

[This case is also cited in *Milledge v. Lamar*, 4 Desaus. 63, on the doctrine of limitations.]

The cause came to a hearing, and the judge delivered the following decree:

This is a bill filed by the administrator of Mrs. Jane Ann Campbell, deceased, who was the daughter of the late Major Samuel Wise.

The suit is brought against Mr. Joel Adams, one of the executors of the late Mr. J. J. Haig, who had been one of the executors of Major Wise.

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\*The bill is for a discovery and an account of major Wise's estate, by the executor of Mr. Haig, who had been executor for Major Wise. And the bill required that Charles Williamson, late sheriff of Richland district, who had sold a tract of land, under execution, to pay a debt due by Maj. W's estate, should account for the surplus re-

maining in his hands, after payment of that debt.

Maj. Wise by his last will and testament, bequeathed some pecuniary legacies: and among other things, directed his executors to raise the sum of 10,000*l.* of the then currency, by certain sales, and to place the same at interest in the State loan office: and to apply the same to pay certain debts due in England. But in case that should be impracticable, or more than would be sufficient, he bequeaths the said sum or the surplus, to his daughter Jane Ann Wise. By a subsequent clause, he devised and bequeathed to his daughter, Jane Ann Wise, all the rest and residue of his estate, real and personal, to her and the issue begotten of her body, forever; but in case of death or failure of issue in his said daughter, Jane Ann Wise, then and in either of these cases, he devised and bequeathed the same to his nephew, Samuel Wise, (of Abby Holm, England,) and to Thomas Boak, his wife's brother, to be equally divided between them.

The answer of Mr. Joel Adams, executor of Mr. Haig, stated that there were other parties in interest, who should have been made parties to the suit;—that Major Wise left several executors, of whom the late Gen. Harrington was one, and Mr. Thomas Boak another, both of whom qualified as executors of the will of Major Wise, and who should have been made defendants. And that the late Mr. Haig left several executors, some of whom had qualified as well as himself, to wit, the late Capt. John Blake, and Col. John Alexander Cuthbert, who had qualified as executors, and two others who have not qualified;—and that Col. Cuthbert who is living, should have been made party to the suit. Also that Capt. Blake's family were principal devisees and legatees of Mr. Haig; and should have been made parties.

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\*The answer also insisted, that Jane Ann Campbell, formerly Miss Wise, had no such rights under the will, as would entitle her representatives to make any claim or institute any suit, as the devise and bequests to her were contingent, and on her death, failing issue, (which had taken place,) the property was devised over to other persons, who alone had the right to claim and to sue, after payment of the debts. But that in fact it was believed the debts were not paid, and the creditors should have been made parties. Also, that if she had had any transmissible rights under the will, she had married a man named Ball, before she had married Campbell; and that if he were dead his representatives were entitled to make the claims in question, and not her administrator; and that at all events, Campbell who survived her, should be the suitor in this case. The staleness of the claim was also insisted upon, as a reason for the court not ordering the executors to account.

The defendant filed his account as to the estate of Mr. Haig.

The answer of Mr. Williamson, late sheriff of Richland district, admitted that he had made sale of a tract of land, formerly belonging to the estate of Maj. Wise, to satisfy an execution for a debt due by his estate;—and that a balance remained in his hands;—but that complainant was not entitled to an account and payment thereof, as the late Miss Wise had no transmissible rights under her father's will entitling her representatives to institute such a suit. Also, that all proper parties were not before the court—that besides other parties Zeph. Kingsley had qualified as administrator with the will annexed, in July, 1781, before the British board of police, and he or his representatives should be made parties, as they may have possessed themselves of part of Maj. Wise's estate. That the lands sold by the defendant Williamson, under execution, were not the lands directed to be sold by Maj. Wise's will, and the money bequeathed to his daughter under certain circumstances. That he as sheriff was bound to apply the money to the payment of creditors, who might be injured by the payment over to the

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administrators of Campbell: or at any rate, to the executors of Wise's estate or their representatives, who were liable to Wise's creditors.

Before I go into the arguments it will be proper to notice the leading facts proved or admitted in the case.

It appears that Maj. Wise was killed in the autumn 1779, and that Mr. J. J. Haig caused his will to be proved and qualified thereon as an executor, in December, 1779, and possessed himself of the real and personal estate.—That sometime in 1781, when the British military power occupied the lower part of the state, a Mr. Kingsley administered with the will annexed, on Maj. Wise's estate, in the board of police, a temporary tribunal erected by the British commanders. He went away with the British troops in 1782, and has never returned. What possession of the estate and effects of Maj. Wise he obtained, and how he disposed of them does not appear by any evidence. After the conclusion of the war, General Harrington, one of the executors, qualified on the will of Maj. Wise, and acted upon the estate. He afterwards removed to North Carolina, and is since dead, and his family and estate are in North Carolina.

It appears further, that Mr. Haig had a considerable, if not the chief management of the affairs of the estate of Maj. Wise, till his death in the year 1808; and that Mr. Joel Adams has acted upon his will as executor; and that Col. Cuthbert has latterly qualified as executor of Mr. Haig. Two other executors named in Mr. Haig's will have not qualified.



It also appears that Mr. Williamson, late sheriff of Richland district, sold a tract of land of the estate of Wise, under an execution, and has paid off that debt; and a surplus remains in his hands.

It also appears, that Miss Wise, the devisee and legatee of Maj. Wise, married a Mr. Ball; from whom she was afterwards separated by agreement in writing, bearing date in the year 1800. He went away and is said to have died.

There was some rumor of her having afterwards married a man of the name of But-

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ler; but it was not \*proved. She afterwards married a Mr. Campbell, and died in 1808, without having had any issue by any of her husbands, but one child, who died before her. Her husband Campbell survived her, but administration has been granted of her estate and effects to the complainant Mr. Clifton, by the consent of Campbell.

No evidence was given of the situation of the devisees and legatees, Samuel Wise and Thomas Boak;—but it would seem from the will that they were residents in England, and subjects of that government.

It seems that before Mrs. Campbell's death, she and her husband filed a bill against the executors of her father for an account and settlement of the estate; but the death of Mr. Haig, the principal acting executor put an end to the suit.

This cause has been well and fully argued, and the court has derived much light from the learned arguments of the counsel.

Various points have been made, which require consideration.

The first point was, that the complainant, the administrator of Mr. Campbell, had no interests in the estate in question, which could entitle him to come into this court, and call upon defendants for an account; for Mrs. Campbell, the daughter of Major Wise, had no rights under her father's will, which were transmissible; for as she died without leaving issue, the property bequeathed to her, went over in that event, to other devisees and legatees.

To this argument it was answered,

First,—That the limitation over was to aliens, who were incapable of holding estates, therefore the devise was void, and the estate devolved on the daughter and heiress of the testator, and her heirs and representatives.

Second,—That the limitation over was too remote and void, being made to depend upon an indefinite failure of issue: therefore, that the whole vested in Miss Wise as the first taker, and was transmissible to her representatives.

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\*Third,—That if both these grounds failed, the daughter was interested in a distinct legacy of 10,000*l.* currency, which was directed to be raised for particular purposes; which

interest was sufficient to entitle her or her representatives to require an account of the estate of her late father at least to that extent.

I have considered the arguments of the counsel, and the authorities they have cited, with the attention they have deserved.

It does appear that in point of fact the defendants are right in stating that the devisees in remainder on the contingency of Miss Wise dying without issue were aliens. The will speaks of them as residing in and being of England, and no evidence has been given to rebut the violent presumption that they are English subjects. I must, therefore take them to be so: and in that case, the law is clear, that an alien cannot hold lands in this country.

The question, whether English subjects though born before the declaration of independence, are not aliens and incapable of holding lands in this country, has been fully argued in several cases in the supreme court of the United States, and finally decided in the case of Dawson's lessee, v. Godfrey, reported in 4 Cranch, 321. This decision is obligatory on all the courts of the United States, and applies to the case under consideration. But it does not avail the complainant much in this cause, for this doctrine applies only to real estate, not to personal; and aliens can receive and hold personal estate in this country beyond all doubt. And as to the real estate, the alienage of the remainder man does not, in my opinion, benefit the complainant; for the rule is, that an alien may take but cannot hold real estate. He takes for the benefit of the sovereign, and the law of escheat would apply to it. Besides the administrator of Mrs. Campbell could not have availed himself of the real estate, if it had devolved on her. Her heir at law, and not her administrator, would represent her as to the real estate.

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\*With respect to the limitation over of real and personal estate, the question is, whether the same was not too remote, as being made to depend on an indefinite failure of issue, and therefore void as to the devisees and legatees, and the property absolutely vested in Miss Wise as first taker.

This is the most difficult subject in the whole circle of law questions. It is the *questio vexata*, which has embarrassed and entangled many of the most able lawyers. Every opinion upon it should be given with caution and diffidence.

The words of the will must be examined with attention. They are as follows:

The testator devised and bequeathed to his daughter Jane Ann Wise, all the rest and residue of his estate, real and personal, to her and the issue begotten of her body forever; but in case of death or failure of issue, in his said daughter Jane Ann, then, and in either of these cases, he devised and be-

queathed the same to his nephew Samuel Wise, and to Thomas Boak, his wife's brothers, to be equally divided between them.

It was insisted in this case, on the part of defendant, that the limitations over were good, and would take effect, on the dying of Mrs. Campbell without issue; as the words dying without issue, or failure of issue, *ex vi termini*, imported a dying without issue living at the time of the death of the first devisee, the daughter. I do not agree that the law is correctly stated.

The general rule seems to be, that wherever an executory devise as to real estate, is limited to take effect, after a dying without heirs or without issue, subject to no other restriction, the limitation is void; [Fearn on Devises, 116.] for the policy of the law will not suffer property to be tied up, and rendered inalienable in expectation of such remote contingencies.

And the like rule holds in the limitation of a term or personal estate, viz. that a disposition thereof, to take effect after failure of heirs of the body, or dying without issue, without other restrictions, is too remote. [Fearn, 144, 167.] For it seems to be

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perfectly settled with respect to terms for years, and other personal estates, (See 2 Atkins, 308, *Beauclerk v. Dormer*;) that whenever an estate in them, is limited to a person in such a way that the limitation if applied to freehold property, would create an estate tail, and a remainder is thereupon given after a general failure of issue or heirs of the body, the whole vests in the first taker, and the remainder is void. 1 P. Williams 132; 2 Atkins 376; 2 Vezey, 120; 1 Vez. 646; 5 Bro. P. C. 435; 6 Vezey, 159; 3 Bro. P. C. 257.

Yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail; because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended; and the limitation over then, not being a fee mounted on a fee is good.—Fearn on Devises, 179; *Cases Temp. Talbot* 1, *Tyte v. Willis*; 1 P. Wms. 23; 2 P. W. 369; 1 Vez. 89; 3 Atk. 617.

And though an executory devise to vest on a dying without issue generally, is not good because too remote, yet where the dying without issue is restrained to the period of a life (or lives,) in being, an executory devise limited thereon, will be good.—Fearn 182, *Duke of Norfolk's case*.

Indeed if there be any clause or restriction whereby it plainly appears that the words heirs of the body or issue, were intended as words of purchase—[2 Atkins 89; 1 Vez. 150, *Cases Talb.* 21; 2 Vez. 652; 2 Bro. 570:] Or if the dying without issue, is restrained to the death of the tenant for life, whereby the remainder over can take effect as an execu-

tory devise—[Fearn 186; 2 Atkins 642; 3 Atkins, 396; 2 Vezey 233; 2 Bro. C. C. 553:] in either case the words heirs of the body or issue, will operate as words of purchase, and the limitation over will be good. And the court of equity, in which it is in a great measure followed by the courts of law, seems willing to lay hold of any words in the will or other circumstances, which can tie up the generality of the expression of dying with-

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out issue, and confine it to \*dying without issue living at the time of the death of the tenant for life—Fearn 186; 1 P. Wms. 432, 534, 563, 663; 3 P. Wms. 258; 3 Atkins 282; 2 Vezey 121.—What those expressions of the will or circumstances are, which the court lays hold of, to authorize this construction, can only be seen by referring to the decided cases, and can scarcely be brought within the compass of any distinct rule. The words dying without leaving issue or children, have been construed without issue living at the death of the first devisee. So a devise to two, and if either of them should die without children, then to the survivor, has been construed dying without children then living, because the immediate limitation over was to the surviving devisee.

This inclination of the court however is chiefly in cases of personal estates. Fearn, 194, 5, 6; 200, 205. In cases of real estates, it seems the construction is generally otherwise, as is expressly stated in the text of that elaborate and profound investigator, Mr. Fearn, and in the notes of his learned editor, Mr. Powell. But certainly the reason given for it, to wit, to favor the heir at law, can have but little weight in this country, where the rights of primogeniture are entirely abolished. And I am the less inclined to support the distinction, as it led in England to the unseemly effect of giving a different construction to the same words, in the same will, as applicable to real or personal estate, (Fearn, 195. 1 P. Wms. 667. 3 Atk. 288. 2 Vez. 606. *Ib.* 180. *Ib.* 125. *Ambler*, 385. *Cowp.* 410.) unless where the testator so manifestly intended the two estates should go together, that they could not be separated, without violating the first rule for the construction of wills; that is, to give effect to the intention of the testator. 2 Vern. 324.

At one time, some of the decided cases had gone so far as to say that the expression, "dying without issue," would of itself, *ex vi termini*, imply a dying without issue living at the time of the person's decease, as has been contended by the counsel in this case. 1 P. Wms. 199, 432, 565, 748. But the modern cases deny such a construction of the words; and lord Hardwicke in *Beauclerk*

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\*and *Dorner*, expressly says that no authority came fully up to supporting the point contended for. 2 Atk. 331, 376. 2 Vez. 181. 1 Bro. 170, 188.

Much and various discussion and even



differences of opinion afterwards took place on this difficult subject, as will be perceived by a reference to Mr. Fearn's book on devises, p. 236, on to p. 258, 9. And it is exceedingly difficult, if not impossible to reconcile those opinions and decisions. In the course of that discussion, we perceive Lord Chief Justice Wilmut, stating in *Keily and Fowler*, p. 245, that the truth is, we are bound in the construction on the words, "heirs of the body," to an artificial and technical sense of those words, unless there is an apparent intention in the testator of using them in their natural meaning, and for that purpose, which is in favor of common sense, the most trifling circumstance is sufficient.

And the result of all the complicated cases is summed up by Mr. Fearn, p. 259, in these words, "that although in the limitation of a personal estate after a dying without issue, those words, "dying without issue," shall not *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate tail, by implication only; yet on the other hand, they shall not *ex vi termini*, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail; but that in either case, if the limitation rests solely upon the usual extent and import of those words, the limitation over is too remote and void; and the whole vests in the first devisee or legatee. But that in either case, the signification of these words may be confined to a dying without issue then living, by any clause or circumstance in the will, which can indicate or imply such intention."

See in support of this doctrine, the important case of *Sheppard v. Lessingham*, Ambler, p. 122. Fearn, 266, 7, 9. And the case of *Exel v. Wallace*, 2 Vez. 118, is very strong to shew that the court will always incline to

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\*support the limitation over, if it can be done without the violation of some plain and positive rule of law.

We come now to the application of these doctrines to the case under our consideration.

The words of the will do certainly shew that the testator coupled the rest and residue of his real and personal estate together, and intended they should go together. If the limitation over then is good, as to either, it will extend to both, in order to effect the testator's intention.

The earlier words of the will devising and bequeathing to the daughter, and the issue of her body, lawfully begotten, forever, do certainly give the impression at first, that the subsequent limitation is grafted on an indefinite failure of issue. But the subsequent words are obscure. They say, but in case of death, or failure of issue of my said daugh-

ter, then, and in either of these cases, I will, give, &c. the same to my nephews, Samuel Wise and Thomas Boak, to be equally divided.

After giving all the consideration I am able, to these words, it does not appear to me that we must, of necessity, take them to amount to an indefinite failure of issue, so as to render the limitation over void.

In one of the alternatives, which was certain, that of her death, it is a simple provision, that in such event, (without any provision as to issue) the limitation should take effect. But if these words should be rejected for their absurdity, or rather for their incompatibility, with the remaining provision of the will, still the limitation over being to two living persons, to be equally divided between them, seems to restrain the testator's meaning to his daughter's dying without issue, living at her death. And so the limitation would be good.

Upon the whole, I think it is discernible that the testator did not intend these limitations over should depend on an indefinite failure of issue. Consequently, the court is at liberty to pursue the leaning it always feels, to support and give effect to the limitations over.

I am bound then to say, that I think these limitations over good and effectual in the event which has happened, of Mrs. Camp-

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bell's dying without issue living at her death. Consequently, the administrator of Mrs. Campbell, will have no right to call the defendant to a general account for the administration of Major Wise's estate.

But it appears to me as Mrs. Campbell had a life estate in the real estate of her father, under his will, she and her representatives have a right to call upon the executors of Major Wise, for an account of the rents and profits of the real estate during her life, which it seems they held and occupied. Besides, she had an interest in the legacy of 10,000*l.* currency, which entitles her to come into this court for an account, though not a general one, of her father's estate.

She had a right to enquire, whether the 10,000*l.* was raised according to the will, how it has been applied, whether there is any surplus, and what part of it is coming to her according to the will.

It was objected to the claim to the whole or part of this legacy, that she was bound to shew that the money had been raised and applied according to the directions of the will, and that there was a surplus to which she was entitled. This is a most extraordinary objection. The will itself shews her interest; and it is for the executors and their representatives to shew that they have done their duty as they were directed by the will. She had a right to this account from them of their transactions, and the right survives to her administrator.

It was insisted that this is a stale claim, and should not be favored. But surely this is not an admissible doctrine in such a case. Here are executors many years in possession of a considerable real and personal estate, of which the only heir of the testator could reap little or no benefit, on the ground that the estate was oppressed with debts, which it is said are not yet finally settled. And when at the end of 30 years, the heir or her representatives, asks for a settlement, she is told, you come too late, though we have never been ready to settle with you before; and though we still say the debts are not all paid.

It is indeed an old claim, but it is not a stale claim in the legal sense of the term;

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nor would a greater lapse of time under such circumstances make a claim stale in this court.

It was further objected to the complainant's having any relief, that there are creditors of Major Wise, yet unsatisfied, who must be paid, before the legatee can derive any benefit from the estate. In other words, that she comes too soon with her claims.

It is obvious, that this objection is entirely at variance with the former objection, that Mrs. Campbell and her representatives came too late, and their claim was stale. As to the present objection, how much longer is she to wait, on the ground of debts unpaid? It is surely time for defendant to shew how the estate has been disposed of, what debts have been paid, and what remain unpaid, and why they are unpaid. The daughter and her representatives have a right to some account, and to have a time fixed for the settlement of the affairs of the estate, at least to the extent of her interests. When that account is rendered, the court will take care by its decree to protect the rights of bona fide creditors, remaining unpaid, before legacies are paid.

It was further insisted that the defendant was not bound to account to the present complainant, the administrator of Mrs. Campbell; because whatever her rights were, they went to her first husband, Mr. Ball, or to her second husband, Mr. Campbell, who survived her.

To this it was answered, and I think satisfactorily, that if she were ever actually married to Ball, she had separated from him by written agreement, in which he substantially, though informally, renounced all interest in her or her property. The ingenious counsel asked to whom, or for whose benefit was the renunciation? I answer, for the benefit of her who had an interest in such renunciation. Besides, if she was married to Ball, she survived him, and the demands she had on her father's estate under his will, were choses in action, which not having been reduced to possession by him, survived to her representatives.

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\*As to Campbell, it appears that he also separated himself from his wife. But if this did not affect his rights as surviving husband, it is expressly stated, and not denied, that this administration is taken out with his consent. Indeed it must have been with his consent, or by his permission, that Mr. Clifton obtained letters of administration. His opposition must have infallibly defeated the application of Mr. Clifton, in the Court of Ordinary.

Another objection was, that the complainant had not made all the proper parties to the suit. That Major Wise left other executors, who should have been made defendants, as they may have possessed the estate in whole or in part, and may have made settlements and payments, all which ought to be disclosed, particularly Gen. Harrington, who certainly did qualify, and act as executor.

It certainly is the rule of the court, to require that all persons who have any interest, should be parties to the suit, and ought to be made so before a definitive decree is pronounced. And it is a rule of much utility, as it prevents multiplied litigation. The court can decide better, and more effectually when all the parties, and all the rights are before it. But it is a rule of convenience, and not of absolute necessity; and if it were carried rigorously into effect, it would become the instrument of injustice. In this case, General Harrington has long since removed to North-Carolina, out of the jurisdiction of this court, and he is since dead, without any known representatives here. To turn a party round in the prosecution of a just claim, on the ground that persons so situated, must in all events be made parties, might defeat the claim altogether. Nor is it necessary in order to obtain information. For a decree pro confesso, would do no good to any of the parties litigating, as it would throw no light on the transactions of the estate, which is the professed object of requiring them to be made parties. Cui bono is all this resistance on this ground? It is not necessary to defend the other executor; for each executor is responsible for his own transactions and no more. So too of Boak, a person named executor then resident abroad, and whose resi-

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dence here at any time is equivocal, and no proof that he ever meddled with the estate, or where he is at present. As to the Blakes, their being devisees and legatees of Mr. Haig does make it necessary to make them parties. The executors represent the estate, and when Mr. Haig's debts are paid, they come in under his will. So too of Kingsley, who took out an illegal administration in an illegal court erected by a foreign enemy. A hundred cases have decided all those acts null and void. It does not appear to me absolutely necessary to the purposes of justice that any of



these parties or the unqualified executors of Mr. Haig should be made defendants. If it should appear to be so in the progress of the cause, the court can order it at any future stage. The case is different as to Col. Cuthbert, who has qualified on Mr. Haig's will; he is resident in the state, and may throw light on these transactions: He ought to be made a party.

One more objection still remains to be considered and disposed of. It is said that this bill is not filed for the recovery of a particular legacy, but for the residuary estate, and that there is no prayer for general relief in the bill of complainant; and that no decree can be given in favor of the complainant, except what comes distinctly within the case made and the prayer of the bill. It would be unfortunate for all parties, if this objection should prevail, as it would not be fatal to the claim, but merely turn the party round, to begin another suit at new expence, and with new delays.

The rule is best laid down in the case of Lord Walpole v. Lord Orford, 3 Vez. jr. 402, 416.

It is that where there is a case made by the bill, and a specific relief is prayed, and also a prayer for general relief, whatever latitude the court takes on the prayer for general relief, no relief can be given upon it, that is inconsistent with the specific relief prayed, and that does not apply to the case made by the bill. And the case is stronger where there is no general prayer for relief. In that case, the court will be confined more narrowly to the case made by the bill, and to the relief specifically prayed for.

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\*The brief the bill furnished me in this case is imperfect, and I fear the bill itself is so. Yet as it refers to the will generally, of which a copy is filed, and as it asks generally for an account, it might not be straining too much to say there is enough of the case before the court to enable it to order an account according to the rights of the parties. But as I shall be obliged in this case to order the addition of some parties to the bill, it will be safer at the same time to give leave to the complainant to file a supplemental bill, to bring the necessary matter in addition to the case made by the original bill, before the court, as is sometimes done, even after hearing the cause, where the complainant appears to be entitled to some relief, but the case made by the bill is insufficient to ground a complete decree. See 3 Atk. 133.

The result of all the foregoing, is, that I am of opinion the limitation over, under this will, is not too remote and void, but is unqualifiedly good as to the personal estate, and carries the property to the legatees, and the limitation is good as to the real estate, though the devisees being aliens, the land may escheat to the state. Therefore the

representatives of Mrs. Campbell have no right to call for a general account of the estate so devised and bequeathed over. But as she had a right to the rents and profits of the land during her lifetime, her representatives have a right to demand an account of them, from the executors, who occupied them as part of the estate. She also had a right to the surplus of the 10,000*l.* if not to the whole sum; and therefore her representatives may justly insist upon an account as to that fund.

That it is not necessary to make the representatives of Gen. Harrington or Thomas Boak parties, nor Zeph. Kingsley, nor the creditors of Major Wise, nor the Blakes, the devisees and legatees of Mr. Haig. But it is proper to make all the qualified executors of Mr. Haig defendants. And finally, that though possibly the court might decree on the case made by the bill, and the prayer, it is doubtful; and therefore it would be better, that the bill should be amended and made more specific in its charges as to the

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legacy of 10,000*l.*; and as to the \*rents and profits of the real estate during the life of Mrs. Campbell, and that a prayer for relief be adapted to the new case.

It is therefore ordered and decreed, that the complainant do make all the qualified executors of Mr. Haig defendants in this suit. And that the complainant have leave to file a supplemental bill, (or to amend his present bill, if the defendants counsel consent thereto) to bring before the court, in addition to the original bill, the charges respecting the 10,000*l.* legacy, and the rents and profits of the real estate, and such other matters as the complainant may consider essential to the full developement of his claims.

With respect to Mr. Williamson, there can be no difficulty. A surplus remains in his hands, which belongs to the estate of Wise. He can make no legal or safe disposition of this fund; neither the creditors nor legatees look to him for that estate. He is bound therefore to pay it over where it will be safe, and where it will be applied to its proper purposes.

It is therefore ordered and decreed, that the said C. Williamson, do pay over the nett balance remaining in his hands, from the sale of the land of the estate of Major Wise, to the commissioner of this court, subject to the future order and direction of the court.

From this decree an appeal was made by the complainant, on the following grounds:

His honor judge Desaussure will please take notice that the plaintiff will move the next Court of Appeals to reverse his honor's decree in this case, as it respects Charles Williamson, so far as relates to the limitation over, on the following grounds:

First,—That it is void, as being impossible or unlawful.

Second.—That it is an estate in fee vested in the child of Jane Ann Campbell.

Third,—That it is an estate tail general, and the limitation over too remote.

C. Clifton.

And an appeal was made by the defendant, Charles Williamson, on the following grounds:

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\*His honor, the presiding judge, will be pleased to take notice, that the defendant Charles Williamson, will move the next Appeal Court of Equity, to be held at Columbia, to reverse the decree in the above case, as it regards the defendant, Charles Williamson, on the following grounds:

First,—Because the said defendant ought not to pay the money in his hands to the commissioner of the court, he being no party to the suit, and not having made any prayer to that effect.

Second,—Because the court ought not to have ordered the officer of another court to pay money into the hands of an officer of this court.

Third,—Because the rights of the remainder man even if they had been British subjects, are good, particularly under the treaty of 1794.

A. Blanding, defendant's solicitor.

April, 1813.

These appeals came to a hearing before Chancellors James, Desaussure, Gaillard and Waties, who after argument delivered the following decree:

We are of opinion that the decrees given by the Circuit Court in these two cases should be affirmed for the reasons which are stated therein.

It is therefore ordered and adjudged that the said decrees be affirmed, and that the costs be paid out of the funds in the hands of C. Williamson.

W. JAMES,  
HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

February, 1815.

The sheriff, Charles Williamson, not having complied with the decree of the court, by paying over the money in his hands, and having left the state, and a return of nulla bona having been made to the execution, which was issued, the complainant in this cause applied to the Circuit Court, for leave to make the securities to the sheriff's bond, parties to the suit. Judge James, who then presided, gave the leave required, and the securities were made parties defendants to the suit.

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\*These defendants demurred, on the ground,

that the complainant had plain and adequate remedy at law on the sheriff's bond, against him and his securities; and on the ground, that the complainant came too late, after a decree, to seek to make new parties to his bill.

June, 1815.

The demurrer was argued before Judge Desaussure, who delivered the following decree:

Most of the points in this case have been disposed of in a former decree. The question now is on a demurrer. In the former decree it was ordered, that Charles Williamson, one of the defendants, who had been sheriff of Richland district, should pay over the nett balance remaining in his hands from the sale of the land of the estate of Maj. Wise to the commissioner of this court, to be held by him, subject to the future order and direction of this court: the balance remaining in his hands, being \$2,150. That decree has not been complied with, (though fi fa was issued, and nulla bona returned by the sheriff) Williamson having left the state. The complainant in order to get at the securities, asked leave of the Circuit Court, subsequent to the decree (and return of nulla bona) to amend his bill by making the securities of the sheriff in his bond, parties to the suit. The judge who presided here in February last, gave the permission requested, and the securities were made defendants. They have demurred and have assigned for cause of demurrer, that the complainant, if he has any cause against them, has a plain and adequate remedy at law. The demurrer had been argued, and the defendant's counsel insisted on the irregularity and incongruity of amending a bill to make new parties defendants after a decree against the original parties, the amendment stating that very decree as a ground of providing against the new defendants, and also that the regular and legal remedy for the complainant was by suit at law, on the bond given by the securities for the sheriff's faithful execution of his office. And the counsel relied on a case decided in Camden, and affirmed by the Court of Appeals as decisive of this question. He stated it to have been as follows: "It was a bill filed by Hoel and wife, administrators

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of W. Bond \*v. Clark, administrator of Carpenter, who had been administrator of Bond; and against Blanchard, security of Carpenter, in the administration bond he gave to the Ordinary for the estate of Bond. In that case, the Circuit Court made the administrator of Carpenter account for the money received by him as administrator, but the court sustained the demurrer filed on the part of Blanchard, the security, because there was plain and adequate remedy at law by suit on the administration bond." I do not feel



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## Case LII.

Laurens, Washington District.—Heard before  
Chancellor James.

WM. RUTHERFORD v. JOHN HENRY  
RUFF.

(June 1812.)

[Contracts ⇐96.]

A deed executed on the day of his marriage, by a man of extremely weak intellects, and habitual drunkenness, conveying his real estate to his brother, who is a man of good understanding, for love and affection, without any reservation for himself and family, must have been founded on a secret confidence and trust between the brothers; and the court will raise a trust; and will not permit the deed to take effect as an absolute conveyance. So too a bill of sale of the personal property of the said grantor, after marriage, to his brother, for a large nominal sum, which was never paid, nor intended to be paid, but had other considerations stated in another paper, of far less value than the property, must be considered as confidential; and the court will raise a trust for the benefit of the wife and other representatives of the deceased weak brother. Though there was no positive proof of fraud, and though the weak man said sometimes he was satisfied with the deed, his extreme imbecility, increased by intoxication, to which his brother in some measure contributed, and the want of real and proper considerations, must defeat the deeds.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1169; Dec. Dig. ⇐96.]

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\*The bill states that in the year 1811, George Ruff died intestate and without issue, leaving a widow Nelly Ruff, a mother, sisters and brother.

That George Ruff during his marriage with the said Nelly, was seized of a valuable tract of land and ten negroes.

That the said G. Ruff, in his life time, from natural infirmities, to wit, fits encreased by almost continual intoxication, was deemed incapable of managing his estate.

That the said George Ruff inherited the whole or the greatest part of his estate from his deceased father.

That the father of the said George Ruff knowing the incapacity of the said George, while on his death bed requested the complainant William Rutherford and the defendant to guard and protect the interest of the said George.

That the defendant John H. Ruff, obtained from the intestate George Ruff, on the morning of his marriage with the said Nelly, a deed of gift for his real estate.

The said George being at the time of executing the said deed under a belief that the same was only a deed of trust, and understanding in a short time afterwards that it was an absolute conveyance, interrogated the defendant concerning the fraud practised on him; and the defendant in order to satisfy the said George, promised to execute an instrument of writing, which should be de-

it incumbent on me to give a decided opinion on the first ground of objection. If the defendant had been dissatisfied with the order of the circuit judge authorizing the amendment, he should have appealed from it; and if it was not a proper subject of appeal, as being a mere interlocutory order, I should not reverse that order now, without very decisive reasons for it. The court has gone great lengths in permitting amendments to prevent the necessity of new suits. In some cases, even after hearing a cause, the court has given leave to file a supplemental bill, to bring some matters before the court, which appeared to be necessary to a complete decree. 3 Atk. 133. And where the amendment necessary is merely the addition of parties, the court has usually made orders for the cause to stand over, with liberty to the plaintiff to amend the bill by adding proper parties. 2 Bro. P. C. 194. Cooper's Pleadings, 344, 5. I do not find however, that the court ever went so far as to allow the addition of parties after a full decree. I will however leave this question as I found it decided, as it does not affect the question of the demurrer, with a request that the point be carried up with the decision on the demurrer, if that should be appealed from. On the demurrer, I should perhaps have hesitated, especially as here the bill is against the administrators of the securities in the administration bond, to oblige them to account, and would certainly save circuity of actions; but the case cited as decided at Camden and affirmed by the Court of Appeals, seems to be applicable and conclusive. Let the demurrer be sustained.

From this decree, the complainant appealed on the following grounds:

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\*First,—The case of Hoel and wife was governed by the act which saves securities from all suits until nulla bona or fi fa against sheriff is returned, which was not done in that case, and which was done in this case.

Second,—Because Williamson was in contempt of the decree and process of this court, holding money for which creditors were waiting at the threshold of this court, and among whom it was the duty of this court to cause the money to be paid; and in fact, the court by its decree had appropriated a part of the money ascertained to be in the hands of said Williamson.

Third,—Because, with this decree standing, it is impossible to recover at law on the sheriff's bond.

C. Clifton, for appellants.

November, 1815.

The appeal was heard by the court, present Chancellors Desaussure, Waties, James and Thompson, and the court affirmed the decree of the Circuit Court.

claratory of the intention for which said deed was obtained; and which should have the effect of a reconveyance of the said real estate to the said George.

That the defendant also on the first day of October 1808, obtained from the said George a bill of sale of all his personal property, purporting it to be for a valuable consideration, and by virtue of the said bill of sale and deed of gift, the defendant took into his possession his whole real and personal estate, and continued to keep the same in his possession, and has enjoyed all the profits and advantages arising therefrom. That the defendant after the death of the said George, obtained from his said widow a receipt of full satisfaction, of the said real and personal property, for the sum of \$100.

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\*The bill prays that the defendant may be decreed to come to a fair and just account of the said estate, both real and personal, and account for the hire, rents and profits of the same, both before and since the death of the said George.

The defendant in his answer admits that the said George died intestate and without issue, as stated, and that the persons named in the bill are the relations of said George as stated.

He further admits that the said George in his life time, did own the property as stated, but not at the time of his death.

He further admits that the said George did on the morning of his marriage with the said Nelly, make a deed of gift of his real estate to the defendant as stated: But denies that the said George understood it as a deed of trust; but insists that he knew it to be a full and absolute deed.

He further admits that the said George, about the time stated in the bill, did give to the defendant a bill of sale of the negroes and other property, as mentioned in the bill.

The defendant states that at the time the bill of sale was executed, the said George was indebted to him between six and eight hundred dollars, and on the same day this defendant gave to the said George his bond in the penal sum of two thousand dollars, to pay to him the said George the sum of one hundred and fifty dollars annually, during life, and to build for the said George a good dwelling house and out houses, and to let him have two of the said negroes, Stephen and Molly, during life, all of which the defendant faithfully performed to the satisfaction of the said George.

He further admits that the said George was subject to intoxication, and when so was imprudent in his contracts, but when sober was capable of managing his own business.

The defendant denies that his father ever called upon him or the complainant, William

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Rutherford, in his \*hearing, to take care of

the said George and prevent him from spending his estate.

The defendant admits that in a short time after the said George had executed the deed of gift for his real estate to the defendant, the said George called on him and told him the complainant William Rutherford, had told him, that he, the defendant, could at any time dispossess him of the land, and appeared dissatisfied, upon which the defendant assured the said George, that he should continue to live and enjoy the said land during his life—that he the defendant did give the said George a deed conveying the said land to the said George during life.

He denies that he ever did give or promise to give any instrument of writing declaring the deed of gift to be a deed of trust.

He further admits that he did take into possession the property as stated, except two negroes, which remained in the possession of the said George during his life, and after his death, he also took them into possession.

He denies that he ever obtained any relinquishment from the said Nelly after the death of the said George, or any other time, or ever applied to her for any.

The cause came to a hearing before Chancellor James.

Christian Ruff, a witness produced on the part of the complainants, proved, that he was acquainted with George Ruff, being raised by the defendant: he was present when George executed the deed of gift for the land to the defendant, and witnessed the deed; heard the deed read to George;—that George knew what he was doing and intended to give the land to defendant absolutely; he signed it freely and voluntarily, and at the time wished his brother to have it;—that the deed was executed early in the morning, and George sober, as he had drank nothing that morning. That George drank hard; sometimes had a quart a day; and was at times intoxicated at the defendant's house: That George came to the house of the defendant and executed the deed. That George, about a year before he executed the deed to

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defendant, \*wished to convey his property to the witness to take care of it for him, defendant told witness not to take it.

On being cross-examined, he proved, that George had no other brother living at the time he executed the deed;—that the deed was read correctly to George; and had heard George say often he had given the land to the defendant, and wished him to have it, and no other person; and ever afterwards said the land was the defendant's, and when sober, always expressed himself satisfied.

J. Clary was next sworn on the part of the complainants, who proved that he signed the deed as a witness, and saw George sign it;—That he was generally intoxicated; saw him drink that morning;—that the defendant read the deed to George—that he



had not seen George sober for several months—that the defendant stated to the witness that George was about to marry into a family that might take the advantage of him—the deed was drawn and signed on the morning of George's marriage. That defendant had great influence over George. Had seen George get a quart a day or more—he was frequently intoxicated at the defendant's house, and always carried liquor with him. That George was a weak man at best. That in a few days after George came and requested the defendant to give him back the deed, which the defendant refused to do. That defendant said his father had requested him to take care of George, as he was unable to take care of himself, and understood by the defendant that he had taken the deed to secure the land for George.

John Ruff, was next examined, and proved, that after the deed was executed he was at the defendant's house, when the defendant shewed him the deed;—defendant said he would secure George: George told defendant he could not too soon, as life was uncertain.—That old Mr. Ruff before his death sent for the witness, and requested him to take care of George.

John Hopkins was next sworn, and proved, that the defendant said if George should have any children, he would convey the land to the children.

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\*On being cross examined said, George was sometimes drunk and sometimes cold sober, and when sober could manage his business well enough.

Mr. Swaggart was next sworn, and proved that he knew George, but not until sometime after his marriage; did not think him capable of managing his business; knew him to get as much as a quart a day, and if ever he saw him sober he did not know it. That defendant said, if ever George had any children they should be no losers by the deed: Defendant said George was incapable of managing his business; and any person could see it, who would converse with him.

On being cross examined, said, he had heard the defendant refuse George liquor, and endeavor to prevent his drinking, but that George could not be kept from it, if he could possibly get it.

Mrs. Carr was next sworn, and said, she knew George a year before he was married, he was very subject to intoxication, frequently saw him drunk at defendant's house—was weak and easily imposed on—subject to fits, saw him have several in a night.

On being cross examined, said, he was not so subject to intoxication before as after his marriage.

H. Shepherd was next sworn, and proved he was present when Mrs. Ruff the wife of the deceased George Ruff, signed a receipt to the defendant, and witnessed the receipt. The defendant told her he would make her a compliment of one hundred dollars, and if

she would not settle that day, he would not settle with her. Defendant gave her a horse, saddle and bridle, a suit of clothes, a note for \$100, and a note for \$47, and she signed the receipt.

H. Winnkhouse was next sworn, and proved that he was also present when Mrs. Ruff signed the receipt to the defendant. Defendant said he would make a present if she would take it, but perhaps he might change his mind. At first she appeared unwilling to take it and sign the receipt, but afterwards appeared willing and did sign the receipt.

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\*Major Nance was next sworn, and proved that the defendant and George came to the court house together; the defendant stated to the witness that he wished to take a deed or bill of sale of his property to secure it, and requested him to draw it.—The witness referred them to Mr. M'Kibbon.

Young J. Harrington being sworn, proved that the defendant said, George was subject to intoxication, and was easily imposed on; told the witness he wished to take a deed, bill of sale or conveyance to secure his property.

James M'Kibbon being sworn, proved, that the defendant applied to him to draw a bill of sale—Thinks that he did draw one.

On his cross examination a bond was produced to him from defendant to George, he proved that he filled up the bond in part.

Mrs. Ruff was then produced on the part of defendant, and proved she was the mother of defendant and George; that Geo. when sober was capable of conducting his own business; but not when drunk. That George lived a miserable life with his wife until his death; they parted twice; she left him each time.—George always said he would fix her. Always said he wished the defendant to have the whole of his property. That George was sober the morning he was married. After the conveyances were made, George always said both the land and personal estate belonged to the defendant—said so on his death bed. That she advised the defendant to take a conveyance of the property; that George lived with her until his marriage, and after his separation from his wife, he lived with the witness and died at her house.

Mrs. Rane was next produced, and proved, that she saw George the morning of his marriage. Thought he was sober. George often told her he lived a miserable life with his wife. That she saw him after his return from the defendant's house, when he executed the deed of gift for the land, and believed him to be sober.

Libi Agner was next produced, and proved, that she saw George on the morning of his

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marriage, and after his return from the defendant's house; that she thought he was sober. That George told her he lived a miserable life with his wife;—that he had given his property to the defendant who was to

take care of him. Often repeated, when sober, and said he was well satisfied.

Mrs. Selster was next produced, and proved, she saw George at his mother's after his return from the defendant's house on the morning of his marriage. That George was sober. Heard George say frequently, he wanted his brother, the defendant, to have his property, and no other person. That she knew he lived unhappily with his wife.

On being cross examined, she said, the said land was conveyed on the morning of his marriage. That she went to school with George, and he learned tolerably well.

Mr. Selster was next sworn and proved, that he heard George often say, he wished the defendant to have his property and no other person—a few days before he was taken sick, told the witness, he lived miserably with his wife.

John Riley was next sworn, and proved, that he was in company with defendant in 1807. That George told the defendant he was persuaded by William Rutherford to sue him. That George was duly sober, and told defendant he wished him to enjoy his property, and no other person.

Major Cannon was next sworn, and proved, that he was present when George executed the bill of sale to the defendant, and witnessed it;—that George was sober at the time. That the defendant signed a bond to George at the same time: it was delivered to Mrs. Ruff. That it appeared to him to be a fair and honest contract, entered into by them. That he saw George the same day deliver the property to the defendant, pursuant to the bill of sale. That the defendant continued in the possession of the property ever after the delivery. That the defendant built the house and out-houses, agreeably to contract, on his own land, and removed George from the land he had conveyed to the defendant.

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to the house built \*for him, where George lived until he was taken sick; he then went to his mother's, where he died. That he wrote a letter for George at his request, which he delivered to Mr. Farrow, directing Mr. Farrow to drop the action against defendant.

Mr. Coon was next sworn, and proved, he was present and saw George sign the bill of sale to defendant of the personal property, and subscribed as a witness.—That George was sober at the time—that defendant would not let him have any thing to drink, lest people should say he was drunk.

The complainant then called Mr. Farrow in reply, who stated, that George, in company with William Rutherford, called on him, and employed him to bring an action against the defendant, in the court of equity, to set aside the deed for the land; that afterwards he received a letter from George by Major Cannon, informing him that he had settled with defendant, and requested him to proceed no further in the action. That after-

wards the defendant paid him his fee for his trouble.

After argument, chancellor JAMES pronounced the following decree:

Nelly Ruff, the widow of George Ruff, deceased, who died intestate, and the other legal representatives of George Ruff, have brought this action against John H. Ruff, to set aside a deed of gift of his real, and a bill of sale of his personal estate, on the ground that the first was a secret trust, and that both instruments were obtained by fraud.

The defendant, John H. Ruff, denies by his answer both the trust and the fraud: and states that the first deed was made by his brother George to him, upon condition of love and affection; and the second upon consideration of his being indebted to him, and for value otherwise received of him.

A great number of witnesses have been examined on both sides, the whole of whose testimony it would be needless to repeat; but the leading circumstances of the case appear to be as follows:

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\*George Ruff the elder, father of George Ruff, the intestate, being sensible of the weakness of his son's mind, upon his death bed recommended him to the care of his brother, the defendant, and left to him the property in question, amounting to a valuable tract of land, and about eight slaves. John H. Ruff, as appears, assumed the charge recommended by his father. From his childhood, the intestate George, seems to have been given to intoxication, and was weak in his intellects. But about a year before his marriage with Nelly the complainant, he had given himself up so much to this vice, that he kept spirits by his bed at night, and was seldom sober: He drank chiefly at his brother's house, who was under agreement to give him a pint a day, but often gave him a quart: The excuse for this, was, he could not keep him from strong drink, and if he did not give him strong liquor, that George would go elsewhere for it, when he might be imposed on. All the witnesses seem to admit, the defendant had great influence over George, and two of them believed he could induce him to do any thing for whiskey.

That George being about to marry the complainant Nelly, his own family, and especially his mother, were much against the match; and the defendant was heard to say, that he was about to marry into a family who would take advantage of his weakness, and therefore his property must be secured. On the morning of his intended marriage, the deed of gift of the lands was prepared by defendant, and executed by George. There was a diversity of opinion, whether he was drunk or sober, at the time the deed was made. Several witnesses thought him sober; but one swore positively, he had not been right sober for several months before, and that he



had been drinking that morning. This man, James Clary, lived in the house, and witnessed the deed: but the other witness to it, thought George sober. One other witness J. Swaggart, also lived at the house of the defendant, said he could not say he ever saw George sober; Mrs. Carr said he was seldom sober. George afterwards, at times, expressed his disapprobation of the deed of

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gift; but this \*was chiefly when drunk: and when sober he wished his brother to have the land. That John Ruff, an executor of George Ruff the elder, called at the defendant's house two or three weeks after the marriage of George, read part of the deed; and he told defendant he had done wrong, that he ought to commit something to writing to secure George and his children, and defendant said he would fix it; and that defendant afterwards told two of the witnesses, if George had children, he would give them the land. So far as to the deed of gift, which is an absolute conveyance. That the bill of sale of his negroes and other personal property, was obtained from him after marriage, and the consideration expressed is two thousand four hundred dollars. But the defendant made it out, that the real consideration is expressed in the condition of the bond made to accompany it, and delivered to one of the subscribing witnesses (Mr. Cannon) for George. The penalty of the bond is two thousand dollars, the condition is to pay one hundred and fifty dollars annually during the life of George, to build him a house and out houses, and to give him during life two of the negroes named in the bill of sale, and land to plant. It was also said that George was indebted to defendant by book account. But the books were not proven. All the witnesses agreed, that after marriage George became more beastly drunken than before, and his brother principally supplied whiskey for his debauches. It was proved that he and his wife lived miserably together, and that he said she should not have any of his property at his death, but that his brother should have it all. By the evidence of two witnesses, it appeared that the first intention of the bill of sale was to secure George from imposition, but by some means not accounted for, that intention was changed. The bill of sale was drawn by Mr. Cannon for the whole of George's personal property, except household furniture and other small matters, and the bond was executed by defendant, and delivered to Mr. Cannon for George, and was intended as a kind of counterpart to the bill of sale.

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\*Mr. Cannon and Mr. Coon, the subscribing witnesses, think that George was sober when he executed the bill of sale. The bill of sale was read to him, and he was satisfied

with it then, and always afterwards, except when drunk. But it appeared from other testimony, that through the influence of the complainant, Rutherford, George once intended a suit to recover back the property, but through the superior influence of defendant, was induced again to drop it. It was also proved that the defendant was put in possession of all the property, lands and negroes, by George, and that the defendant supplied him annually with one hundred and fifty dollars, not in cash, but the value thereof, which is not mentioned. It further appears from the evidence, that the defendant, after the death of George, obtained from his widow, Nelly, a receipt purporting to be her renunciation of all rights to the estate of George; the witnesses to which, one of whom is a Clergyman, both seem to think and express an opinion that the transaction was very fair. The true statement of the case is this, the defendant thinking himself secure against her by the former instrument of writing, told her he would, if she would sign the receipt, make a compliment, or present of one hundred dollars, which she might either take or not, and if she would not, the property was his, and she should have nothing. The complainant, Nelly, supposing herself in the power of the defendant, was induced to sign this receipt. There were two witnesses to it, neither saw any money paid, but defendant gave her a suit of clothes, a horse, saddle and bridle, and a note for about forty-seven dollars. This receipt, as well as all the other papers, was executed before two witnesses, and every matter respecting them appeared quite complete. The defendant's counsel from some cause mentioned to the court, disclaimed all right under the receipt, and appeared to treat it very slightly.

Having now stated the principal facts, the court will consider only, whether the instruments of writing are fraudulent; because if they are so, the trust will be presumed.

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\*Defendant's character is said to stand high, and his witnesses are said to be respectable, but there are certain circumstances attending this case, which I cannot get over, and which this court will never encourage. George was a very weak man, intrusted by his father to the care of defendant, who is a shrewd man in business. Under these circumstances he has obtained possession of all the property of George. He has thus obtained it at an inadequate price; and having the care of George, he has furnished him abundantly with the means of intoxication in his own house. I will endeavour to state what is the law arising under these circumstances, when either of them is made to appear to the court. I have said this is the case of a weak man under the care of a knowing one. The authorities on

this head are numerous and much against the defendant. I will refer at present to the case of *Osmond v. Fitzroy, et al.* (3 P. Wm. 129), in commenting upon which, Powell in his *Contracts*, has laid down the following general rule: "If there be any fraud in obtaining a bond from a weak man, or the transaction be attended with circumstances, that warrant suspicion, that the party binding himself has been practised upon by imposition, then a Court of Equity will furnish relief."

Two of the witnesses said George would do any thing for liquor, and all of them admit, he was much under the influence of the defendant. These are the circumstances which warrant the suspicion of imposition; and while these stand in the way, I do not regard the opinion of witnesses, when expressed to me as such. It is for facts alone which I wish for from them; nor have the sayings of George any more weight, for he was naturally a weak man, and that weakness was rendered more so by intoxication. But further, the consideration for these instruments of writing was inadequate. That of the deed of gift for the lands was love and affection, which might have done very well, if George had not intended that morning to place himself under new relations and new obligations by contracting a marriage.

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\*In passing, I will just observe this circumstance shews a deplorable weakness. The condition expressed in the bill of sale, is two thousand four hundred dollars, which would be sufficient, if such a sum had actually been paid; but a bond is produced, which is said to contain the real consideration, and that is conditioned for only one hundred and fifty dollars, to be paid annually to George during life, and to build him a good house and out houses also; also to give him one negro boy Stephen, and negro woman Molly, which were his own, and land to plant during life. Every one must see that the sum of one hundred and fifty dollars during such a life as that of George, was grossly inadequate to the value of eight slaves and three horses, contained in the bill of sale; yet this was all proved to have been paid, and that not in cash, but in supplies, the nature of which was not stated. There is indeed no evidence of the value of the houses built. But defendant, whatever they were, erected them on his own land, and George had only the use of them during life.

In the answer, George was said to be largely indebted to the defendant, which was a further consideration for the bill of sale; but on the hearing, this was said to be on book account, and the books were not proved. Complainant's counsel said, the debt was chiefly for whiskey; and still no offer was made to produce the books.

Upon the whole, I am quite dissatisfied

with patch work. The doctrine laid down in *Powell*, relative to inadequacy of price, will certainly apply to it. That the inadequacy of price considered abstractly as such, is not a ground for setting aside a contract. I mean the light furnishing self-evident demonstration from the intrinsic nature and subject of the bargain itself of fraud. Lord *Thurlow* observes upon the case of *Heathcote and Paignon*, that where there is such inadequacy as to evince that the person did not understand the bargain he made, that will amount to fraud. This contract was quite of a complicated nature, contained in two instruments of writing, and embracing

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within its scope, the doctrine of an annuity. Now I appeal to the samples which we have already had of the understanding of George, whether it can possibly be believed that he understood this bargain when made.

But we come now to the third circumstance in this case, with which I am more dissatisfied than with any other. This is, that the defendant having the care of George, furnished him in his own house abundantly with the means of intoxication. To avoid repetition, I have not applied this fact to the grounds of weakness of mind and inadequacy of price; but it is now evidently a suspicious circumstance. It will have application to both. The law in such cases is well settled. That if drunkenness be of a man's own procuring, it is not, in law, of itself a ground to rescind a contract or agreement; but if the party from whom such contract or agreement has been gained, were drawn into such a debauch by the management or contrivance of him who gained the contract or agreement, and was in such a state as to be utterly deprived of his reason and understanding, then equity will relieve. The authority cited, appears to allude to a particular case of drunkenness; but the case in question instead of being weakened, will be strengthened when it is proved that the means furnished for intoxication and debauch, were not for one sitting only, but were continually repeated. I refer back to the evidence for this fact. The single instance of his being enabled to keep whiskey by him all night is conclusive. Now his brother furnished the means of his intemperance, and that in his own house. It is no excuse that he could have procured it elsewhere, where he might be imposed on. The defendant at least ought to have washed his hands clean of it. The facts speak for themselves.

I shall add no comments concerning the receipt or release of all rights from the widow *Nelly*. Little need to be said, except that it casts a suspicion on the other transaction connected with it. It is the case of a man who thought he had a weak woman in his power, and who for want of knowing better,



believed he had so. And under these circumstances, it comes fully up, nay \*indeed it is stronger than Heathcote and Paignon, decided by the Master of the Rolls, and sustained by lord Thurlow as Chancellor; and yet the witnesses thought this a fair transaction.

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Upon the whole, therefore, relying upon the circumstances of the weakness of the intestate, while under the care of the defendant, the inadequacy of the consideration, the continual drunkenness of the intestate, induced by the defendant, and also upon the release last mentioned under its circumstances, I am of opinion that the deed of gift, the bill of sale, and the release, ought to be set aside as fraudulent.

Wherefore it is decreed, that the defendant be considered as holding the property of George Ruff, the intestate, in trust, for the complainants, as his legal representatives, for distribution. That the defendant do account to the commissioner for the rents and profits of the estate, real and personal. That he be allowed his proportion of the estate, and that he do pay the costs of the suit.

(Signed) W. D. James.

The defendant gave notice, that he would move the Court of Appeals to reverse the decree, upon the following ground:

First,—That the decree was contrary to law and evidence.

And should he not succeed in reversing the decree, he will move for a re-hearing upon the following ground:

That on the trial, the defendant had his books of account in court, ready to prove the amount which was due him by the intestate, George Ruff, at the time of executing the bill of sale for the personal property, and was prevented from doing so, by the judge stating it to be unnecessary.

S. Farrow, defendant's solicitor.

December, 1812.

The appeal was argued, and a majority of the judges, Gaillard, Desaussure and James, delivered the following judgment, in affirmation of the decree of the Circuit Court:

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\*There can be no doubt, as to the first deed, it is void. George Ruff intending to marry in the evening, conveyed in the morning of the same day, for love and affection, his real estate to his brother. I do not believe he was drunk when he executed this deed, but from many parts of the evidence it is clear there was an understanding between him and his brother, and that the deed was accompanied with a secret trust. A like trust appears also to have attended the bill of sale of the negroes.—George had married in a family disagreeable to his friends—was a very weak man—in the habit of intoxication

—and easily imposed upon. The deeds were made with a view to his benefit, to secure the property to him. If he had had children, the defendant would probably have given up the property to them: he said that he would. George Ruff at different times, and on his death bed, said, that he intended his brother should have his property. If he had made a will, it is probable he would have given it to him; but he died intestate. His declarations on many occasions, and on his death bed, that he intended his brother should have his property, have been much relied on. This shews his affection for his brother, and it does not appear that he was not deserving of it; but they cannot alter the nature of the original transaction respecting his property. If it were parted with, subject to a trust for George, his legal representatives are entitled to the benefit of it. I am therefore, for affirming the decree of the Circuit Court. (Signed.) THEODORE GAILLARD, Jun.

I concur in the above opinion.

HENRY W. DESAUSSURE.

Upon a reconsideration of the above case, I continue of the same opinion which I entertained upon the circuit. There are, indeed, several unpleasant facts stated in the decree, but they are neither of my procuring or invention. They were sworn to, positively, by three witnesses, and were denied by none in as positive and unequivocal a manner as they were stated. These facts are as stubborn as

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they must have been unpleasant \*to the defendant. But I have made no applications of them to his character; I have only deduced a legal conclusion from them, which I conceived it my duty to do: and in this point of view, I apprehend they ought not to be extenuated. As to the conveyance of the lands, all seem to be agreed that it was obtained under circumstances which operate so strongly against it that it cannot stand. And as to the release, defendant's counsel early saw that it could not be supported. There are circumstances of themselves, unconnected with the inadequacy of price, which cast a suspicion on the bill of sale of the negroes; but when they became connected with it, are in my mind imperious. Little stress was laid upon the testimony of the mother, because I thought it could not alter what was already fundamentally wrong. The case of wills cannot apply, seeing the declarations of George upon his death bed could not amount to a disposition. The evidence of Mr. Nantz and Mr. Harrington, shews that a trust was originally intended, and as I have stated in the decree, it is not satisfactorily accounted for, why the original intention was changed. I was at first inclined to consider the whole transaction a secret trust, but all the circumstances of the case combined, convince me it was a secret trust combined with some-

thing more; for the moment defendant withheld the property from its true destination as a trust, there he was guilty of a breach of it, and the fraud commenced. However, as two of my brethern are inclined to consider the transaction throughout as a secret trust, in order to meet the justice of the case so far as I am able, at present, I shall agree with them.

(Signed)

W. D. JAMES.

Judges Thompson and Waties, delivered the following opinion for reversing the decree of the Circuit Court:

In taking this case into consideration, we cannot view it in such high colours of fraud as contemplated in the decree of the Circuit Court. With regard to the deed of conveyance for the land, we consider it to have

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\*been predicated on a disposition in John H. Ruff, the defendant, to secure it from descending to the wife of George Ruff, with an intention to reconvey to the issue of the said George, in the event of his having any. We therefore think that the transaction was combined with a secret trust, and the deed should be set aside. As to the bills of sale of the personal property, we view it as a separate and distinct act, entered into with the double object of securing the property to the defendant, who from the uniform conduct, or rather declarations of Geo. Ruff, was the peculiar object of his bounty, as well as to render a benevolent deed to the unfortunate brother, by securing to him a competency during life.

In the whole of this transaction there appears to be nothing unfair. The bill of sale on the face of it, imports no intrinsic evidence of fraud; and there is no extrinsic evidence to justify the court in putting so harsh a construction on it. Indeed the testimony of Maj. Cannon and Mr. Coon, both respectable men, who subscribed the instrument as witnesses, is conclusive as to its fairness. We also place very great reliance on the evidence of Mrs. Ruff, the mother. We cannot think so unfavorably of human nature, as to suppose that the mother would form a combination with a son possessing a vigorous mind, to defraud one of weak intellectual faculties, of his whole estate: and it appears to the court that she advised George to enter into this contract. Upon the whole, we see nothing in this case which would justify the court in setting aside this contract: and we are of opinion that the decree should be reversed, so far as it relates to the bill of sale of the negroes.

W. THOMPSON,  
THOS. WATIES.

Creswell, Farrow and W. Crenshaw, for the appellants.

Caldwell, Starke and A. Crenshaw for the respondents.

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\*Case LIII.

Beaufort District.—Heard by Chancellor James. CHRISTOPHER JENKINS et al. v. SAMUEL FICKLING, Executor of C.

Jenkins.

(February, 1813.)

[*Executors and Administrators* ⇨500.]

Commissions not allowed to an executor, unless he settles his accounts annually with the ordinary according to law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2134; Dec. Dig. ⇨500.]

[*Executors and Administrators* ⇨104.]

Executors having balances in their hands for several years, and not investing these balances in productive property, for the estate, are chargeable with interest.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 424; Dec. Dig. ⇨104.]

[*Executors and Administrators* ⇨497.]

Executors not entitled to charge for overlooking or superintending the estate, when they entitle themselves to and actually draw commissions. Where the commissions are not drawn, the charge of overlooking allowed in some cases.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2118; Dec. Dig. ⇨497.]

This cause came to a hearing upon the report of the commissioner and exceptions of the defendant.

First exception abandoned.

Second,—That the report does not allow commissions to the defendant.

It appears upon the report that the defendant settled with the ordinary, up to the 12th day of February 1805, and the ordinary passed his accounts on the 2d day of May 1806, on which settlement commissions are allowed by the court, the same not being disputed by complainant's solicitor: For although such accounts were not rendered, at the end of the year strictly, according to the words of the act of 1789, for granting probates of wills and letters of administration, yet they were settled in a reasonable time. But from the 2d day of May 1806, until the 12th day of June 1812, the defendant has not accounted with the ordinary, and on these accounts, the court will allow no commissions, (except on the last year, 1811, rendered on the 12th day of June, 1812, at a time not very late,) because the act above mentioned appears to be positive upon that head. If there had been a neglect only of a few months, it is thought that such a short period of neglect may be passed over; but where more than six years have elapsed, it is conceived that such an omission is not to be tolerated.

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\*Third,—The report does not decide, whether defendant as executor is to be charged with interest.

But the court can do so. Executors are



much favored in equity, where they act well, and even where there is a slight default in paying up monies, it is seldom rigorous; but where an executor has kept monies in his hands for near seven years, (from Jan. 1806, until June 1812,) as the present one has done, without investing them in productive property, as directed by the will, he is not entitled to favor. I am clearly of opinion, that he ought to pay interest for the use of these monies. So that this exception is overruled.

Fourth,—The defendant's solicitors were not summoned to appear before the commissioner. But it appears that the solicitor on record was summoned, which is sufficient. So this exception is overruled.

In this case another point was made at the hearing, which I do not see in the exceptions. The executor has charged \$300 per year for the two last years of his executorship for overlooking in his capacity as executor; no overseer being actually hired. Is he to be allowed such charges? For the first of these two years, the court will allow him the charge, because his commissions for that year were struck out; but for the last of these years, in which he has been granted commissions, the court will not also give him overseer's wages: Because, unless an executor has actually hired an overseer, commissions and overseer's wages ought not both to be passed to his account. So that the commissioners report stands confirmed, as far as above stated. And as the defendant appears to be considerably in default in this case, let him pay the costs of this suit.

(Signed) W. D. JAMES.

There was no appeal from this decree.

#### 4 Desaus. \*371

\*Case LIV.

Beaufort.—Heard by Chancellor James.

BUCKNER, Administrator of Foster, v.  
SMYTH et al.

(February, 1813.)

[*Husband and Wife* ⚭18.]

The husband is not liable for the debts of the wife, contracted *dum sola*, unless judgment be obtained against him during the coverture; even though he receives an estate by her. And the interest of the husband in the settled estate during life, he being the survivor, is no more liable to the debts of the wife, *dum sola*, than any other property of the husband.

[Ed. Note.—Cited in *Witherspoon v. Dubose*, Bailey, Eq. 167.

For other cases, see *Husband and Wife*, Cent. Dig. § 118; Dec. Dig. ⚭18.]

[*Husband and Wife* ⚭29.]

[Marriage is a good consideration for antenuptial settlement.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 162; Dec. Dig. ⚭29.]

The wife of the defendant, Smyth, *dum sola*, had become indebted to the intestate,

Foster, in the sum of £27. 6s. 9d. She afterwards intermarried with the defendant; and previous to the marriage, a settlement was made of her property, for the joint lives of Smyth and wife, and the survivor of them for life; then for the issue of the marriage; and if none, then for a child of the wife by a former marriage. She died leaving a son of the last marriage, who is one of the defendants. The debt was sued for during the coverture; but judgment was not obtained. The prayer of the petition is, that the settled estate may be made liable for the debt.

"It is extremely clear," says lord Talbot, "that by law, the husband is liable to the wife's debts, only during coverture, unless the creditor recovers judgment against him, in the wife's lifetime." Heard and ux. v. Stansford. 3 P. Wms. 410. This case was so decided by the Lord Chancellor, although the husband had received £700 which came by the wife.

And although the point had been pressed upon him, that if a feme sole, who brought a fortune to her husband, and did not owe more than one tenth of it, should marry and die, and on her death, the husband should not be liable for a farthing of her debts, it would be of pernicious consequence to creditors; yet his lordship answered, "if I relieve against the husband, because he had sufficient with his wife, wherewith to satisfy the demand in question: by the same reason, where a feme indebted *dum sola*, afterwards

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marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, by the same reason, I say, I ought to grant relief to the husband, against such judgment, which yet is not in my power; consequently, there can be no ground for a Court of Equity to interfere in the present case."—*Ibid*.

The case of the petitioner now before me, differs but little from the case cited. By this it appears, that the property of Smyth, independent of the settlement, cannot be made liable for the debt. Yet, it is said, that as survivor of the wife, his life estate, which was settled, should be made liable. But this is also his property, and I cannot see, how the settlement can place him in a worse situation, than if there had been none. Had there been none, his marital rights would have attached upon the property; and by law it would now have been out of the reach of the creditor. It appears to be well settled, at the present day, that marriage may be either a natural or valuable consideration. It is valuable, where there is a transmutation of property, made by the settlement. It is simply natural, where the consideration is love and affection, and the settlement is intended to make provision for the family. This consideration goes further than that of blood, for a man seized of land in fee simple, may

covenant to stand seized of it, to the use of the woman he intends to marry, or to the use of any woman, whom his son, or his kinsman is about to marry: and if the marriage take effect, the use will arise. *Plow. 307. 2 Roll. Abr. 783.* And if a settlement be made to stand seized, the use will be carried by the natural consideration of marriage to all the objects of the matrimonial union. *Roberts on Fraudulent Contracts. 110.* Now although the settlement in this case does not appear to be for valuable consideration, agreeable to the above definition, yet, it is certainly founded upon the natural consideration of marriage, and the providing for a family, which is fully sufficient to prevent a debt from attaching, which had no prior lien. The life estate of the husband, who has survived, and also the remainder to the son, were intended as a provision for those

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"two objects of the matrimonial union," the father and son; and therefore they are well secured by the settlement.

Wherefore I am of opinion, that the petitioner is remediless, and that his petition must be dismissed, but not with costs, as the act provides for none, in the case of a petition.

(Signed)

W. D. JAMES.

There was no appeal from this decree.

#### 4 Desaus. 373

##### Case LV.

Orangeburg.—Heard by Chancellor James.

BARTON and Others v. RUSHTON and Others.

(February, 1813.)

[*Equity* ⇨ 345.]

Fraud will not be lightly presumed against the denial of the answer.

[*Ed. Note.*—For other cases, see *Equity*, Cent. Dig. § 720; Dec. Dig. ⇨ 345.]

[*Execution* ⇨ 42.]

A judgment against a man who has contracted to purchase land, and has taken a bond from the vendor to make titles, and has paid part of the purchase money, does not bind this equitable title, which is incomplete, and may be rescinded by the parties, if done without fraud, especially where the agreement was, that if the money was not paid by a particular day, the bond to make titles should be void; and the payment was not made. No such estate vested in the purchaser as could be subjected to the judgment.

[*Ed. Note.*—Cited in *Richards v. McKie*, Harp. Eq. 195.

For other cases, see *Execution*, Cent. Dig. § 115; Dec. Dig. ⇨ 42.]

Under such circumstances, this court will not interfere to enjoin the party entitled at law, under a verdict and judgment, from holding the same.

[*Judgment* ⇨ 462.]

[Where a bill is filed for relief against a judgment at law, charging fraud, and that the facts on which such charge is founded are with-

in the knowledge of the defendant only, the bill will not be dismissed upon a simple denial of fraud.]

[*Ed. Note.*—For other cases, see *Judgment*, Cent. Dig. § 897; Dec. Dig. ⇨ 462.]

This case came to a hearing, and the judge delivered the following decree:

This case originated at law, where defendants were enjoined from proceeding on a judgment obtained there, in an action of trespass, to try title to the lands in the bill described.

In the suit at law, the complainant, Martin, was the tenant of Barton, in possession of the land, and need not be further noticed here.

The present case is briefly as follows: One Jacob Hutto, now deceased, being possessed in fee of 100 acres of land, sold it to John

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Rushton, one of the defendants \*for \$80; and John Rushton entered into possession of the same. That while he was so possessed, a certain Thomas Hall obtained a judgment against him, in the month of March, 1802, and afterwards on the 26th April following, levied his execution upon the lands. That on the 7th June, in the same year, the Sheriff of Orangeburgh sold the land, which was purchased by the plaintiff, Hall, for \$40.50. That the purchaser ordered the titles to be made to the complainant, Barton; and that the sheriff made him a title, which is dated on the day of sale.

Complainant charges in his bill, that about the time the execution was issued, John Rushton fraudulently colluded with the said Hutto, to take back the title for the land, and defeat the judgment. That Hutto did so, and afterwards, on the 26th March, 1806, sold the said lands to Sherwood Rushton. That Hutto had made a title to John Rushton, which was never recorded, and that they destroyed it. That Sherwood Rushton afterwards died, and after his death the defendants, as his heirs, brought their action at law, and recovered the lands.

The bill states particularly (what in this case is very material) that the reason why the recovery was had at law, was because of a defect of testimony, which is in the possession or knowledge of defendants alone. And that the said defect of testimony consisted in not sufficiently proving the deed of conveyance from Hutto to John Rushton: And complainant now prays a discovery of the same.

All the answers deny fraud or collusion between John Rushton and Hutto; but only Robert and John Rushton have stated what besides the denial of fraud appears to be relevant. Robert Rushton answers, that he witnessed a bond, or writing between Jacob Hutto and John Rushton; and believes, the exhibit A. accompanying the answer of John Rushton, to be a copy of the same; but what is gone with the original, he cannot say.



That John Rushton lived on the land about the year 1801, and continued on it about twelve months. John Rushton stated in his answer, that Jacob Hutto sold the land

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to him \*conditionally, for \$80, about January, in the year 1801, to be paid the 20th of March, 1802; on which event he was to make him titles; and in case the money was not then paid, the contract was to be at an end. All which would appear by a written instrument, if defendant had the same to shew, but a copy of which is filed, marked A. That finding it impossible for him to pay for the land, he applied to Hutto early in 1802, to rescind the contract, which Hutto consented to do; and he delivered up to him the writing abovementioned. That he held possession of the land fourteen or fifteen months, and offered it several times for sale, with a view of paying for it, and realizing something. The complainant produced much evidence, the most material of which is as follows:

Henry Mills, deposed, that John Rushton lived on the land at the time of the levy, and he heard Hutto say he had only endeavoured to save the land for the poor fellow. That he had sold him the land and made him as good titles as he could make him; and that John Rushton had paid him all the money for it, but fifteen dollars.

Lazarus Kelly also deposed, that Hutto told him all the purchase money of the land was paid, except fifteen dollars.

George Kelly likewise stated, that after Hall obtained judgment against John Rushton, he heard him say, that he would be fast enough for Hall yet; for he would give up the titles to Hutto, and prevent the land from being taken under execution.

Such is an abstract of the evidence so far as it appears to be relevant.

I shall now, first consider the plea to the jurisdiction of the court, which has been made; and afterwards, the effect of this testimony.

The plea is, that the court of law had competent jurisdiction to try the question of fraud, except in the purging of defendants consciences; and the complainant having called for a discovery on that matter, and the fraud being denied by the answers, that he is precluded from giving evidence to contradict them, and from proceeding any further in the case.

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\*This plea throws some difficulty in the way; and it well becomes us to attend to it, lest there should be a clashing of jurisdictions.

Under the former establishment of the court of equity, it has been decided, that where a case originates at law, and the complainant comes here for a discovery, after a verdict against him, and states that a particular fact of which he seeks discovery is in the

knowledge of defendant alone; that if the defendant answering deny all knowledge of such fact, then the complainant is precluded from going into evidence to contradict the answer. Because to permit him to do so, after stating that the fact was known to defendant alone, would be to entrap him, by holding out an untruth. The complainant having called for a discovery, and obtained it; it then becomes his own evidence which he cannot contradict. Besides, that to allow such evidence to be introduced here, would be in effect to erect this court into a tribunal of appeals from the court of law. The case decided upon this ground, of which I have the best recollection, was that of Calhoun and Perrin, in which I had the assistance of my brother Thompson. The complainant had brought an action of trover at law, to recover back a slave he let his son-in-law Perrin have, when he married his daughter, upon the ground that the slave was only loaned to him. Complainant failed at law, and afterwards applied for and obtained an injunction in this court, upon the single allegation that the fact of loaning was known to defendant alone. But upon the coming in of the answer, defendant denied that fact, and the judges refused to let complainant go into evidence to contradict the defendant. But it will be observed in the case cited, that no discovery was obtained. I admit that the present case may be so far assimilated to it, that as the loaning was charged there, so is fraud here, and is denied; and thus far the plea in bar may be supported.

But the merits of complainant's case do not seem to rest upon the charge of fraud alone; for he calls for a discovery of the

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title deed from Hutto to John Rushton; \*and important discoveries have been made on this head, by the answers above cited.

These are, First,—That the contract was in writing. Second,—That John Rushton had possession under it. Third,—That the instrument was cancelled. And fourth,—We find from other testimony, that John Rushton was possessed of the land at the time judgment was obtained; and that all the consideration money was paid except fifteen dollars.

It is true, some of these facts might have formed a ground of defence at law; but still they also give rise to certain subjects here, over which equity exercises, either an exclusive, or a more highly favored jurisdiction than courts of law.

These are, discovery, spoliation and specific relief. We shall hereafter consider these, and at present clear the way to them.

First,—By establishing the validity of the bond, acknowledged by the answers, which has been said to be inefficacious.

It has been stated by the defendant John Rushton, that the bond was conditional, and

that if the consideration money named therein, were not paid by the 20th March, 1802, that the contract was to be at an end. He has also denied that any consideration money was paid. But I find that this assertion depends upon his answer alone, where it is stated as a matter of defence, which is not called for by the bill.

In this shape it is no evidence, but a bare allegation, which is contradicted: for both Mills and Kelly have agreed in their evidence, that Hutto told them he had received all the money but fifteen dollars. Now what Hutto said was against himself, and therefore ought to be credited. But even supposing what Hutto said was not evidence, yet we have other testimony which shews that the judgment attached while John Rushton was possessed of the lands: and after that, how could any power remain in him to rescind the contract with Hutto? That power had certainly passed over to the judgment creditor. The validity of the bond to trans-

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fer all right from \*Hutto, is therefore placed beyond any doubt. And having established this ground, we now proceed to the equitable subjects of jurisdiction above mentioned.

We have seen that they arise on the doctrines of discovery, spoliation, and specific performance.

In compelling a discovery, this court has exclusive jurisdiction, and I need not at this day cite an authority to shew it. In cases of loss or spoliation, equity is favorably inclined towards the applicant, in odium spoliatoris: and for specific relief, there is an unceasing call for equitable interference. To which may be added, as it seems to apply here, that correlative branch of equity jurisdiction, which is exercised in putting a salutary stop to injurious proceedings, by decree of injunction. See *Ambler*, 209; *Anon. Rob. on Frauds*, 85, 129; 1 *Fonbl.* 149.

Having premised so much, I shall now proceed on the grounds proposed.

And first as to the discovery—The answers of John and Robert Rushton afford full evidence that the contract was reduced to writing. This fact is very important for the complainant, since it takes his case out of the statute of frauds. And as complainant has alleged, that he could not prove the deed of conveyance at law; and also as the discovery could not have been obtained there, without the aid of this court; these circumstances go at once to shew that the subject matter of this suit is proper for equitable cognizance.

On the grounds of spoliation and specific performance, there arise two questions for consideration.

The fact of cancelling being admitted by John Rushton, and it also appearing that the judgment had deprived him of all right to rescind the contract, First, whether, under

these circumstances, coupled with the testimony against him, such cancelling will not be deemed a spoliation.

Second,—If John Rushton had applied against Hutto here, for a specific performance of his contract, whether, under the contract and the facts developed, the court would not have decreed it; and what consequences would result therefrom as to complainant?

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\*On the first of these questions, it has been seen, that the answer of John Rushton admits the cancelling yet he wishes to make it out, that it was not a spoliation. But it is for the court, and not for him, to draw a legal inference from his admission. The evidence of George Kelly shews, that his intention was to defeat the execution, by some means, without positively contradicting his answer; and taken as an independent fact, this testimony goes the length to raise a presumption of spoliation; and this is all that is necessary. For the fact of destruction, from the nature of the thing, can only, and therefore is required only, to be made out upon grounds of strong inference and probability.—*Ambler* 247, *Saltun v. Melhuish*; 1 *Vezey*, 387, *Whitfield v. Fausset*.

On the second question, it appears that little need be said. After paying the sixty-five dollars, if John Rushton had brought his bill offering to settle the balance, and praying for specific performance of the contract, there cannot be a doubt but this court would have decreed it. Now, as the assignee of a judgment creditor, the complainant stands virtually in the shoes of John Rushton; the injunction which he has obtained, when properly modelled, will operate substantially and in like manner, with a decree for specific relief; and equity, disregarding forms, looks only to the substance of things. So that the spoliation and complainant's title to relief, appear to be well established.

But defendant's counsel have raised an objection, namely, that Sherwood Rushton was an innocent purchaser. But from the several dates mentioned, it is evident that he bought the lands from Hutto, more than three years after the judgment, the levying of the execution, and the sale by the sheriff. Now in the face of all these public proceedings, especially the judgment, I cannot conceive how he is to be considered an innocent purchaser. So that the objection falls to the ground; and we approach the end of a case, involving little property it is true, but as much litigation as if the dispute had not been about a piece of pine barren soil, but a great principality.

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\*If Hutto, or as he is dead, if his representatives had been parties to the suit, I would decree the balance of fifteen dollars to them; but as they are not, I am at a loss where to bestow it.



Therefore it is decreed that the injunction be perpetual; That the defendants do deliver the title deeds for the land to the complainant Barton; and that they do pay the costs of this suit.

(Signed)

W. D. James.

May, 1814.

From this decree an appeal was made, which was heard, and a majority of the court delivered the following judgment:

The decree of the Circuit Court appears to have been predicated on the ground that the rescission of the contract between Hutto and John Rushton was fraudulent; and also that the bond for titles vested in John Rushton a sufficient legal estate for a judgment and execution to attach on. As to the first point, to wit, the alleged fraud and collusion between Hutto and Rushton, there is no evidence in support of the suggestion, except the loose and vague expression of Hutto, that he had endeavoured to save the land for the poor fellow, which is not a sufficient foundation to infer fraud, it being a principle in this court, that fraud shall not be lightly presumed. But admitting this circumstance should be considered as having some weight, its influence is entirely destroyed by the denial of every species of fraud in the answer. The bond for titles was conditional. The payment of the purchase money was a condition precedent; and if it was not paid by the 20th of March, 1802, it was to be void. There can be no doubt, but that in every contract, the parties making, possess the power of dissolving it. And this contract was as completely within the control of the parties as any other which could be formed. They had the right to rescind, and they did so. But admitting this did not take place, the instrument upon the face of it operates its own dissolution: if the money was not paid by the 20th March, the bond was to be void. The whole of the money was not paid, and

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the bond became a nullity. \*With respect to the liability of this land to discharge John Rushton's debt, there can exist no doubt. He had neither a legal or equitable right; no legal right, because the land had not been conveyed to him; and he could have no equitable right, until he paid the purchase money. It is contended that this bond vested a right in John Rushton to the fee; but the fact is not so; the greatest right that could arise to John Rushton from this bond, would have been, to have taken the case out of the statute of frauds, in case of his having instituted his suit for a specific performance. It is a very clear case that the land was not liable to an execution for John Rushton's debts. That Hall's purchase from the sheriff, was invalid; and of course Timothy Barton's claim has no legal or equitable foundation.

It is therefore ordered and adjudged, that the decree of the Circuit Court be reversed;

that the injunction be dissolved, and that the appellees Philip Martin and Timothy Barton do pay the costs of this suit.

HENRY W. DESAUSSURE.

(Signed)

THOMAS WATIES.

W. THOMPSON.

Judge James differing from his brethren, delivered the following opinion:

In this case there are two points upon which there is a difference of opinion:

First,—Whether the execution of Hall mentioned in the decree below would attach upon the lands in the possession of John Rushton, under the conditional bond:

Second,—Whether there was such fraud as would vitiate the second contract made between Hutto and Sherwood Rushton.

On the first question I stand alone. On the second I am supported by one of my brethren.

As to the first point, it appears that the bill was filed for an injunction and discovery. The discovery made, was that there existed a conditional bond to make titles to the land between Hutto, the vendor, and John Rushton the vendee. This was the first contract

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made, which was \*dated in 1801. The consideration money mentioned therein was eighty dollars; upon payment of which Hutto was to make titles: and upon failure, the bond was to be void. John Rushton was put in possession of the lands, and held them for fourteen or fifteen months, and he paid sixty-five dollars of the consideration money. In 1806, he and Hutto rescinded the contract as between themselves; but there was no proof of the repayment of the sixty-five dollars to John Rushton. They cancelled the bond, and Hutto made a second title to Sherwood Rushton. By other evidence adduced on the trial, it appeared that while John Rushton was in possession in 1802, Hall obtained judgment against him and issued his execution. It was levied upon the land, and Hall offered Hutto, by his agent, thirty dollars to quit his claim, which he refused, saying, he had made titles to John Rushton.

From the scope of the evidence, it appears that the sheriff got possession of the grant and title deeds, either from Hutto or John Rushton, and that he afterwards sold the land at sheriff's sale, and Hall became the purchaser. Hall sold to Kelly, and Kelly to Barton, the complainant. Now, both in an equitable and legal point of view, the execution will attach upon the lands, as those of J. Rushton, under the conditional bond. Both these positions are capable of demonstration. I grant that the parties to this conditional contract had a right to rescind it while it remained executory; but by the possession and payment by John Rushton of a material sum, and not of mere earnest money, the contract became executed by part perform-

ance, and upon an offer of the balance, this court would decree specific performance. *Ha-good v. Neal*: Pre. Chan. 561. 1 Pow. 309.

At this time the right of Hall commenced under his execution; he stepped at once into the shoes of John Rushton, and offered to pay the balance. This was doing all that equity required; and the liberty of the contracting parties to rescind the contract, was now at an end. They both had notice of Hall's right, and if they annulled the contract without his consent, it was an in-

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\*fringement of that right. Now the powers of a Court of Equity, called emphatically a court of conscience, are not confined to things tangible alone by the senses, it will lay hold on the consciences of men, and mould them so as to make them conform to the principles of justice. "And it will prevent a wrong, even where the positive law is silent." And again, "there is no magic in words, or technical expressions; the party contracting has not an election, to perform his contract or not; in conscience he is clearly bound to do the specific thing which he has covenanted to do. 1 Fonb. 35, 36—But which obligation a court of law cannot in all cases enforce." Hall had a right or demand. Hutto and Rushton were bound by a conscientious obligation not to defeat that demand. They have attempted to do so. Then will equity give him relief? It certainly ought. Setting aside technical forms, equity ought to shape either the execution or its "injunctions," in such a way as to cause it to attach upon the consciences of the contracting parties, in order to prevent the wrong intended, and to establish the right, so that metaphorically speaking, and in such language as this court often adopts, the execution will attach in equity upon the consciences of the parties. But further, at law it will attach upon the condition of the bond, such as it was after part performance. By the common law in England, a man could only have satisfaction by execution out of goods and chatties and present profits of lands upon feudal principles: afterwards by a writ of *elegit* provided by statute goods and chatties were not sold, but appraised and delivered to the plaintiff. If these were not sufficient to satisfy the debt, then the moiety of the freehold lands of the debtor, whether held in his own name, or in trust, were delivered to the plaintiff to hold, till out of the rents and profits the debts be levied.

Thus we find that executions in England were not issued against the whole estate in lands, tenements or hereditaments. But by the statute of 5 George II. for the more easy recovery of the debts in the colonies, and which is made of force in this state, feudal

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principles are \*laid aside, and the houses, land, and negroes, and other hereditaments and real estates of debtors, are made liable to

execution. By the county court act, tenements are also made vendible under execution; the words hereditaments is inserted in our common *feri facias*, and not in the English precedents. 2 Black. 17.

Judge Blackstone says, that hereditaments, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses, such as may be seen and handled by the body. Incorporeal are not of sensation; can neither be seen nor handled, are creatures of the mind, and can only exist in contemplation. This definition alone would carry us to an extent, which those confining themselves to common law principles, and not recollecting that we are governed by statute law on this subject, are but little aware of. But further, Lord Coke says, that a hereditament is any thing which may be inherited; and so a condition, the benefit of which may descend to a man from his ancestors, is also a hereditament, which last decision completely proves my position, that the execution at law will attach upon the condition of this bond, to make titles; for the benefit of such condition as is contained therein, will descend to a man from his ancestor. The extent of this doctrine cannot possibly be an objection to it, since in justice every part of a man's property ought to be liable for his debts. It is easy too to distinguish between the liability of a vendor or a vendee, if part performance be made to constitute the line of distinction. The good policy of extending the lien of executions is also well worthy of serious consideration. In the state of New York, this policy has been adopted to a great extent, and that too by the bench of Common Pleas judges, where it has been solemnly decreed, "that a resulting trust capable of proof, is vendible under execution. And by the converse of the proposition stated in another case, that an equity of redemption is also liable to execution at law."

On the impolicy of confining the lien of the execution in this case, I will barely observe, that in this lately settled country, slight evi-

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dences establish a good title to \*lands. And it is notorious that the most common right made for lands by vendors, is a conditional bond to make titles: Then to decree that such lands in the hands of purchasers, shall not be liable under any circumstances, (for this goes that length,) will be completely opening the door to frauds. All that is necessary for a purchaser to do, will be to pay up a material part of his purchase money, then to leave his titles incomplete, and he may bid defiance to his creditors. If part of the consideration money be paid substantially, if it exceed the bounds of earnest money, and something be done as owner of the estate, the vendee will be equally safe, as against the vendor, so that on all sides his conditional bond will be a wall of defence;



against the vendor, because he may pay up the balance and rest upon his imperfect title; and against the creditor, because by the present decision of the equity bench, such title is not vendible under execution. For the above reasons, I am of opinion that the execution in this case will attach upon the conditional bond, under the circumstance of part performance.

We come next to the second question of fraud;—I think it more plain than the first, because it does not rest upon abstruse principles.

I mean to confine myself to statutory, which is peculiarly within the province of equity: and to shew, first,—that Joseph and John Rushton were the original contrivers of the fraud, and therefore ought not to be benefitted by it. Second.—That Sherwood Rushton was connusant of the claim of Hall, and of the fraud, and therefore his title is vitiated—and the claim of all the defendants being derived from it is void.

John Rushton was called upon for a discovery, and to purge his conscience of the fraud. A simple discovery or a direct denial of the charge was all that was necessary for his defence, and all that was required by the bill. He makes the discovery and denies the fraud; but he afterwards goes on to state that the contract was rescinded and the bond cancelled, and his intentions were upright in all matters regarding the rescision and cancelling. But it was his business to state

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facts, and for the court \*to draw the inferences. The fact of cancelling originated with himself; it was neither charged in nor called for by the bill; and matter, pleaded in evidence are not evidence, "for where a defendant confesses and avoids, as to the evidence, he is as a plaintiff. Then as to the cancelling, the testimony of the witnesses is to be received against the answer, independent of the plea in bar, and they establish the motive with which the cancelling was done. They testify that John Rushton said, after the judgment was obtained, that he would be fast enough for Hall yet; that he would give back his title and defeat the execution. His motive therefore in cancelling, was to defeat the rights of Hall, a third person who was implicated, and not consenting to the transaction.

This evidence is sufficient to establish a spoliation on the part of J. Rushton, which would be enough for my present purpose; but the fraudulent motive can also be brought home to Hutto.—Roberts on Frauds, 85-6.

In 1802, he had waived all claim to the land; and in 1806, he made the second title to Sherwood Rushton in the face of his waiver; and three witnesses have testified that he said he did so to save the lands for the poor young fellow, naming John Rushton; for his expected loss was the subject of conversation at that time. But in saving Rushton, his motive also was to defeat the claim of Hall.

Now, this brings back the intention of Hutto to the same point with that of John Rushton, namely, to a deceit practised upon one who was not a party to the contract:—But particular persons in their contracts shall not only contract bona fide among themselves, but shall not contract mala fide in respect to other persons, who stand in such a relation as to be either affected by the contract or the consequences of it.—Lord Hardwicke in *Ches-terfield v. Janssen*.

Hutto might have been led into this weakness in favor of a neighbor, by mistaken motives of humanity, or by his imposition; but still, this will not alter the case; it may acquit him of gross immorality, but still the legal fraud will remain. For equity will con-

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strue even silence, \*connected with a weakness of the most amiable kind, into a legal fraud.—2 Viner, 150, *Henderson v. Cherry*.

Some doubt was raised here as to the evidence—not as to Hutto's admission, for that point was ceded; but as to there being loose and vague declarations.

Now I answer, that it was the evidence of three witnesses unimpeached. Admit the doubt here,—then it must apply generally;—and where will it lead? Will it not be to the entire exclusion of parol testimony? Certainly it will: and are those who doubt prepared to meet the objection to this extent. The doubt then must be as to the credibility of the witnesses. But I have already observed, that their credit stands unimpeached: Besides, I have always thought that the court into which witnesses are introduced, and which inspects their manner and attends to their matter, can form as good an opinion of their credibility and accuracy as need be required.—No other court can have the same opportunity.

What I have said only goes to establish the fraud on the part of John Rushton and Hutto; but Joseph Rushton is also implicated.

He states in his answer, that he believes there was no fraud in Sherwood Rushton's obtaining the title to the land; but says nothing of the part which he took in the business. Now Kelly has proved that he tampered with him to get possession of the grant and title deeds. His son, Sherwood, then lived under his roof, subject to his control; and the presumption of collusion becomes in these points of view strong against him: but to place parties under a disability to commit fraud, certain transactions of an equivocal or ambiguous nature are construed to be fraudulent in judgment of law—Roberts on the Statute of Elizabeth, 189. At present by the death of Sherwood Rushton, both Joseph the father and John Rushton his son have become interested in the suit. Now it has been a long established rule, that what is good at the beginning cannot become fraudulent by matter, *ex post facto*. 9 Roberts on the Statutes 189, 517, 521, 2. To which rule however,

there are exceptions in favor of creditors and

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purchasers; then in favor \*of these the converse of the rule must hold still more strongly.

That a transaction fraudulent at the beginning cannot become good by matter ex post facto, more especially when the original contrivers and actors in the fraud are to be benefitted. At law fraud must be proved—in equity it may be presumed, and inferred from suspicious circumstances and equivocal dealings, which is the constructive fraud of the statutes; but if it can neither be presumed nor inferred from a case under the circumstances of this kind, then I am clearly of opinion there is an end of the equitable distinction in this country.

The second point under the last general question next offers itself for consideration—that is, whether Sherwood Rushton had sufficient notice of the right of Hall, or of the fraud to vitiate his title.

This would again divide itself into two different branches of considerable extent; but I shall consider it briefly in one. For with a knowledge of the rights of Hall, either direct or constructive, his title would be bad. If the validity of the judgment and execution to attach has been established, and I am clear it has, the judgment will operate as a sufficient notice. If it has not, still there are other grounds of notice. Sherwood Rushton lived near to his brother John, and as is before observed, under the roof and subject to the control of his father: both of these defendants were perhaps enemies: the facts relative to Hall's claim were proved to be notorious in the neighborhood: and Sherwood Rushton dealt with Hutto who had notice.

Under all these circumstances the presumption against him is violent. It is sufficient under the statutes. But further, the grant and other titles, as we have seen, were in the possession of the opposite party, and when at the second sale they were not produced, this certainly was sufficient to put the vendee upon enquiry, and he could immediately have resorted to the vendor, who was connusant, for information. Even a defective title, much less a total want of title, was a sufficient constructive notice: it was crassa

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negligentia, that he sought \*not after it, and yet would traffic for what in equity belonged to another: so that the title of Sherwood Rushton is not good against Hall, a creditor and bona fide purchaser. And further tracing it back to the fraudulent source whence it is derived, it becomes vitiated and void in the hands of all the defendants.

For the above reasons I am of opinion that the decree of the circuit court ought to be affirmed.

W. D. JAMES.

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Case LVI.

Abbeville.—Heard by Chancellor Thompson.

CHARLES GOODWYN and Others v. The STATE BANK and Others.

(February, 1813.)

[*Injunction* ⇨172.]

The court will dissolve an injunction on the coming in of the answer of some of the defendants, though all the defendants have not answered.

[Ed. Note.—Cited in *Bryce v. Bowers*, 11 Rich. Eq. 50.

For other cases, see *Injunction*, Cent. Dig. § 375; Dec. Dig. ⇨172.]

[*Pledges* ⇨58.]

The court will not delay a creditor from pursuing and enforcing his remedies against his debtor, on the ground that some collateral securities, which were intended as a benefit to the creditor, are entangled, and in controversy, among the debtors themselves.

[Ed. Note.—Cited in *Scott v. Davis*, 9 Rich. Eq. 41.

For other cases, see *Pledges*, Cent. Dig. §§ 188, 189; Dec. Dig. ⇨58.]

The cause retained. The collateral securities to be re-assigned.

[*Injunction* ⇨26.]

[Cited in *Walker v. Covar*, 2 S. C. 20; *Clark v. Wright*, 24 S. C. 534, to the point that where a creditor held several securities for a debt, the court refused to enjoin him from proceeding to enforce one of them, to give the debtors opportunity to settle among themselves a question of priority as to their liabilities.]

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 28; Dec. Dig. ⇨26.]

The bill was filed to obtain an injunction restraining the defendants from enforcing certain judgments and mortgages, which they held against the complainants until the determination of certain questions of priority, and of the primary liability of certain parts of the securities.

In the course of the proceedings, the complainants moved to make the representatives of Galphin parties to the suit, as defendants; and an order was accordingly made to that effect. But the complainants not having procured the answers of the new defendants, moved at a subsequent court, that the cause should be postponed, and the court granted the motion; whereupon the counsel for the defendants, the Bank, and for Mr. Poinset, moved that the injunction which had been obtained, restraining them from proceeding to enforce their demands at law, should be

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dissolved: and on that motion, the \*presiding judge, Thompson, made the following decretal order, dissolving the injunction.

George Galphin the elder, was indebted both in his private capacity and as guarantee for Galphin, Holmes and company, to Higginson and Greenwood, merchants, of the city of London, in the total sum of £3,500—viz. £885 in his private capacity, and £2,615 for Gal-



phin, Holmes and company. That to secure the payment of the said sums of money, the executors of George Galphin deceased, did on the 4th June 1798, confess judgment for the said £885 and also for the said £2,615; and Thomas Galphin, co-partner of Galphin, Holmes and Co. did also confess judgment for the last named sum.—These confessions were taken in the federal circuit courts of Georgia and South Carolina; and the better to secure the said debts, a mortgage of twenty-five negroes was given by the said Thomas Galphin. That David Ramsay, Charles Goodwin and Ephraim Ramsay, on the 4th October 1796, did purchase of Thomas Galphin, executor of George Galphin, and one of the co-partners of Galphin, Holmes and company, the lands late of the said George Galphin, deceased, on both sides of Savannah river, containing about 13,000 acres, together with mills, stock, tools, &c. being part of the estate bound by the said judgment and executions; in consideration of which said Ramsay and Goodwin did assume and agree, to pay the said debts to Wm. Greenwood as attorney of Higginson and Greenwood. But as additional and further security, only for payment of said judgment, and not in exoneration of them or a release of the property secured thereby, David Ramsay gave his note for \$6,363 42 cts. which was endorsed by Charles Goodwin and E. Ramsay, and guaranteed by Wade Hampton. And all the parties gave at the same time, their bonds to the said William Greenwood, for the sums payable at the times mentioned in complainant's bill; and as further and additional security, the said David Ramsay mortgaged his house and lot in Broad street, Charleston, and Charles Goodwin and Ephraim Ramsay, mortgaged 48 negro slaves for the same purpose.

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\*That the said William Greenwood, for valuable consideration and by written agreement, with consent of all parties, on the — day of June 1801, did assign to D. E. Poinsett, the balance due on the said note, amounting to £410 12s. and also did assign the first bond mentioned, amounting to £1,403 12s. on which there was then due £1,654 12s. together with the mortgage on David Ramsay's house and lot; under this express agreement, that if the said mortgaged house should be sold under the mortgage, the proceeds should first go to discharge the said Poinsett's debt, and the balance, if any, to discharge the two remaining bonds then retained by the said William Greenwood; and if the 48 negroes were sold under the mortgage, the proceeds should first go to discharge the two bonds retained, and the balance to Poinsett's debt.

That about the 27th April 1802, the 48 negro slaves mortgaged were carried to the city of Charleston by the direction of the said William Greenwood, to be sold to pay the two bonds retained; Charles Goodwin and Dr. John Ramsay, one of the adminis-

trators of Ephraim Ramsay deceased, together with Thomas Ogier, applied to the bank to advance the sums due on the said two bonds. That the bank did, on the 27th April 1802, discount on account of the parties the sum of \$12,543.97, being the amount due on the said two bonds; in consideration of which sum the said William Greenwood, did, on the said 27th April, assign over to the said Thomas Ogier, (trustee,) the two said bonds, with the mortgage of the 48 negroes, and the judgments in the federal courts.

That the said Thomas Ogier wishing to decline all agency in the business, on the 2d of March 1803, did assign the same over to the state bank.

It further appears, that General Hampton becoming uneasy at the great delay of payment, and the insolvency of two of the parties, did warn the bank, that unless they used all due care and proper diligence to collect their debt, he should exert himself to get released from his securityship: in consequence of which, the bank immediately employed

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Eldred Simkins, Esq. as agent to enforce the mortgage, upon the said 48 negroes, by sale, and they were accordingly advertised, and by the consent of all parties, the sale was to take place on the bank of Savannah River, opposite Augusta, about the 1st day of January; but many objections being made to the legality of time and place, it was thought most prudent to postpone the sale, until the first Monday in March, at Edgefield Court-house; before which time complainant obtained an injunction, which has continued in court ever since.

At the last June term, the court made an order, that the representatives of Thomas Galphin should be made parties to the suit; but it not having been in the power of the counsel for the complainant to procure their answer, as most of them reside in the state of Georgia, the cause was ordered to be continued on its merits; when the counsel for defendants moved for a dissolution of the injunction.

For the complainant it was contended, that by an agreement entered into, between Wm. Greenwood as agent for Greenwood and Higginson, and the Silver Bluff concern, the mortgage of the 48 negroes was to be considered as a collateral security, and could not be sold until the primary fund was exhausted, and that it having been recorded was notice to every person, and preceded all the subsequent negotiations; of course that it was obligatory on the bank. But upon reference to the testimony of Capt. Blake, he positively swears, he had not, nor does he believe any of the directors had, any knowledge of the existence of such an instrument. Nor was it at all material in this case, whether they had or not, as it clearly appears to the court, that the privy of contract, between the complainant and the bank, commenced at the

time when the negroes mortgaged were carried to Charleston to be sold, when the second negotiation was effected, through the agency of Mr. Ogier. It does not appear to the court that any equity arises out of this case to justify it in keeping the defendants out of a just debt.

It is therefore ordered that the injunction be dissolved.

W. Thompson.

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\*From this decretal order an appeal was made, on the following grounds:

That it was essential to the merits of the cause that answers of the representatives of Thomas Galphin, (a party to the bill since deceased) should have been received before the dissolution of the injunction; that by the exhibits both of complainants and defendants the latter were bound to assign the judgments against George Galphin's estate, and Galphin, Holmes & Co. in terms of the agreements between Higginson, survivor of Higginson & Greenwood, and Ramsay, Goodwin & Ramsay, and the assignment of Higginson, survivor as aforesaid, by W. Greenwood, jun. their attorney, and the said Wm. Greenwood, jun. in his own right, to Thomas Ogier, and his assignment to the defendants; or to make good and sufficient titles to the said Silverbluff estate; and that the decree was contrary to the equity of the case.

Goodwin, solicitor.

April 1813.

The appeal was argued, whereupon the court delivered the following judgment:

We are of opinion that the decree of the Circuit Court in this case was correct in dissolving the injunction as to the State Bank and Mr. Poinset. The Bank made a loan, and took various securities for the repayment thereof. Among others are assignments of certain judgments against Galphin's estate, and mortgages of negroes, and a house and lot in Charleston. Since all the circumstances have been disclosed by the answer and documents, it would be extraordinary and unjust, that the multiplication of securities, which was intended as an inducement to the loan by the Bank, should be converted into a source of delay in the recovery of the debt, and should be used to involve the bank in a litigation respecting the Galphin property, in which it has no concern or interest. It appears obvious, that the mortgages were taken as an additional security, and it was intended that the Bank should be at liberty to resort to any of the securities, to enforce payment.

It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed,

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and that the State Bank and Joel R. Poinset, son and heir of Elisha Poinset, be left at liberty to pursue their claims, and enforce

their remedy. But as the bank and J. R. Poinset will have no right to retain any part of the securities assigned to them after payment of the sums due to them, it is further ordered and adjudged that upon the payment of the whole sums due to the Bank and Mr. Poinset, by Charles Goodwin, the representative of Ephraim Ramsay, and Dr. David Ramsay, the Bank and J. R. Poinset, instant, and by a contemporaneous act, re-assign to them all the securities which had been placed in their hands for the purpose of securing the debts due them.

W. JAMES,

(Signed) HENRY W. DESAUSSEURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

Bacon and Goodwin, for appellants.  
Simkins, for respondents.

#### 4 Desaus. 394

Case LVII.

Laurens, Washington District—Heard before  
Chancellor Thompson.

BULOWS and POPE v. THE COMMITTEE  
OF HUGH O'NEALL, a Lunatic.

(February, 1813.)

[Judgment  $\hookrightarrow$  784.]

A creditor instituted a suit at law, against his debtor, who was in embarrassed circumstances, and had nearly obtained judgment; when another creditor filed a bill in equity, and obtained an injunction, restraining the former from proceeding at law, on the allegation, supported by affidavits, that the debtor was lunatic, and unable to defend himself, and judgments might be unjustly obtained, to the prejudice of other creditors. Afterwards the debtor was regularly found to be a lunatic; and a committee was appointed to take charge of his person and affairs. Both the above creditors then obtained judgments at law at the same time. The first suing creditor claimed priority of payment, in consequence of his having been delayed in his legal remedy by the injunction; and the Circuit Court decided that he was entitled to priority. But this decree was reversed by the Court of Appeals.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1354; Dec. Dig.  $\hookrightarrow$  784.]

[Insane Persons  $\hookrightarrow$  65.]

Afterwards the subordinate points in the case, relative to the management of the lunatic's estate, came on before the Circuit Court, on the report of the commissioner.

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\*Among other points, it was decided, that the committee were not liable to pay interest for monies in their hands, kept during the controversies among the creditors; and that the committee were not entitled to extra compensation for ordinary services.

[Ed. Note.—Cited in Oswald v. Givens, Rich. Eq. Cas. 350.

For other cases, see Insane Persons, Cent. Dig. § 113; Dec. Dig.  $\hookrightarrow$  65.]

[Insane Persons  $\hookrightarrow$  62.]

Counsel fees paid by them, in the management of the estate, allowed; also the costs of suit.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 109; Dec. Dig.  $\hookrightarrow$  62.]



The bill was filed to obtain payment of certain debts due by the lunatic to the complainants—and to settle the order of payment of these and other debts of the lunatic, and for other purposes.

After hearing the case, the Chancellor delivered the following decree:

This suit is instituted by the complainants, who are judgment creditors, against the committee of Hugh O'Neill, to recover from them certain sums of money in their hands, and those of other persons, in satisfaction of their claims.

It appears that Hugh O'Neal, prior to his lunacy, was largely indebted to the complainants, and also to Samuel Maverick, who anticipating the insolvency of the said Hugh O'Neal, had instituted his action in the Court of Common Pleas, for the recovery of his demand.

That pending the action at law, the complainants, Bulows, becoming alarmed about their debt, obtained an injunction † against

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the said Samuel Maverick, to stay \*proceedings on his action, until they could institute their suit; and obtained a judgment contemporaneous with his. That accordingly at the ——— term, 180— judgment was obtained in favor of the said complainants, and the said Samuel Maverick, and executions thereon simultaneously lodged in the sheriff's office, for Newberry district. The said Samuel Maverick therefore, now interposes his claim, and by way of interpleader insists that he is entitled in equity to a priority of satisfaction on his judgment. There are a number of points of minor importance, and which are deemed by the court immaterial in this case, insisted on by the counsel for the complainants. The great question in the case is, whether the said Samuel Maverick is entitled to have his judgment first satisfied, or whether the complainants shall come in, in average and proportion, according to their respective demands. And it appearing to the court clear beyond a doubt, that the said Samuel Maverick would have established his demand in

†After Maverick had instituted his suit at law, and made some progress therein, before any of the other creditors, they discovered that O'Neal, the debtor had recently become lunatic, and was unable to manage his affairs, or defend himself against any demands, however unjust, or subject to discounts. They therefore filed their bill in equity, to obtain an injunction, restraining Maverick, and all other creditors from proceeding at law, until the lunacy should be regularly established, and a committee appointed to defend the suits at law. After great argument by Mr. Cheves for the complainants, and Mr. Parker, for the defendants, the injunction was granted by Chancellor Desaussure.

Subsequently, the lunacy was regularly established, and a committee appointed: and these contending creditors obtained judgments at law, at the same time. But a contention for priority of payment still continuing, the committee refused to pay any creditor, until the Court of Equity should decide on their respective rights, which was the occasion of this suit.

the court at law, and thereby entitled himself to a satisfaction of his debt, had it not been for the interference of the said John and Charles Bulow, that in equity he must be considered as entitled to all the benefits and advantages which would have resulted to him, had it not been for their interposition:

It is therefore ordered and decreed, that the several persons having cash funds in their hands, pay the same over to the said Samuel Maverick, in extinguishment of his judgment, and the residue, if any, be applied to the discharge of the respective demands of the complainants, and other judgment creditors, obtained at the same time. And it is further ordered, that each party pay his own costs.

April, 1813.

From this decree there was an appeal, which was heard at Columbia, and the judges delivered the following judgment:

The decree of the circuit court has given a preference to Maverick's judgment; but as Maverick before the inquisition of lunacy had not acquired any legal priority, and his judgment and the complainants were obtain-

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ed \*and entered upon the same day, they ought to be put upon the same footing. The injunction granted against Maverick on the application of the complainants, was for the purpose of letting in their debt equally with Maverick's, in the event of Hugh O'Neal's lunacy.

This having been found, these debts must be paid rateably and proportionably.

It is therefore ordered and adjudged, that the decree of the circuit court be reversed and that all the costs of suit be paid out of the lunatic's estate.

W. D. JAMES.

HENRY W. DESAUSSURE.

THEODORE GAILLARD.

THOS. WATIES.

June, 1813.

Afterwards the subordinate points of the case were brought on, upon the commissioner's report, before Chancellor Waties, who made the following decretal orders:

Various exceptions have been made on both sides to the report of the commissioner in this case.

On the part of the complainants, the first exception is, to the allowance of eight hundred dollars paid by the committee on a judgment of M'Dowel and Blair against the lunatic.

This exception is over-ruled. The payment appears to have been made on a judgment regularly obtained before those of the complainants, and the balance due thereon was afterwards directed by an order of the court of common pleas for Newberry district, to be paid out of the proceeds of the sales made under the judgment of the complainants.

A second exception is, that the commis-

sioner has not charged the committee with interest on the sums of money collected by them on behalf of the lunatic.

This exception is over-ruled. The committee have held these sums as stake holders, until the clashing claims of the lunatic's creditors were determined, and as such are not chargeable with interest.

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\*A third exception is, that extravagant bills have been allowed for medical attendance on the lunatic.

There appears to be no grounds for this exception. It is ascertained that the medical assistance offered the lunatic has been greatly beneficial to him; and the expenses incurred on this account are not unreasonable;—They may indeed be said to be for the interest of the creditors, for if the lunatic be restored to his reason, (which seems to be confidently expected,) they may receive from his future exertions the full payment of their demands. This exception is therefore over-ruled.

A fourth exception is, to the allowance of costs for witnesses' attendance in the court of common pleas.

This expense was a necessary one. The debts due to the lunatic could not be recovered without it, and it was for the interest of the creditors that witnesses should be summoned to prove these debts. The committee were, with respect to the estate of the lunatic, (it being an insolvent one,) the trustees and agents of the creditors, and it was their duty, as such, to summon witnesses and employ all other necessary means for the recovery of the debts. This exception is therefore over-ruled.

The exceptions on the part of the defendants, are,

First,—That the commissioner has not allowed a credit for the amount of the attorneys' costs due on suits brought on behalf of the lunatic, which could not be recovered from the parties, who were sued.

This exception is sustained. The committee were bound to bring suits for the recovery of debts due to the lunatic, in all cases in which they believed a recovery could be had, and they have sworn that they brought suits in no other cases. This was for the benefit of the complainants, and the other creditors, and if nothing could be recovered, the costs must be paid out of the funds of the lunatic.

A second exception is, that a credit has not been allowed to the committee for the sum of one hundred dollars, paid to S. Farrow, Esq. as a counsel fee on behalf the lunatic.

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\*I thought at first that this was an extravagant fee to be given by an insolvent estate, but as it appears that Mr. Farrow's professional services were afforded in several cases in defending the interests of the lunatic, this

charge must be allowed, and the exception to the report in this respect is sustained.

A third exception on the part of the committee is, that the commissioner has not allowed a charge made by them for their extraordinary trouble, in managing the business of the lunatic.

This exception is over-ruled. The proof of extra services, and the necessity for them, have not been sufficiently shewn.

There were other exceptions taken on both sides, but they have since been abandoned.

The report is, therefore, confirmed in all other respects. THOMAS WATIES.

#### 4 Desaus. 399

Case LVIII.

Laurens.—Heard by Chancellor Thompson.

JOHN GRAY and M'CLANAHAN v. DOCTOR SAMUEL TODD.

(February, 1813.)

[Sales  $\hookrightarrow$  77.]

A man contracting to purchase cotton and to allow the Charleston price for it, on its being delivered at Granby, deducting the freight to Charleston, shall be bound to pay what was the Charleston price, at the time of such delivery to his agent at Granby; though it afterwards was greatly diminished in value by the embargo.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 208–212; Dec. Dig.  $\hookrightarrow$  77.]

The petition states, that the defendant contracted with the petitioners for a parcel of cotton, and promised to give them the Charleston price, deducting the expense of sending the cotton from Granby to Charleston. That in pursuance of the said contract, in July 1807, they carried and delivered the cotton to Finley Holmes of Columbia, agreeably to the directions of the defendant. Finley

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Holmes directed the \*same to Nicholas Hane, of Granby, to be sent by the first boat to Charleston, for the defendant.

That in the beginning of August 1807, Mr. Hane shipped the said cotton, together with other bales, which the petitioners took down for Mrs. Hughs, on board of a boat for Charleston, on account of the defendant. That cotton at that time was selling in Charleston from 20 to 22 dollars per hundred, and continued at that price for a considerable time afterwards.

That placing confidence in the integrity of the defendant, they did not have the cotton weighed in Granby, so as to obtain a receipt as to the weight of the cotton, but took a receipt for the bales, which they delivered to the defendant. That the defendant was in a short time to go to Charleston, and promised on his return to furnish them with the weight and sales of the cotton, and to pay to them the amount thereof. That he did go to town, and on his return informed them, the cotton was not sold, as it had not ar-



rived in town:—That it remained in this situation until after the embargo was laid, and they again called on the defendant, who then informed them, that the cotton did not arrive in town until after the embargo was laid, that it was much damaged and could not be sold.

That in the spring of 1808, one of the petitioners, Samuel McClannahan, having business in Charleston and going there, requested the defendant to give him an order on his merchant for the cotton, that he might sell it. That the defendant did write to his merchant, Gillaspie, and on the delivery of the letter, he was informed, that the cotton had been shipped to Boston some time before, by the direction of the defendant, so that he could not get the cotton.

The petition prays a discovery of the weight of the cotton and price, and that the defendant may be compelled to account with the petitioners for the same, and to pay over to them, what upon such account shall appear justly due to them.

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\*To this petition an answer was put in—and the defendant also filed a cross bill or petition, which the present complainants answered.

The facts stated in the petition set forth above, were substantially admitted or established.

It came to a hearing before Chancellor Thompson, who delivered the following decree:

It is a principle in law, that if a person, undertaking to do a thing for another, without reward, shall use common care, or exercise such caution, as a prudent man would of his own property, he shall be exonerated for any accidents which may arise. In this case it does not appear that the defendant was to be any thing benefitted by the sale of the cotton:—He was to allow the petitioners the Charleston price, deducting carriage from Granby; and whether high or low, all parties are bound by it. It is therefore the opinion of the court, that the report of the commissioner in this case, is erroneous, and that the price of the cotton at the time it arrived at the place of destination, should be the criterion by which to regulate this transaction.

It is, therefore, ordered, that the report be set aside so far as relates to the price of the cotton.

From this decree there was an appeal, which was heard, and the judges delivered the following judgment:

In this case the defendant contracted with complainants for a number of bales of cotton, in payment of a debt due the defendant, which were to be delivered to Finley Holmes in Columbia. The defendant was to be allowed the Charleston price for the cotton, de-

ducting the expence of sending it from Granby to Charleston.—The complainants brought the cotton to Columbia, and applied to Finley Holmes, who accompanied them to Granby, and saw the cotton delivered to N. Hayne, who gave them a receipt for the cotton. On their return home, the defendant was well pleased with what they had done.

The above statement is taken from the answer of the complainants to the cross petition; and the answer of the defendant does

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not contradict it, further than that \*he states the cotton was to be delivered to Finley Holmes, which cannot alter the case.

Upon this statement of facts, it appears that the complainants applied in Columbia to Finley Holmes, the acknowledged agent of the defendant, who took charge of the cotton by accompanying them to Granby, and seeing it delivered to N. Hayne. This being the act of the defendant's agent, must be taken as his own; and when the cotton was delivered in Granby, the sale must be considered as complete, and the right of complainants to the Charleston price, deducting freight, accrued.

The consideration of the sale, which was the payment of a debt, was likewise satisfied, and the defendant was afterwards bound to receive the cotton, and was at liberty to dispose of it as he might think fit; which it seems he did, by sending it to Boston.

Therefore it is adjudged, that he do take the cotton at the Charleston price, deducting freight, at the time the cotton was delivered at Granby, and that the decree of the circuit court be reversed, and the defendant pay the costs.

W. D. JAMES.

HENRY W. DESAUSSURE.

THEODORE GAILLARD.

THOMAS WATIES.

#### 4 Desaus. 402

Case LXIX.

Laurens.—Heard by Chancellor Waties.

DAVID CALDWELL v. ISAAC WHITAKER  
and Wife.

(June, 1813.)

[*Replevin* ⇨ 112.]

A verdict at law for a very large sum, greatly beyond the value of the property sued for, and intended to coerce the defendant to deliver up the property itself, in order to get rid of the verdict, shall not be enforced, if the defendant offers to deliver up all the property, except a portion carried off by a third person without the fault of the defendant, and to pay the real value of the portion so carried off. The verdict to stand as a security.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 443; Dec. Dig. ⇨ 112.]

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\*In an action at law, brought by the present defendants against the complainant, for

the recovery of four negroes, a verdict was given against the complainant for \$1,500, under an agreement between the parties, that the verdict should be released on the delivery of the negroes. It appears that one of the negroes was carried out of the state by one Madden, which put it out of the power of the complainant to comply fully with the condition of the verdict. He therefore tendered only three of the negroes, and offered to pay the value of the one carried off. The defendants have refused to make this settlement, and have issued their execution for the sum given by the verdict, insisting that the complainant's inability to comply with the condition of the verdict, was occasioned by his own fault, for that he had sold the negroes to Madden, and had assisted him in carrying away one of them.

A great deal of contradictory evidence has been given in this case, and it would be difficult to decide on it, if it were necessary to ascertain the truth of all the facts: but I think this unnecessary. There is not however any ground for the allegation, that the complainant had sold the negroes to Madden; this is disproved by the fact, that three of them remained with the complainant and were tendered by him to the defendants. The doubt is, as to the charge, that the complainant had assisted Madden in carrying off one of the negroes. There has been a good deal of evidence in support of this charge, but contradicted, as it has been, it does not appear sufficient to establish the fact. And if it were sufficient, it could only furnish a good ground for punishing the complainant, by making him pay more than the value of the negroes taken away, as an indemnity for the injury. I think the case must be decided on a ground which does not depend on any doubtful fact; and this is the nature of the verdict. It was never intended that the amount of this should be the measure of the damages. It would have been a most outrageous valuation for a woman and three children. It was evidently only in nature of a penalty to secure the fulfilment of another

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object, which \*was, that the complainant should restore the negroes for which the defendants had sued.

If indeed it had been stipulated between the parties, that the amount of the verdict should be the damages which the complainant should pay as an indemnity to the defendant's for his failure to restore the negroes, this court could not relieve against such stipulated damages. There are many cases to this effect; but there is no evidence that this was the agreement between the parties; nor is there any reason to believe that the jury intended the verdict as a true assessment of the value of the slaves; on the contrary, there is the strongest reason to believe that it was only intended to compel the

restoration of them; and viewing it in this light, it cannot be enforced against the complainant. He must however pay to the defendants three hundred dollars, as an indemnity for not delivering the boy who was carried away by Madden; for this is his own assessment of the damage.

It is therefore ordered and decreed, that the complainant be discharged from the verdict obtained against him by the defendants, on his delivering to them the three slaves, Chloe, Sylvia and Sarah, and paying to them three hundred dollars as an equivalent for the boy Edmund, who has been carried away; unless the said complainant shall recover, and deliver the said boy also to the defendants, on or before the first day of September next. And it is further ordered, that the said verdict do stand in the mean while, as a security for the full performance of this decree.

The court gives no costs on either side.

(Signed) THOMAS WATIES.

There was no appeal from this decree.

#### 4 Desaus. \*405

\*Case LX.

Camden.—Heard by Chancellor Desaussure.

JESSE WREN and JANE, his Wife, v. ROBERT CARNES and Others.

(June, 1813.)

[*Descent and Distribution* ⚡35.]

The half blood is postponed one degree to the whole blood, in successions to the personal as well as real estate, by the express provisions of the statute of February 1791. And though the act of 1797, amending the former, does not expressly recognize that distinction, but speaks generally of brothers and sisters, without discrimination of whole or half blood, the same postponement shall take place according to the decision of the court of appeals.

[Ed. Note.—Cited in *Lawson v. Perdriau*, 1 McCord, 460; *Ex parte Mays*, 2 Rich. 62; *Edwards v. Barksdale*, 2 Hill, Eq. 420.

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 102–107; Dec. Dig. ⚡35.]

In another case, (the heirs of Richard Guerard, v. the executors of Richard Guerard,) it was decided by the circuit court, that in remoter relationships, not comprehended within the enumerated cases in the statute of 1791, the half blood in the same degree with the whole blood, should take equally with the whole blood; but there was no appeal.

[*Descent and Distribution* ⚡35.]

[Under the statute of 1797, the terms "brothers and sisters" do not include those of the half blood.]

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 102; Dec. Dig. ⚡35.]

In this case, the judge delivered the following decree:

†All the facts stated by the bill of com-

† It is not known that any judgment has been rendered by the Court of Law in this state, on this point. But see the opinion of Judge Bre-



plaint are admitted by the answer, and they form the following case for the opinion of the court:

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\*Mary S. White died in May, 1812, unmarried and intestate, leaving a considerable personal estate. At the time of her death, her nearest relations then living, were, her mother, Jane Wren, one of the complainants; a brother of the half blood, named Robert Carnes, a defendant, and a sister of the half blood, named Jane Wren, a daughter of the complainants.

Jane Wren the daughter, hath since departed this life, unmarried and intestate, leaving alive her mother Jane Wren the complainant, and her half brother the above named Robert Carnes.

The question arising out of these facts, is

ward in his digest of the statute law of this state, in a note to page 426, of the first volume.

Another case occurred respecting the rights of the half blood, under our statutes, which was heard and decided by Chancellor Desausure, and which, as bearing on this question, is inserted below, as a note.

**The Heirs of R. GUERARD v. The Executor and Trustee of R. GUERARD.**

In the principal decree made in this case, most of the points in controversy were decided; but it seems that it is necessary to make an additional order for the sale of part of the property, and also to decide a collateral point, arising among the complainants themselves, which I am requested to do by the parties.

It is therefore ordered and decreed, that the house and lot situated in the town of Beaufort, belonging to the estate of Richard Guerard, deceased, be sold by the master or commissioner (at the choice of the parties) on the following terms: One ——— part cash, and the balance payable in ——— years. The purchaser to give bond and mortgage for securing the payment of the purchase money; and the nett amount of the said sales shall be distributed in the same manner as the rest of the estate of Richard Guerard, deceased, was directed to be distributed by the decree heretofore made in this case;

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that is to say, one fourth \*part to be equally divided between the heirs of Godin Guerard, deceased, a half brother of R. Guerard; another fourth part to be equally divided between the heirs of Godin Guerard, as assignees of Jacob Guerard, another half brother of Richard Guerard; and another fourth to Joseph Guerard, a surviving half brother of Richard Guerard, the testator; and the remaining fourth part to be equally divided between the heirs at law of John Hill Guerard, a nephew of Richard Guerard, by a whole brother named David, who was dead at the time of R. Guerard's decease.

The question which has arisen among the complainants themselves is this: Who are the heirs at law of John Hill Guerard, among whom the division of his fourth part of Richard Guerard's estate is to be made? John Hill Guerard died intestate, in 1799, leaving neither father, mother or other lineal ancestor, wife or lineal descendant, brother or sister, or any of their descendants. His relations were two uncles of the half blood, who survived him; and the children of another uncle of the half blood who died before him; also one uncle and two aunts of the whole blood, who all survived him; though they are dead since leaving children and legal representatives.

Do any, and which of these relations of the

whether this defendant Robert Carnes, is entitled to any, and if any, what portions of

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the personal estates left by his \*two sisters of the half blood, who have died intestate.

By the operation of the third, eighth and eleventh sections of the act for the abolition of the rights of primogeniture, passed in 1791, the mother of these children, would, under the circumstances stated, have taken the whole of the real as well as personal estates, of which they died possessed or entitled to. But by the law of 16th December 1797, for the amendment of the act for the abolition of the rights of primogeniture, it is enacted, "that in all cases in which any person shall die intestate, leaving neither wife, child or children, or lineal descendant; but leaving a father or mother, and brothers

half blood come in for distribution, under the act of 1791, equally with the relations of the whole blood, or are they excluded by them?"

In the provisions of the act of 1791, for the abolition of the rights of primogeniture, and for a more equal distribution of intestates estates the relations of the half blood, are postponed one degree to the whole blood as far as the cases are specified. For instance, the brothers and sisters of the half blood, are postponed to the brothers and sisters of the whole blood, but they are let in equally with the children of such of the brothers and sisters of the whole blood as are dead.

The first six sections lay down the rules for distribution in a number of specified cases; then the 7th section enacts in these words: "If

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\*the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor, then the widow shall take two thirds of the estate, and the remainder shall descend to the next of kin. Another clause provides, "that if there be no widow, the share intended for her shall go as the rest of the estate is directed to be distributed by the act." And another clause puts real and personal property on the same footing.

I regret that I have not had the usual advantage of the aid of counsel in this case, the parties having submitted the point without argument.

It is manifest from the preceding statement, that the property in question, that is, the fourth part of Richard Guerard's estate, which descended to John Hill Guerard, must be distributed according to the 7th section abovementioned, because he left no relations for whom provision is specified in the preceding clauses. By that clause it is said it shall "descend to the next of kin." This brings us then directly to the question, who are the next of kin.—The English statutes of distribution, 22d Car. 2d (amended by the 29th,) which was of force in this state, governed upon this subject before the act of 1791 was enacted; and I presume it is reasonable and proper that the construction put upon the words of those acts, should be followed, where the same words are used in the new act. By those acts it was provided, that if there be neither widow nor children, the whole estate (personal) shall be distributed among the next of kin. Mr. Justice Blackstone says, (2d vol. p. 215, 316.) "the next of kin here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration, of whom (he says) we have sufficiently spoken. In re-

and sisters, or brother and sister, or brothers and sisters one or more, the estate real and

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personal of such \*intestate, shall be equally divided amongst the father, or if he be dead, the mother, and such brothers and sisters, as may be living at the time of the death of such intestate, so that such father or mother, as the case may be, and each brother and sister so left living by the intestate, shall each take an equal share of his estate real and personal: Provided that the issue, if any, of any deceased brother or sister, shall take among themselves the same share, which the father or mother if living would have taken; and if but one such issue, then he or she shall take the same share which his father or mother would have taken if living.

The question which has been raised on this last mentioned act, is, whether the words

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brothers and sisters, as \*used in the above

currence to what he said on that subject, (2d vol. p. 504, 505.) we find that he lays it down, that "the half blood is admitted to the administration as well as the whole; for they

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are the kindred of the in\*testate, and only excluded from inheritance of land on feudal principles." Therefore the brother of the half blood, shall exclude the uncle of the whole blood, and the Ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion." Here then is direct authority, that under the words, next of kin, relations of the half blood in equal degree, are let in equally with relations of the whole blood, as to personal estate.

Now we have seen that the legislature in the act of 1791, after specifying certain enumerated cases, declares in the 7th section, that in default of such relations as are so specially provided for, the estate shall descend to the next of kin, and has not given any direction for a different construction of those words, than heretofore used and settled.

Indeed the 9th section of the act of 1791 enacts, that in reckoning the degrees of kindred, the computation shall begin with the intestate, which is the civil law rule; he being the terminus a quo, the several degrees are numbered. And this was the rule by the English law in the construction of the statutes of distribution, though the rule of the cannon law prevailed in computing descents for the inheritance of real estates. 2 Black, 504, 5.

This mode of resorting to the old rules and modes of construction, and even to the old principles of descent, in cases not provided for by the statutes giving a new rule, is generally resorted to.

In *Johnson v. Haines' lessee*, in 4 Dallas, 64 [1 L. Ed. 743,] and in *Cresoe v. Laidley*, 2 Binnely, 279, it was decided that where a case arose not provided for by the new act regulating descents, the court must decide according to the ancient rule, and that the heir at common law must take. The reason given, to be sure, is that the new distribution was an alteration or encroachment on the common law, and whenever such an encroachment takes away a right, which would otherwise be vested in the heir at law, the operation of the statute should not be extended further than it is carried by the very words of the legislature. And I presume,

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\*that where rights are vested in particular de-

mentioned clause, include brothers and sisters of the half blood?

I have considered this question, and though it is susceptible of doubt, I am of opinion that I am bound to let in the brother of the half blood, in the case stated under the provision of the act of 1797. The words brothers and sisters are so broad, as to include brothers and sisters of the half blood. The act of 1797, does not discriminate between the whole and the half blood, as the act of 1791 did; and if the half blood should be let in equally with the whole blood to a share of the estate of the intestate, where a parent is living, though excluded where the parents are dead, as is the case under the act of 1791, this will be the effect of legislative

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intention, or of want \*of precision in stating a contrary intention. But we are not required to decide that point now; for there are no brothers and sisters of the whole blood of these intestates. When such a case

descriptions of persons by statute, that the new regulations shall not alter those rights beyond the very words used.

I come then to the application of all this. The old statute of distributions, used the words, "next of kin." In the construction of those words in the acts, the relations of the half blood were let in equally with those of the whole blood of the same degree.

The act of 1791, after distributing the intestate's estate in certain enumerated cases, (and certainly postponing the half blood to the whole, one degree in those enumerated cases,) goes on to provide generally, that in all other cases not enumerated, the estate shall descend among the next of kin. And the ninth clause of that act directs, that in reckoning the degrees of kindred, the mode of computing shall be by beginning at the intestate and counting in a manner, which is found to have been that of the civil law.

Now that was the mode of reckoning under the statute of distribution in England, which we had adopted; and we find it settled, that the half blood in the same degree, were let in equally with those of the whole blood, in such cases. 1 Vez. sen. 15. I feel myself bound, therefore, when our statute of 1791 ceases to make new provisions, and directs the estate to be divided among the next of kin, to construe those words as they were formerly construed.

It is true that the court of appeals seems in another case not to have acted on that principle. It was in the case of *Wren and wife v. Carnes*, decided two years ago at Camden. The point decided by the circuit court was, that the act of 1797, (amending the act of 1793,) having let in brothers and sisters equally with the mother of an intestate, to the inheritance of the property of the intestate, the word brothers and sisters, included half brothers and sisters. But the court of appeals finding the half blood postponed one degree by the act of 1791, to the whole blood, (in the enumerated cases.)

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decided that the act of \*1797, using the words brothers and sisters, did not include the brothers and sisters of the half blood; and that the mother should take the whole estate of her daughter, who died intestate, leaving no other relations but that mother and a half brother.

This case, however, was of a new impression, and the court was divided three to two. And it does not bear directly upon the question now under consideration; only by analogy. I there-



arises, it will be decided. The present question is simply, whether the mother of the deceased intestates shall take the whole property from Robert Carnes, the defendant, who is their brother of the half blood?

I have said already, that the general words brothers and sisters, appear to me broad enough to include brothers and sisters of the half blood, where the clause makes no discrimination. For it cannot be denied that a brother of the half blood, is a brother, and answers the description of the act of 1797;

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where the act of 1791 means \*to discriminate between the brothers and sisters of the whole and of the half blood, it does so distinctly and clearly. But no such discrimination is made by the act of 1797. The reasonable deduction is that none was intended. The object of the act of 1797 was to prevent a surviving parent from carrying off all the property of a deceased child from his brothers and sisters. The extension of this prin-

ciple to the half blood, seems to be conformable to the general spirit of the act, which is to divide estates among the near relations.

I feel the more disposed to give this construction to the act of 1797, because brothers and sisters of the half blood, were let in equally with brothers and sisters of the whole blood, in the distribution of personal

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estates of in\*testates, by construction of our old act of distributions—[1 Vezey, sen. 156, 7, Burnet v. Man.] For the courts of justice decided that brothers and sisters of the whole and of the half blood were in equal degree of relationship to the intestate: And to let those of the half blood in, in the total absence of the whole blood, seems still more reasonable.

It is therefore ordered and decreed, that the defendant Robert Carnes, is entitled to a moiety of the personal estates of his intestate sisters, Mary S. White and Jane Wren; and that the mother Jane Wren, the com-

fore shall not hesitate to follow my own judgment, that the half blood are let in, under the words, "next of kin," in the 7th section of the act of 1791, equally with the whole blood, conformably to the construction of those words, under the old statute of distributions. I am confirmed in this opinion, by that expressed by judge Brevard in his valuable notes to his digest of the statute laws of the state—See 1st volume, page 426, where he says, "The act has made no special provision for the half blood after brothers and sisters. They must come to the succession under the denomination of next of kin, mentioned in the 7th rule, in which case they will not be postponed one degree in deference to the whole blood, as in the other cases where they are specially provided for." "And in the provision made by the act of December, 1797, amending the act of 1791, no distinction is made between brothers and sisters of the whole and half blood and their issue."

Another question, however, arises. The intestate John Hill Guerard, left alive, as above stated, two aunts and one uncle, of the whole blood on the maternal side, and two uncles of the half blood on the paternal side, and the children of a third uncle, Mr. Godin Guerard, of the half blood of the paternal side, who was dead at the time of the intestate's decease.

The question is, admitting that the half blood are entitled to come in equally with the whole blood, can the children of Godin Guerard, be admitted to take their father's share of the estate, which he would have been entitled to, had he been living at the intestate's death.

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\*The statute 22d Car. 2d, enacted, "that where the intestate leaves no wife or children, the personal estate shall go to the next of kin, and their legal representatives, provided there shall be no representation amongst collaterals, after brothers and sisters' children." In the construction of that act, it was decided in Pett's case, 1 P. Williams, 25 to 28, that the grandchildren of a deceased brother should not come in and take by representation what their grandfather or father would have been entitled to. The whole court of king's bench agreed that "among collaterals, saving only in the case of brothers and sisters' children, proximity of blood should give title to the personal estate of the intestate." Lord Macclesfield, in the case of Bowers v. Littlewood, 1 P. Williams, 594,

considered the doctrine settled by Pett's case, notwithstanding Lord Cowper had inclined by an ingenious construction of the words of the proviso to let in the children of collaterals. And in the case then before him, he, Lord Macclesfield, refused to let the son of an aunt take any part of the estate of the intestate who left an uncle living.

The point decided in Bower's case is precisely the second question we are now considering. For the children of a deceased brother claim with their uncles and aunts by right of representation among collaterals. But it seems they have been prevented from taking by the words of the proviso, in the statute of 22d Car. 2d, restricting representation to the children of the brothers and sisters of the intestate. I do not however find any such direct proviso in our act of 1791; so that if the matter rested here, the children of Mr. Godin Guerard might perhaps be allowed to come in. But there is another difficulty in their way, the words of the seventh section of the act of 1791 directs the property, in case of the failure of the specified relations, to go to the next of kin, and stops there. The act of 22d Charles 2d, gave it to the next of kin and their legal representatives, (with proviso, &c.) Now the next of kin are the uncles and aunts living at

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John Hill Guerard's death. Godin Guerard was then dead. His children who set up this claim are one degree further off; they are not next of kin.—They cannot take then by the words of the act, and there is nothing to induce the court to think that the words "and their representatives," were omitted by accident in the 7th section of the act of 1791. For the right of representation is carefully secured in the preceding clauses among the lineal relations. I must then conclude that the words were omitted designedly, and that it was not intended to extend the right of representation any farther. Upon this ground, therefore, I am of opinion that the children of Godin Guerard cannot come in to take the share to which their father would have been entitled, of John Hill Guerard's fourth part of R. Guerard's estate. Proximity of blood must prevail.

It is therefore ordered and decreed, that the fourth part of the estate of the late Richard Guerard, which descended to his nephew, John Hill Guerard, deceased, shall be divisible into five equal parts, one whereof shall be paid to

plainant, is entitled to the other moiety: and that the administrator J. Wren, do account for said estate with the commissioner of this court, and pay over what may be due to the

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\*guardian of said minor, Robert Carnes.—The costs to be paid out of the estate.

(Signed) Henry W. Desaussure.

From this decree there was an appeal, which was very fully and ably argued by Mr. Blanding for appellants, and Mr. Hooker for the respondents.

Mr. Blanding's argument was as follows:

By the act of 1791, the brothers and sisters of the half blood are postponed one degree, and placed on a footing with the issue of the whole brothers and sisters. Their issue are entirely excluded, unless they are embraced in the general provision for the "next of kin." They are noticed in none of the particular provisions of the act. Thus stood the claims of the half blood, prior to the act of 1797. Was it the object of that act to alter their rights and place them on a different footing in relation to the whole blood? This is not pretended. The preamble of the act shews, that this was not the intention of the legislature. It had another and specific object. The father and mother under the act of 1791, took in exclusion of the brothers and sisters. Large estates, descended from the father, thus passed into the family of the mother, even where there were children of the father still living. To avoid this injustice, was the declared object of the legislature. There was no intention to disturb further the provisions of the act of 1791, or the relative situation of the whole and half blood. In providing the remedy, the act has declared that the father and mother shall take with the brothers and sisters. It is contended that the half blood are included in these terms: That the father and mother are placed on the same footing with the whole and half brothers and sisters, while they themselves are not on the same footing. This can never be, unless the omnipotence of legislation has destroyed the first principles of mathematical relations and proportions, and made a thing equal to both of two other things, which are themselves unequal. In the construction of the acts of the legislature, we are bound to suppose them consist-

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ent, un\*less they have marked their absurdities in characters too plain to admit of reconciliation. Is there here that plain unequivocal language including the half blood,

the heirs or legal representatives of John Bernes Barnwell, deceased, an uncle of the deceased John Hill Guerard; another fifth part to the heirs and legal representatives of Mrs. Elizabeth Deceaux, deceased, an aunt of the deceased: One other fifth part to the heirs and legal representatives of Mrs. Phoebe Campbell, an aunt of the deceased: One other fifth part to John Guerard, an uncle of the half blood of the deceased: And the remaining fifth part to the heirs and legal representatives of Godin

which necessarily prevents the construction of their exclusion? The terms "brothers and sisters," may be satisfied by a construction which takes in the whole blood only. This is their common law construction, where the whole blood alone are known in the canons of descents. 2 Blackstone's Commentaries. The act of 1791, of which the act of 1797 is an amendment, in all its provisions relates to real estates alone. An after clause places the personal estate on the same footing as the real. It would seem thence to follow, that in all cases of doubt, where the common law is resorted to for furnishing the rule of construction, the law of descents and not of distributions should be consulted. But if we resort to our own act of distributions, the words brothers and sisters have the same meaning. They are used in the act of 1791 twice without any term of restriction annexed to them; yet they there invariably mean the whole blood alone. The rule of the common law then, and the act of 1791, fix a meaning to the terms, which makes every thing consistent, and leaves the symmetry of the plan of descents as conceived by that legislature unimpaired.

It has been correctly said that under the statute, 22 and 23 Car. 2 Cap. 10, Sec. 6, the words "shall be distributed equally to every of the next of kindred of the intestate, who are in equal degree," have let in the half blood with the whole. In other words, it has been the construction of that act, that the half blood are in equal degree with the whole. Now if it be true that the brothers of the whole and half blood, are, according to our law, in equal degree, the cases are parallel. But we have to contend with the act of 1791, which has placed the whole and half blood in different, and not in equal degrees, as far as the particular provisions of the act go; and the case under consideration, is within these particular provisions. Had the case arisen under the general provision in favor of "the next of kin," it would be parallel with the one cited, and ought to be governed by it.

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\*To give the act of 1797, any other construction than the one contended for by the complainant, would be attended with many absurdities. Thus, where there is no father or mother, under the act of 1791, the whole brother takes in exclusion of the half. But if there be a father and mother, the act of 1797 governs, and according to the construction contended for by the defendant, the

Guerard, (not in right of their father, against whose claim I have decided,) but as assignees of Jacob Guerard, another half uncle of the deceased John Hill Guerard: And that the costs be paid out of the estate of John Hill Guerard, deceased.

HENRY WM. DESAUSSEURE.

J. Ford and Henry Alexander Desaussure for complainants—T. Parker for defendants.

There was no appeal from this decree.



whole and half brother take together, and come in with the father or mother; or what is more strange, where there is a father or mother and whole brothers, the words "brothers and sisters," in the act of 1797, mean whole brothers and sisters in exclusion of the half; but where there is no whole brother, "brothers and sisters" in the same act mean half brothers and sisters.—In other words, "brothers and sisters" have two different meanings, not by being used in relation to different subjects, but in the same sentence, in relation to the same subject, and even without being repeated. The same difficulties attend the proviso of the act of 1797. But there are some peculiar to that proviso.—"Issue of brothers and sisters," are the terms there used without the qualification of blood.

Does this mean the half blood? Then the issue of the half take with the issue of the whole brother, or even with the whole brother himself: This must be the case on the construction contended for, or the words have a different meaning in the proviso, from their meaning in the enacting clause. Suppose there is a father, a brother of the half blood, and the issue of another half brother. In that case, according to the decree, the half brother takes with the father, and under the proviso of the act of 1797, how is the issue of the other half brother to be excluded? But if there be no father, then the half brother excludes such issue. There being or not being a father, includes or excludes the issue of the half brother; and what seems strange, there being a father brings them in—there being none excludes them. The reverse of the rule might be tolerated. The absence of those placed before them under the act of 1791, might admit them. By the rule contended for, it excludes them. Under the act of 1791, which still governs where

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\*there is no father or mother, the issue of a whole brother is in the same degree with a half brother, and the issue of a half brother never takes as long as there is a whole brother or the issue of one. But if "brothers and sisters" in the act of 1797, mean half brothers and sisters, then "issue of brothers and sisters," in the proviso of that act, mean issue of half brothers and sisters.—Then, in case there be a father, the issue of a half brother takes with a whole brother; but in the absence of such father, the issue of a half brother is two degrees more remote than a whole brother.

These are difficulties which cannot be surmounted, but by rejecting the construction of the circuit court, and adopting that contended for by the complainant. The whole brothers and sisters and their issue, will then be placed on a level with the father or mother, and the half blood left to make out their claims under the act of 1791.

After some deliberation, the court disagreeing in opinion, the chancellors Gaillard, James and Thompson, delivered the judgment of the court, for the reversal of the decree:

The respect I feel for the opinion of the judge whose decree is appealed from, has made me give to this case the best consideration a short time would allow.

The question is, as he states it, whether the defendant, Robert Carnes, is entitled to any, and what portion of the personal estates left by his sisters of the half blood, who have died intestate? Or it may be stated thus: Whether the mother is entitled to their estates exclusively?

It is admitted that the mother would be entitled exclusively under the act of 1791, abolishing the rights of primogeniture, &c. if the act of 1797, to amend that act, were not in the way. By the operation of the act of 1791, a surviving parent, the mother for instance, got the whole estate of her husband, who died intestate, and by a second marriage, carried it off with her into another family, strangers to the blood of the first

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husband. The legislature viewed this as a mischief, and to remedy it, passed the act of 1797.

Let us consider the preamble to this act: "Whereas it hath been adjudged by the courts upon the construction of the aforesaid act, (referring to the act of 1791,) that in cases in which persons die intestate, leaving no wife or children or lineal descendant, but leaving father or mother, although such intestate also leave brothers and sisters, or brother and sister, or brothers or sisters, one or more, that the father or mother is entitled to receive the whole estate, to the exclusion of such other of his or her kindred aforesaid." The cases in which it had been adjudged by the courts, that the surviving parent took the estates of the children who died intestate, were all of them cases in which the children were the children of both parents.

A. married, we will say, B. and had by her two children, C. and D. B. died. A. afterwards married E. and had two children by her, F. and G. A. died intestate, leaving his wife E. and three or four children. If either of the children of the first marriage, died afterwards intestate, his or her share of the intestate's estate, under the act of 1791, went to his brother or sister of the whole blood; not to the wife of the intestate, because she was not his or her mother; and if so, children of the half blood, that is, brothers and sisters of the half blood, were not in the contemplation of the legislature when they passed the act of 1797, and the words "brothers and sisters, or brother and sister, or brothers or sisters," used in the preamble, must be understood of the whole blood.

It is correctly said in the decree of the

circuit court, that where the act of 1791 means to discriminate between the brothers and sisters of the whole and of the half blood, it does so distinctly and clearly.

The counsel for the appellant has observed, that in the fourth clause of the act of 1791 the words brothers and sisters are used twice without any terms of restriction, and that they there mean the whole blood.

This is so; but they so evidently and ap-

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propriately \*refer to the words immediately preceding in the same clause, "brothers and sisters, or brother and sister of the whole blood," that the insertion of the words "of the whole blood" afterwards would have been superfluous. The clause upon which this question turns, enacts, "That in all cases in which any person shall die intestate, leaving neither wife, child or children, or lineal descendant, but leaving a father or mother, and brothers and sisters, or brother and sister, or brothers, or sisters, one or more, that the estate real and personal of such intestate, shall be equally divided amongst the father, or if he be dead, the mother and such brothers and sisters, as may be living at the time of the death of such intestate, so that such father or mother, as the case may be, and each brother and sister so left living by the intestate, shall each take a share of his estate real and personal: Provided always, that the issue of any deceased brother or sister, if more than one, shall take, amongst themselves, the same share which their father or mother if living would have taken; and if but one issue, then he or she shall take the share which his or her father or mother would have taken if living."

In every clause of the act of 1791, in which the children of a brother or sister are provided for, it is the children of a brother or sister of the whole blood. Whatever construction shall be put upon the words brother and sister in the proviso, must be put upon the same words in the clause of the act in 1797, to which the proviso is attached, there being no repugnance between them. If then, the expression brothers and sisters or brother and sister in the clause, comprehends the half as well as the whole blood, the issue of a brother of the half blood is put upon a footing with a brother of the whole blood, which would reverse the situation in which they are placed by the act of 1791, for by that act, the children of a brother of the whole blood, take with a brother of the half blood. Many absurd consequences would follow from this construction in favor of the half blood, and we cannot shut our eyes to them. If the meaning of a statute be doubtful, the consequences are to be considered in

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the \*construction, and if in this case we say that the legislature intended brothers and sisters of the half, as well as of the whole

blood, we shall be bound to say so in every other case which may occur.

It is said, that under our old act of distribution, brothers and sisters of the half blood were let in equally with brothers and sisters of the whole blood; but the manner of computing the degrees of kindred is prescribed by the act of 1791, and the issue of the brother of the whole, is expressly put, on a footing with a brother of the half blood. The act of 1797 refers to the act of 1791, and relates to the same subject. Now all acts that relate to the same subject, must be taken to be one system and construed consistently.

The general words brothers and sisters are certainly broad enough to include brothers and sisters of the half blood; but the act of 1797, is open to two constructions, one consistent, and the other inconsistent with the act of 1791. I am bound, I think, to adopt the former. This view of the subject, appears to me to be warranted by sound principles of construction, and consistent too, with the object of the act of 1797.

I am, therefore, of opinion, that the decree of the circuit court be reversed; and my brethren, Thompson and James concurring with me, it is reversed.

THEODORE GAILLARD.

We concur in this opinion.

W. D. JAMES.

W. THOMPSON.

The Chancellors Desaussure and Waties were of opinion that the decree of the Circuit Court ought to be affirmed, and delivered their opinion accordingly:

I have reconsidered the decree of the Circuit Court in this case, and I am satisfied that it is correct. By the act of 1791, abolishing the rights of primogeniture, passed in the year of our Lord 1791, if an intestate left no child, or other lineal descendant, but left a widow and a father or mother, the

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widow was declared to be entitled \*to one moiety of the estate, and the father, (or if he be dead, the mother) to the other moiety. By this regulation, the father and mother were preferred in the case stated, to the brothers and sisters of the intestate. This was considered an unjust preference, and the act of the 16th Dec. 1797, was passed, to correct the principle; and it was enacted that if any person should die intestate, leaving neither wife, child or lineal descendant, but leaving a father or mother, and brothers and sisters, (one or more) the estate, real and personal of the intestate, should be equally divided amongst the father, (or if he be dead, the mother) and such brothers and sisters as may be living at the time of the death of such intestate: so that such father or mother, and each brother and sister, so left living, should take an equal share of his estate, real and



personal, with a proviso in favor of the issue of any deceased brother or sister. In the case under consideration, the intestates being females, left no husbands or lineal descendants, but left a mother, who is one of the complainants, and a half brother, Robert Carnes, who is the defendant; and he appears to come in under the general words of the act of 1797, which lets in brothers and sisters equally with a surviving parent of the intestate. But it is objected, that the act of 1797 does not expressly name brothers and sisters of the half blood. To this I answer, that it was unnecessary. In the construction of the British statute of distributions, formerly of force here, the brothers and sisters of the half blood were let in equally with brothers and sisters of the whole blood, to the succession of intestates estates. And when the act of 1791 meant to discriminate between them, and postpone the half blood to the whole blood, in cases of personal, as well as real estate, it does so by express words. The omission of such words of discrimination, and preference of the whole blood, in the act of 1797, leaves a strong impression that the legislature did not mean to make the discrimination in the case stated; or at any rate we are left free to give the broad words of the act of 1797, their natural and full operation, and to a construction analogous to

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the construction of the old statute of distributions. But in reality, it is not necessary to go so far, for I agree that the act of 1797 is to be construed in connection with the act of 1791, both being passed in *pari materia*. The effect of the regulations of the act of 1791, is to postpone the half blood to the whole blood, but not to exclude them. They are let in on failure of the whole blood, and equally with the children of the brothers and sisters of the whole blood. Even in the case of the widow of a childless intestate, (and the widow is the most favored relative of these laws) the brothers and sisters of the half blood are let in to a moiety of the estate in default of brothers and sisters of the whole blood, or to equal portions of that moiety with the children of brothers and sisters of the whole blood. These shew the intention of the legislature to provide for the half blood, secondarily to the whole blood. The act of 1797, makes no other alteration in the system, than to take away the exclusive right of the parent in the case stated, to the estate of a wifeless and childless intestate, and to let in brothers and sisters. In the case under consideration, there is no brother or sister of the whole blood to answer the description, nor any of their children. But there is a brother of the half blood, who does answer the description, and who, (without prejudice to the rights of the whole blood, if there were any brothers and sisters of that description) does seem to me entitled to the benefit of the act of 1797.

I am therefore of opinion, that the decree of the Circuit Court judge should be affirmed.

HENRY W. DESAUSSURE.

I concur in this opinion, and for the reasons therein stated.

THOMAS WAILES.

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\*Case LXI.

Cheraw District.—Heard by Chancellor Gaillard.

CHARLES IRBY, Administrator of Mehitabel Lide, v. DUNCAN MCRAE, Administrator with the Will Annexed, and JOHN LIDE, CHARLES M. LIDE, and Others, Devisees of Thomas Lide, Deceased.

(December, 1814.)

[Equity ⚡445; Judgment ⚡640.]

The sentence of the court of ordinary establishing a disputed clause in a will, supported afterwards by the verdict of a jury, and judgment of a court of law, cannot be shaken in this court, where there is no discovery of new matter material to vary the case, and affect the justice of the decision. It is *res adjudicata*, by the competent tribunals.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. ⚡445; Judgment, Cent. Dig. § 1154; Dec. Dig. ⚡640.]

[Evidence ⚡265; Wills ⚡746.]

Parol proofs of loose declarations of a party, shall not, after a great lapse of time, establish an alleged renunciation of clear rights. The statute of limitations is not a bar to legacies.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1050; Dec. Dig. ⚡265; Wills, Cent. Dig. § 1929; Dec. Dig. ⚡746.]

[Annuities ⚡6; Wills ⚡734.]

Interest is properly allowed on arrears of an annuity bequeathed by a husband to a wife, in lieu of claims on his estate.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. § 18; Dec. Dig. ⚡6; Wills, Cent. Dig. § 1847; Dec. Dig. ⚡734.]

This was a bill filed by the administrator of Mrs. Mehitabel Lide, against the representatives of the late Colonel Thomas Lide, for the recovery of the arrears of an annuity of 50 *l.* bequeathed by the said Thomas Lide, to his widow the said Mehitabel Lide, by his last will and testament.

The bill charged, that the said last will and testament was duly executed on the 7th November 1787, by which the testator bequeathed £50 per annum to his said wife, during her natural life; to be paid out of the profits of his estate, in lieu of the portion to which she would have been entitled. And that the testator departed this life, leaving the said will in full force.

That the widow received three years' annuity, and no more; and lived to the month of February, 1804; and considerable arrears were due; for which the suit was brought.

The bill also charged, that the defendants,

the devisees of the testator, had taken possession of, and were in the enjoyment of the real estates devised to them, on which said annuity was charged. The bill prayed relief.

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\*The defendants in their answers, admitted that the said Thomas Lide had made the will in question, at the time stated, wherein he made a bequest of 50*l.* per annum to his wife; but they insisted that the said bequest was obtained by undue importunity, urged in the last moments of the testator, and by false allegations and pretences, made by Mrs. Mehitabel Lide, stating that she was pregnant, and that the estate of her first husband, Mr. Irby, had turned out badly, and would be nearly insolvent, so that she would be in want; which pretences, it is alleged, were false and unfounded.

The defendants also insisted, that an agreement had been entered into, by the said Colonel Thomas Lide, and the said Mehitabel, before their marriage, that neither of them should acquire by the intended marriage, any rights in the property or estate of the other; and that the said Thomas Lide had strictly complied with the said agreement, and had not set up any claims, or obtained any share of the property, to which the said Mehitabel was entitled in the estate of her former husband, Mr. Irby, deceased; and had inserted in his last will, a clause, releasing to the said Mehitabel, all the rights which he had acquired in her property, by virtue of the marriage between them. But that the said Mehitabel had obtained, contrary to the said agreement, an interest in the estate of the said Thomas Lide, by the importunities and false pretences above stated, a few hours before the death of the said Thomas Lide.

The defendants admitted that they had taken possession of the lands devised to them; and they admitted that only a small part of the said legacy, had been paid to the said Mehitabel, by the administrator with the will annexed; and they pleaded the statute of limitations against the claim for the remainder of the said pretended legacy.

One of the defendants, James Lide, admitted and stated the facts set forth by the other defendants, and added, that he had offered the said Mehitabel Lide, to pay her a certain sum, in full compensation of his proportion of the said annuity: But she refused

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to receive \*it, and told him it was not her intention to require any part of said annuity from said defendant, which information had been confirmed since her death, by her administrator, the present complainant.

The defendants stated, that they had caused Duncan McCrae, the administrator with the will annexed, of their father the said Thomas Lide, to be summoned by the ordinary of Marlborough district, to prove the said will in solemn form, which suit was still pending in the court of ordinary; and as the

said defendants had little doubt that on the probate of said last will, they should be able to produce such proofs of the improper conduct of the said Mehitabel Lide, in procuring the said clause, bequeathing her the annuity aforesaid, as would induce the court of ordinary to reject the said clause, they prayed that the Court of Equity would suspend their decree, relative to the payment of the said annuity, which was the sole object of complainant's bill.

The court of equity accordingly suspended the hearing the cause respecting the payment of said annuity, until the court of ordinary should decide on the validity of the clause, in the will of the said Thomas Lide, bequeathing the same to the said Mehitabel.

The cause was accordingly tried in the court of ordinary, and the parties went into plenary proofs as to the due execution of the said last will and testament of the said T. Lide, and of the manner in which the said clause, bequeathing of the annuity of 50*l.* to Mrs. Lide, was obtained to be inserted; and Morgan Brown, who drew the said last will, and inserted the said clause, was particularly examined relative thereto.

After a full hearing, the judge of the court of ordinary was of opinion, that the said clause, bequeathing the said annuity to the said Mehitabel Lide, was not obtained by undue importunities, or by false pretences; and he established the said clause as well as the rest of the said will.

From this sentence of the court of ordinary, the children and devisees of the said Thomas Lide appealed, to the court of common pleas.

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according to the provisions \*of the 16th section, of the statute of the 13th March, A. D. 1789.

On this appeal an issue was made up, and the question as to the validity of the said clause of the will of Colonel Thomas Lide, which was in question, was tried before a jury in the district of Marlborough, who found a verdict against the validity of the said clause.

A motion was afterwards made in the constitutional court, before all the judges, for a new trial, on the ground that the verdict was against the weight of evidence. On argument of that motion, the judges ordered a new trial; whereupon a second trial was had before the jury of the district, who found a verdict in favor of the validity of the said clause, in the said last will and testament. This verdict was acquiesced in, and no motion was made for a new trial.

All these proceedings were certified up to the circuit court of equity, sitting in the district of Cheraws, in February 1811, whereupon Judge Gaillard, ordered a reference of the bill, which had been filed in this court, for the recovery of said annuity, and the answers thereto, to the commissioner, to examine and report to the court what was due on



the said annuity: And the said commissioner made report that the arrears of annuity, including interest, amounted to \$5,089; and that the administrator with the will annexed, having paid and delivered over the funds of the estate to the children and devisees of the testator, they were liable to pay the same, in the proportions reported.

No exceptions being filed to this report, the same was confirmed by the decretal order of the court, from which there was no appeal.

Afterwards, in June 1814, an application was made to Judge Thompson, then holding the circuit court of equity at Cheraws, for a re-hearing, in the nature of a bill of review.

This motion was fully argued before Judge Thompson, who being of opinion that the petitioner for a re-hearing, not having shewn any error of law apparent upon the decree, nor pretending to have discovered any new

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testimony, which could materially vary the merits or alter the decree, ordered and decreed, that the application for a re-hearing should be rejected.

From this decision, an appeal was made, to the court of appeals in equity, which was argued very fully by Mr. Charles M. Lide, for the appellants, and by Colonel Blanding for the respondent.

The court of appeals afterwards made the following decree:

This is an appeal from the decree of a Circuit judge in Equity, made upon a bill of review, which was filed on the 26th October, in the year of our Lord 1813, by which decree the judge decided, that "the petitioners not shewing any error of law apparent upon the decree, (complained of) nor pretending to have discovered any new testimony which would materially alter or change the decree, the application for a re-hearing should be rejected."

It is necessary to state the circumstances of this case in order to a right understanding of the decree now appealed from.

Col. Thomas Lide, of Cheraw district, made and executed his last will and testament, on the 7th day of November, 1787, wherein he, amongst other things, bequeathed to his wife, Mrs. Mehitabel Lide, a legacy of £50 per annum, during her natural life, to be made and raised out of the crops or profits of his plantation, and paid to her by his executors, annually, in lieu of her part or portion of his estate. He also added that as his wife had been entitled to a part of the estate of Charles Irby, deceased, and which by special contract with her, he the testator was not to have any part of; he therefore bequeathed to her all and every part of the said Irby's estate, which he might be entitled to in consequence of his said marriage with her. The testator further disposed of the rest of his estate among his children by a former marriage. The testator died on the

day of the date of his will, which was soon after proved in common form before the ordinary, without opposition; and the annuity bequeathed to his wife was paid to her for

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nearly \*four years. After that, it ceased to be paid to her during her life. She never claimed dower in the real estate of her husband, and she died in the month of February, 1804. In the month of August, 1805, Mr. Charles Irby, her son and administrator, filed a bill in the Court of Equity, against the representatives of Col. Lide, for the recovery of the arrears of annuity. But before the cause came to a hearing, the defendants, the representatives of Col. Lide, made application to the judge of the Court of Ordinary, of the district of Marlborough, suggesting that the clause in the will of Col. Lide, bequeathing £50 per annum to his wife, had been obtained by the undue influence, improper solicitations, and false suggestions of his said wife; and praying that the will might be proved in solemn form; and that the administrator of the widow might be called upon to shew cause why the clause of the will, under which the annuity arose, should not be rejected, as having been improperly obtained. The proceedings in equity were thereupon suspended. The cause in the Court of Ordinary was tried in the month of October, 1807, and the judge of that court, after hearing all the testimony adduced, and reading the evidence of Morgan Brown, one of the subscribing witnesses to the will, who had been examined under a commission issued at the instance of the representatives of Col. Lide, decided, that the clause in the will of Col. Thomas Lide, which bequeathed £50 per annum to Mrs. Mehitabel Lide, was not obtained by the undue influence, improper solicitations or false suggestions of the said Mehitabel Lide, and that the same ought to be proved in solemn form.

From this sentence an appeal was made by the representatives of Col. Lide, to the Court of Common Pleas, under the act of the legislature, which prescribes that course to be pursued by the party dissatisfied with the judgment of the Court of Ordinary. Upon this appeal an issue was made up in the district of Marlborough, on the 2d day of November, 1807, and the cause was tried before the circuit judge and the jury of that district. The jury found a verdict for the plaintiffs in appeal against the validity of the contested clause in the will.

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\*A motion for a new trial was made by the administrator of Mrs. M. Lide; and the judges of the Constitutional Court, upon full deliberation, ordered a new trial, on the ground, that the verdict was manifestly against evidence. Accordingly, a new trial was had in Marlborough district, and the jury found a verdict for the administrator of Mrs. Lide, which established the disputed

clause of the will. This verdict was acquiesced in, no motion having been made for another trial. The representatives of Mrs. M. Lide, who had suspended the proceedings on the bill in equity, filed for the recovery of the legacy, pending the proceedings in the Courts of Ordinary and of Common Pleas, then urged their demand. The Circuit Court of Equity sitting at Cheraws, on motion of the solicitor, ordered a reference to the commissioner, to ascertain what was due on the legacy. That officer reported to the court, that the administrator with the will annexed of Col. Lide, had made several payments in part of the annuity, which he credited, and that there remained a balance due, including interest, of \$5,089, which was payable by the defendants, the children of Col. Lide, to whom the administrator had paid over the funds of the estate, and who were in possession of the real estates on which the annuity was chargeable, and had received the rents and profits thereof.

To this report no exceptions were filed, and the presiding judge, on motion of the solicitor, confirmed the report. No appeal was made from this decision, and the cause was at an end according to the legal and established forms of proceeding in the Court of Equity.

The representatives of Col. Lide, afterwards, to wit, on the 26th October, 1813, filed a bill of review in Cheraw district, in order to obtain a review of the decree made by the Circuit judge in Equity, and to reverse the same on various grounds stated in the bill of review.

The circuit judge, before whom the bill of review was brought, upon full argument, decided, as above stated, that the parties not shewing any error of law apparent on the face of the decree, nor pretending to have discovered any new testimony, which would

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materially alter \*or change the decree, the application for a re-hearing should be rejected.

From that decree an appeal was made, upon which this court is now called upon to decide.

The points made by the bill of review, and on the argument, may be classed under two distinct heads:

First,—That the sentence of the Court of Ordinary, in favor of the disputed clause in Col. Lide's will, and the judgment of the Constitutional Court, and the verdict of the jury confirming that sentence, were erroneous, and ought to have been so pronounced by the circuit judge in equity, before whom the legacy was recovered under that clause; and that this court is now bound to declare those judgments and decrees erroneous, and to correct them.

Second,—That the decree of the circuit judge was erroneous in several other respects; but more especially in not giving the children and representatives of Col. Lide,

the benefit of the declarations of Mrs. M. Lide, the widow, which (it is alledged) amounted to a declaration, that she had no rights under the will of Col. Lide; or that she renounced them. Also, in not allowing the parties defendant in equity, the benefit of the statute of limitations; and also in allowing interest on the arrears of annuity.

In the argument on the first head of error, there was (as was properly observed by the circuit judge, before whom the bill of review was brought,) no allegation of any new discovered matter which could vary the case which had been made before the Court of Ordinary, and the Constitutional Court, and decided by them successively. The case made, and the evidence offered to the Circuit Court of Equity, on the bill of review, and now to this court, is precisely what was offered to those courts. We think therefore that the circuit judge in equity acted rightly in considering the judgment of those courts conclusive. It was *res adjudicata*, by the proper and competent tribunals, to which the representatives of Col. Lide themselves resorted; for they were the persons who sought the judgment of those courts, and

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for a number of \*years acquiesced therein. It appears to us, that any interference on the part of the Court of Equity, to defeat or control the sentences and judgments of those courts, without any pretence of new evidence, or new matter essentially varying the case, would be very mischievous. There would be no end of litigation. Besides, this would be to erect the Court of Equity into a direct court of appeals from the decisions of the Courts of Ordinary and of law, which it neither was in its original constitution, or has been made by statute. It is true, that where from various causes, from accidents, from the loss of papers, from ignorance of testimony, afterwards discovered, from the narrow forms of proceeding in those courts, the whole justice of the case has not been examined and decided upon, that the Court of Equity interposes to prevent injustice. Not indeed as a Court of Appeals, but as a high tribunal, whose essence is justice, which it never suffers to be defeated by forms. But it must appear, before the Court of Equity can be drawn out to act and interpose its high powers, that the party applying has justice in his cause, of which he could not avail himself in the courts below; or where those courts were prevented by circumstances from reading that justice; where the merits had not been examined maturely, and with full lights. In such cases, it interferes to cause justice to be done. Such was the case of Kennel and Abbott, reported in 4 Vez. jr. p. 802, where the Court of Chancery refused to set up a legacy which was given by a lady (under a marriage settlement) to the person to whom she had been married, but who was a married man when he imposed himself on this lady as a single



man. The lady made her will and died in ignorance of the deception and fraud which had been practised on her. This decision was founded on the civil law, with which Swinburne agrees. But it required no authorities, no precedents to guide the court directly to the justice of the case. And if the question had been made before the Court of Ordinary, the decision would doubtless have been the same, according to the eternal

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principles of justice. But it had not been made there. Probably the discovery of the imposition had not been made when the will was proved.

In the case before this court, the objections to the disputed clause in Col. Lide's will were known, and were discussed, and fully decided upon by the Court of Ordinary, and subsequently by the Constitutional Court, and the verdict of a jury. We must presume that justice was done by those tribunals, exercising their proper jurisdiction. The judge of the Circuit Court of Equity, therefore did right in decreeing the payment of the legacy, even if the objections to the bequest had been brought to his view. And the judge before whom the bill of review was brought, was right in refusing to allow it, upon this first ground, even if bills of review are at all admissible under our present equity system.

We come now to the second head insisted upon for the allowance of the bill of review, to wit, that the circuit judge in equity, who decreed the payment of the legacy, ought to have allowed the representatives the benefit of the declarations of Mrs. M. Lide, stated in the evidence of Morgan Brown, which declarations it is insisted admitted that she had no right to the legacy; or if she had any right, she had renounced it. Also, that they should have been allowed the benefit of the plea of the statute of limitations. And that at all events, no interest should have been allowed on the arrears of annuity. It seems that none of these points were insisted upon before the circuit judge in equity, who decreed the payment of the legacy. But if they had been, they were not tenable. The declarations imputed to Mrs. M. Lide, in the evidence of Morgan Brown, formed part of the case which was before the Court of Ordinary, and before the Court of Common Pleas, and the jury, and was decided by them. But if we suppose this a new, distinct and substantive ground of defence, proper for the decision of the Circuit Court of Equity, we do not think these declarations amounted to an admission by Mrs. Lide, that she had no right to the legacy, or had renounced that right. The court would require the most explicit, clear and unequivocal declarations of

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a legatee, most distinctly proved, before they would consent to strip the heirs of the legatee of the benefit of a legacy. But we do not think the declarations imputed to Mrs. M. Lide, amount to a clear unequivocal de-

nial or renunciation of her right to the legacy. The proof too of these declarations, is of the most dangerous kind to be relied on, to shake legal rights. It is founded on the recollection of a witness, at the end of nearly twenty years; and we well know that a slight variation in the expressions, might materially vary the sense. No imputation is intended to be thrown on the veracity of the witness; but we think the recollections of conversations, after such a lapse of time, and after the death of one of the parties, is too uncertain to be relied upon implicitly, to destroy the rights of legatees; more especially when the actual receipt of four years arrears of the annuity, by Mrs. Lide, seems to be inconsistent with the idea of disavowing or renouncing her right to the legacy. We notice further, not to discredit the witness, but to shew the caution which courts of justice should exercise with respect to recollections, even of correct men, of such distant transactions. Mr. Brown states in his testimony, that the legacy of 50*l.* per annum was not given to Mrs. M. Lide, in lieu of dower on Col. Lide's estate, and gives a reason for his belief.—Yet on the face of Col. Lide's will, drawn up by Mr. Brown, we find that this legacy was expressly given to Mrs. M. Lide, "in lieu of her part or portion of his estate." Disavowals or renunciations of right cannot be supported on such proofs.

With respect to the statute of limitations, it is the settled doctrine of this court, that legacies cannot be barred by the statute of limitations; and the heirs being put in possession of the estate, charged with the legacy, does not emancipate the estate from its liability. We do not mean to say that no length of time, with other circumstances, might not amount to a bar. But there is no such lapse of time in this case, nor such circumstances, as ought to produce a bar.

With respect to the allowance of interest on the annuity, that was in the legal discretion of the court, and we do not perceive

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that there was any error, under the circumstances of the case in the exercise of that discretion. The annuity was given by the testator to his wife, "in lieu of her part or portion of his estate," and it was therefore her bread; and the interest was properly allowed on the arrears of annuity.

Upon this second head then, we do not perceive there was any ground to allow a bill of review. There is no error on the face of the decree, and no new matter discovered to make a new case. It should be remarked also, that after so much delay, expence and litigation through so many courts, a very strong case ought to be made to induce the court to open the door to further litigation. There ought to be strong ground to believe that substantial justice has not been done between the parties.

Again, it is to be remarked, that the parties now applying for the bill of review, have

at various stages of the cause, neglected or abandoned, the regular course prescribed or allowed by law, for the prosecution of their rights. They neglected to move for another trial, after the second verdict, differing from the first.—And they neglected appealing from the decree of the Circuit Court which directed the payment of the legacy with interest.—And though laches will not always destroy rights, it weakens the claim to indulgence.

Upon the whole, we are satisfied that the circuit judge, who refused to allow the bill of review, decided correctly.

It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed, and the appeal dismissed.

HENRY W. DESAUSSURE.  
THEODORE GAILLARD,  
THOMAS WATIES,  
W. THOMPSON.

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\*Case XLII.

Camden.—Heard by Chancellor James.

ANN BARWICK v. MILLER and M. GAYLE.

Orangeburgh.—Heard by Chancellor Waties.

ELEANOR JONES v. SARAH BURDEN et al., Administrator of M. Burden.

(February, 1814.)

[*Bastards* ⇨104.]

In these two cases, turning on the same point, the two judges gave different opinions. On appeals from both, the court decided, that a mother cannot take either real or personal estate from her illegitimate child, dying intestate. Nor can a sister or any other collateral relation, take from an illegitimate brother or kinsman, dying intestate.

[Ed. Note.—Cited in McDonald v. Southern Ry., 71 S. C. 355, 51 S. E. 138, 2 L. R. A. (N. S.) 640, 110 Am. St. Rep. 576; Croft v. Southern Cotton Oil Co., 83 S. C. 235, 65 S. E. 216.]

For other cases, see *Bastards*, Cent. Dig. § 259; Dec. Dig. ⇨104.]

[*Bastards* ⇨104.]

The act for the abolition of the rights of primogeniture, and for the division and distribution of intestates' estates, did not make any alteration of the old law, in the rights of bastards, or those claiming under them.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 257; Dec. Dig. ⇨104.]

[*Bastards* ⇨95.]

[Cited in McClenaghan v. McClenaghan, 1 Strob. Eq. 321, 47 Am. Dec. 532, to the point that by the common law a bastard is incapable of inheriting.]

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 246; Dec. Dig. ⇨95.]

[*Bastards* ⇨104.]

[Upon the death of a bastard intestate, none but his own lineal descendants are entitled to share in his estate.]

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 259; Dec. Dig. ⇨104.]

The sole question in this case arises upon the following facts: William Gayle, died

without issue, and intestate, leaving a widow, one of the defendants, and a mother, who is complainant. He was an illegitimate son. Is the mother entitled to take a distributive share of his estate under the act of 1791, abolishing, &c. The clauses of the act which may have application, are the 3d and 9th. "If the intestate shall not leave a child or other lineal descendant, but shall leave a widow, and a father or mother, the widow shall be entitled to one moiety of the estate, and the father, or if he be dead, the mother shall be entitled to the other moiety."

"In reckoning the degrees of kindred, the computation shall begin with the intestate, and be continued up to the common ancestor."

Before I proceed to make any application of the clauses cited, to the cases under consideration, it will be necessary to observe generally, that the object of the act was to abolish the right of inheritance by descent, as it existed at the common law; and to establish certain rules of distribution in cases

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of intestacy. There can be no claim here by right of heirship, but by right of distribution, arising under a law of the land, made expressly with a view to reach new objects, rejected by the English common law.

It will be proper to keep this distinction in view throughout the whole case; but it will more particularly meet an objection that may be made at the threshold against the claim of the complainant, that by the maxim that a bastard is nullius filius, the intestate Gayle must be considered as having no mother. But this is one of those legal paradoxes into which fictions of law, when universally applied, are so apt to lead. The rule that a bastard is nullius filius, applies only in cases of inheritance, where the parent is uncertain. In this point of view, it may prevent a mischief, but it ought not to be extended so as to work an injury.

Lord Coke says, that a bastard is quasi nullius filius, because he cannot inherit. Coke Lit. 123. The same opinion is confirmed by Black. 1 Com. 458, and by the case of King v. Inhabitants of Hodnett, 1 T. R. 101. And further, it is laid down in 1st lord Raymond 68, Haines v. Jeffee, in point of law that maxim is not universally true, for if it were, a bastard might marry his own mother, which could never be allowed.

These decisions narrow down the maxim nullius filius, to the single case of the right of inheritance, which our act abolishes, and establishes other rights in its place. Then our law is not to be taken in *pari materia* with the common law of inheritances; but in connection with other laws to which it is more nearly related, or whence it is derived. Now this is the civil law. Our act of 1791 is nearly a copy from the Institutes of Justinian; I refer to the 3d book, tit. 1, and the



118 *novelle*, from which it will be found, that only those passages in these laws have been omitted by our law, which could have no application in this country. It further appears by passages, cited by the counsel from *Domat*, 1 vol. 569, that the mother of a bastard could take a part of his estate in certain cases therein mentioned, because she is certain. The civil law therefore admits of no

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fiction, as to the mother, but establishes her rights. Hence we have a high authority nearly allied to our own law, to shew that the intestate Gayle has not only a mother *de facto*, which has never been doubted, but also one *de jure*, which has been denied.

Now in the first clause cited from the act of 1791, the *nomen generalissimum* mother only is used, and no exceptions are made as to any particular mother. What then must it naturally be supposed, was the intention of the penner, and of the framers of that law? Was it the mother of the English law (which they were repealing) whom they meant, or the mother of the civil law, which they were enacting. I am of opinion that they intended the latter. But besides the ground I have taken, that the act of 1791 is in its principles derived from the civil law, and therefore that it ought to be construed conformably thereto, there is another which is furnished by the second clause cited above. By it we see that the mode of computing the degrees of kindred according to the rule of the civilians has been adopted; and the mother would be included in the first step from the *propositus* in the present case. This is a further proof that the idea of the civil law was still uppermost in the minds of the penners of the act of 1791.

These observations might be extended much more, but I am satisfied with the development of principles.

Several objections have been raised, which shall next occupy my attention.

It has been strongly argued that it would be contrary to good policy to adopt civil law rule, because the mother is the offending party. This is the doctrine of the English common law. The operation of it is to be by way of punishment for the offence, and by way of example to others. On this subject, the author of the excellent essay on crimes and punishments, has strongly observed, that useless and pernicious must all laws and customs be, which tend to diminish the sum total of this passion. The best method of preventing this crime, would be effectually to protect the weak woman from that tyranny which exaggerates all vices which cannot be concealed under the cloak of virtue; p. 129,

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132. Towards the end of his book \*he has also drawn a conclusion from the whole subject, which I think applicable to the present case. It is often quoted in courts of criminal jurisdiction; but yet, it may be somewhat

novel here, where we are not often called upon to punish offenders. "That a punishment may not be an act of violence of one or many against a private member of society, it should be public, immediate and necessary, the least possible in the case given, proportioned to the crime and determined by the laws." Now in this case it cannot be immediate, because the culprit is to be punished at the end of nearly half a century; and it has not been determined by the laws, because the law appears to be in her favor." To the wise observations of this author I will only add, that I shall neither cast the first stone against the mother in such cases, nor throw more temptations in her way to induce her to abandon her offspring than those which already arise from shame and public infamy. But it has further been insisted upon, that under the English statute of distributions, the mother of a legitimate child, as being of the next of kin, can take a share of his personal estate, and the mother of a bastard cannot; and that both the statute and our act being derived from the civil law, therefore the cases of the mother of a bastard in England and here are exactly parallel. But we have the authority of judge Blackstone himself to shew that the statute of Charles is not taken from the civil law. He says, "it bears some resemblance to the Roman law of succession, *ab intestato*, which, and because the act was penned by an eminent civilian, has occasioned a notion that the parliament of England copied it from the Roman *Prætor*, though indeed it is little more than a restoration, with some refinements and regulations of our old constitutional law, which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western part of Europe; 2d vol. 218. Our act therefore being copied from the civil law, and adopting its principles, and the statute of Charles being little more than a restoration

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\*of the old constitutional law of England, the parallel contended for does not apply.

Then all that remains of the argument is the authority of the English decisions, which is done away by our acts adopting the principles of the civil law. I am also aware of another objection that may be urged, that by an act of the legislature, passed 1795, "that if any person shall have begotten, or shall hereafter beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall convey for the use of such child or woman, more than one fourth part of his estate, such conveyance shall be void as to so much as shall exceed the said fourth part of his estate." And from this act an argument may be drawn that the law of this country is more rigid against bastardy than the law of England, and

therefore that the decisions of our courts ought to assume the same aspect. This argument is drawn from analogy, but the cases embraced in the act, bear no resemblance to the present one. The intention of it appears to have been to guard the rights of wives and legitimate children, and it does not warrant any decision that would interfere with the rights of others, not the object of the act. Besides, analogy alone in this case will not be sufficient. If the act of 1791 has vested any rights in the mother in the present case, no construction of the act of 1795, except that of repeal, ought to take them away from her. Besides the objections stated above, the analogy of this case to that of the disinherited bastard in England, has been strongly pressed upon the court. Here I will remark again, that the question is not whether a bastard, whose father is uncertain, shall inherit; but whether the mother who is certain shall be excluded. Should the other case ever occur, it will be time enough then to consider it. Great pains and much learning have been bestowed by judge Blackstone, to evince the superior morality of the rule, that a bastard shall be considered quasi nullius filius over that of the civil law, which allows him a hope of being legitimate. It cannot be denied but that he has succeeded in a

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great measure; but after all this \*boasted rule of the English law, like the one of attainder, is liable to great objection, namely, that it is a visitation of the sin of the father upon the child; a punishment of that kind, which the Almighty appears to have reserved for himself alone. It is not my object however to weaken the rule, but to confine it to cases where only it should apply.

Upon the whole of this case, I am of opinion that the rule of the civil law should prevail in the construction of the 7th clause of the act of 1791, above cited; and that the complainant should be entitled to a moiety of the estate of her deceased son, notwithstanding his illegitimacy.

(Signed)

W. D. James,

Orangeburgh.—Tried before Chancellor Waties.  
Eleanor Jones v. Sarah Burden et al. Administrator of M. Burden.

The complainant claims, as sister of the intestate, Matthew Burden, a distributive share of his estate, he having died without issue.

It appears from a verdict found on an issue directed by this court, that Burden was the illegitimate son of the complainant's mother. The question then is, whether any right can be derived by the complainant, from one thus spuriously related to her?

I have felt the strongest inclination to support this claim, and have been desirous of finding some ground which would authorise it; for although I think the best interests of society require that a bastard should not have

the same civil rights, as one born in wedlock, and should not therefore be allowed to inherit himself, yet it appears to me too rigorous to extend this rule of policy to any claim to be derived from him, and especially to the claim of one who was born of the same mother. The rule is not applied to the issue of a bastard, and I should have been glad to find that it did not (as the counsel for the complainant contended) apply to any collateral relation. But after a full examination of the

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authorities, \*they appear too explicit on the point to leave any room for discretion. In 2 Bla. Com. 249, the common law is thus strongly stated: "as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies; for as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred, and consequently can have no legal heirs but such as claim by a lineal descent from himself."—How then can the complainant, who is a collateral and not a lineal relation, inherit from the intestate? It was supposed that Mr. Wooddeson, in his statement of the common law on this subject has admitted an exception which is favorable to her claim. He says, vol. 2, page 260, "if the issue of a bastard purchase lands in fee, and die childless, although those lands cannot descend to any heir on the part of the illegitimate father, yet the heir on the part of the mother of such first purchaser may succeed." It would be sufficient to observe, that the case contemplated by Wooddeson, is not like the one before the court. It is the case of a collateral, deriving a title from the issue, (that is the legitimate offspring,) of a bastard, and not as here, from the bastard himself. Such a title is allowed to be deduced through the mother, because the father's blood having no inheritable quality, cannot convey it, and the maternal stream may therefore be resorted to. The same rule obtains in the case of an attainer, and for the same reason. The father's blood being corrupted, is considered as extinct; but the mother's furnishes a pure inheritable stream, by which the title may be conveyed. A brother may therefore inherit from a brother, although their father was a bastard; but the case here is a sister claiming from a brother who was himself a bastard; and upon this point Mr. Wooddeson has been as explicit as judge Blackstone. In the same passage quoted, he expressly says, "a bastard can have no heirs except his own progeny." In vol. 1, 396, he further says, "a bastard may take an estate to him and his heirs generally; yet it will not come by descent to his legitimate brother, born of the same parents, (in

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case \*he dies without issue,) but will escheat. For a bastard, by the laws of England, is incapable of transmitting real or personal prop-



erty by inheritance, except to his wife and his lineal descendants." And again, page 397, "if a bastard possessed of personal effects dies intestate, and without wife or children, the crown is entitled to such property."

It is evident from these authorities, that by the common law, no collateral right can be derived from a bastard, being as he is emphatically called, nullius filius, he has no father or mother, and can therefore have no brother or sister, but is regarded as a separate creature, unconnected with the human race by any links, except those which he may form by his own progeny.

It has been insisted, however, (and the counsel chiefly relied on this ground,) that the complainant's right is supported by the civil law, and that this ought to be the rule of decision with the court.

The civil law would, no doubt, decide for the complainant, and no judge is more disposed than I am, to draw from that rich fund of written wisdom; but the civil law is not the authoritative law of this court; it becomes so only by adoption, and it can only be adopted, where the rules of the common law or of equity are doubtful or silent. But the common law here is plain and positive, and has been always followed by a court of equity. [See *Newland on Contracts*, 70; *Pre. Cha.* 475.] The civil law, therefore, can have no weight, and much less can it over-rule the established law. I am bound then, to dismiss the bill.

The complainant, however, will most probably find relief elsewhere; for there is little doubt, that the legislature will, on her petition, release to her, the share which accrues to the state by the illegitimacy of her brother. This is so much the practice in England, that judge Blackstone considers it as almost of course.

The bill must be dismissed with costs.

Thomas Waties.

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May, 1814.

\*In both these cases, which turned on the same question, and on which the two chancellors had given different opinions, there were appeals, which were brought and argued together in the court of appeals, present Chancellors Desaussure, Gaillard, Waties, James and Thompson.

Mr. Miller and Mr. Felder, argued to reverse Judge James' decree, and to affirm Judge Waties' decree. That the laws make a radical distinction between legitimate and illegitimate children, who are held to be incapable of inheriting real estate, or of taking personal estate, under the statutes of distribution. The property of the father shall rather escheat than go to illegitimate children, and this is a constant operating disqualification,

effective in every case where it applies, whether in the particular case the law under consideration speaks of illegitimacy or not. The common law, and the law abolishing the rights of primogeniture and for the more equal division of intestates' estates, always have legitimate children in contemplation, in all their regulations. The laws never contemplate illegitimate children but as objects incapable of taking, and our statutes have superadded disabilities. For a father of a bastard, if he has a wife and child living, is precluded from devising or bequeathing to such bastard child more than a fourth part of his estate; and without such bequest he would take nothing.

If the general words of our act of 1791, regulating the descent of real estate, and the distribution of personal, are permitted to include bastard children, and to allow them to take in any case, then they may as well come in and take equally where there are legitimate children, as where there are none but collateral relations. The civil law, properly understood, does not affect this question. When it speaks of children, it means legitimate children.—See 1 *Domat*, 569, 646, and 1 *P. Williams*, 49.

Mr. Starke and Col. Blanding, argued in support of Judge James' decree, and to reverse Judge Waties' decree.

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\*It is in the power of the court to follow the civil law rule on this subject, and that is the most consistent with reason and humanity, and is not productive of any immorality. There is no certainty as to the putative father, but there is perfect certainty as to the mother.

There are cases of great hardship under the old common law of excluding illegitimates. The circumstances in the case of Barwick, brought up by appeal from Camden, are peculiarly hard. A mother who had acquired some property, gave part of it to her illegitimate son. He died leaving neither wife nor child. Shall the mother be excluded from taking, and shall the property escheat? This would be peculiarly cruel.

The statute of 1791, enacts generally, that the property of an intestate shall go to the wife and children, and in default of these to other near relations. It uses general words, and does not distinguish between legitimate and illegitimate. The broad words used will comprehend both.—See 6 *Bacon*, 386, for the rules of construction of statutes.

Illegitimate children are within the provisions of the restraining marriage act in England, under the general denomination of children.

The rigor of common law rules is not imperatively yoked on us. The old acts establishing and regulating our courts of equity,

direct and authorize it to follow the rules and regulations of the court of chancery in England, and that court resorts to the civil law rules, and breaks in upon the common law rules, when general convenience requires it. The civil law rule, admits bastards to inherit from the mother—Cooper's Just. 215; and as from the uncertainty of the putative father, an illegitimate cannot have any agnates, or paternal relations, the cognates or maternal relations, are let in to inherit the property of an illegitimate intestate.—Cooper's Justinian, 217.

Bastards succeed to the inheritance by the civil law, at least in a limited manner, (and that is favorable to the mother's claim.)—1 Domat. 45, 569.

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\*In enacting the statute of 1791, regulating descents, and dividing the estates of intestates, the legislature have abandoned the rules of the common law, and adopted those of the civil law. Thus the half blood is let in to inheritances of real estate, contrary to the old feudal doctrine. So the preference of the paternal to the maternal line is given up, and they are put upon an equal footing. And the application of the civil law principles, would permit the illegitimate to inherit from the mother, and the mother and the relations of the illegitimate, on the maternal side, inherit from him.

In the great case of *Edwards v. Freeman*, 2 P. Williams 441, the occasion of passing the statute of distributions, is stated by Sir Joseph Jekyl, the master of the rolls, to have been, to put an end to the long contest between the temporal and spiritual courts; and was made in favor of the practice of the spiritual court, which made equal distribution among the children, agreeable to the civil law. And lord chancellor Hardwick says, in the case of *Wallace v. Hodson*, 2 Atkins 115 and 117, that he takes it to be fully settled, that this act is to be construed by the rules of the civil law; and the statute of 1 Jac. 2d, is to be construed in the same manner, being in continuance of the act of Charles 2d, with three additional clauses.

All the judges of the Court of Appeals, (except Judge James,) after maturely deliberating on these cases, and the arguments of counsel, ordered and adjudged, that the decree of the circuit court, at Orangeburgh, in the case of *Eleanor Jones v. Burden*, administrator of Burden, should be affirmed for the reasons given by judge Waties, in the decree: And that the decree of the Circuit Court at Camden, in the case of *Ann Barwick, v. the Administrator of M. Gayle*, should be reversed.

Chancellor JAMES differed from his brethren in both cases.

## 4 Desaus. \*445

\*Case LXIII.

Beaufort District.—Heard by Chancellor Waties.

MRS. CHARLOTTE HEYWARD v. JOHN A. CUTHBERT, Executor of W. Heyward.

(February, 1814.)

[*Parent and Child* ⇐3.]

A mother who has only a bare competence for herself, and has minor children living with her, who are entitled to large estates, shall have an allowance made her by the executor, out of their estates, for the maintenance and education of her daughter, and for the maintenance of her sons.

[Ed. Note.—Cited in *Rhode v. Tuten*, 34 S. C. 502, 13 S. E. 676.

For other cases, see *Parent and Child*, Cent. Dig. § 55; Dec. Dig. ⇐3.]

[*Parent and Child* ⇐2.]

She has the exclusive right to the care and education of her daughter, unless there be strong objections to her character. The executor to direct the expenditure for the education of the sons.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. § 18; Dec. Dig. ⇐2.]

The complainant has applied to the court for an annual allowance out of the income of the estate of her children, for their maintenance and education.

They are entitled, it appears, to a considerable estate, and she has not more than a competent provision for herself. It is reasonable, therefore, that she should be relieved from the burthen of maintaining and educating them. But in providing for these objects, the court should take care not to exceed them. The allowances ought to be liberal, but not beneficial. The mother ought to be indemnified for all expences on account of her children, but not for her care and attention; her only and best reward for these, is to be looked for, in the good effects produced by them, on their morals and manners. The allowance then, should be to such an amount, as will provide for the maintenance of the children in a way suitable to their condition and estates, and no more.

But another question arises, shall the allowance be for their education as well as maintenance?

I have no doubt that the complainant ought to have the exclusive direction of the education of her daughter: This is a sacred right of which a mother ought not to be deprived, unless there are serious objections to her want of character or discretion. I am fully of opinion at the same time, that a judicious executor is better qualified to direct the education of the sons, and that this trust ought

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\*to be left with the defendant. I shall therefore make an allowance for the education only of the daughter.

It is accordingly ordered and decreed, that the defendant do pay to the complainant out of the estate of his testator, the sum of



two thousand dollars annually, to commence from the first day of January last, for the maintenance and education of her daughter, and for the maintenance of her sons, while they live with her; giving leave to either party, to apply to the court for an increase or diminution of the said allowance, under any future change of circumstances. The costs to be paid out of the estate.

THOMAS WATIES.

There was no appeal from this decree.

4 Desaus. 446

Case LXIV.

Camden.—Heard by Chancellor James.

Executor of PHILIP HAWKINS v. THOMAS SUMTER et al.

(February, 1814.)

[Witnesses ⇨298.]

A security in a bond, for a sheriff's faithful performance of his duties, who has obtained possession of the sheriff's books, after his death, insolvent, shall be obliged to produce those books in evidence, on a subpoena duces tecum, in a suit between other persons, notwithstanding the surety was apprehensive of danger to himself, from the disclosure of the books.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1039; Dec. Dig. ⇨298.]

William Mayrant, having been ordered to shew cause why an attachment should not issue against him for not obeying a subpoena duces tecum, requiring him to produce the official books of Wm. R. Davis, Esq., former sheriff of Camden district; for cause says, that he was one of the securities in the bond given by the said sheriff upon his appointment to his said office, conditioned for the faithful discharge of his said office, &c. and that divers claims are made against the estate of the said W. R. Davis, (now deceased) on account of failures to discharge the duties of his said office faithfully; which claims, if true, would cause a right of action

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on the bond aforesaid \*against the said William Mayrant. And the said Wm. Mayrant says, that the estate of the said Wm. R. Davis is insolvent, and that should any recovery be had against the said Wm. Mayrant upon the bond aforesaid, he could not obtain from the estate of the said Davis, any reimbursement of what he should have to pay upon such recovery. And the said Wm. Mayrant further says, that if the said books were in his possession, he believes he could not shew them, without discovering evidence which might, as to some of the said claims, operate against his own interest, and give to some of the claiming parties the means partly, or wholly of establishing against himself a right to a recovery upon the said bond. But the said Wm. Mayrant is not adminis-

trator nor successor in office of the said Wm. R. Davis.

Hooker and Levy, for W. Mayrant the witness.

On hearing arguments of counsel on both sides of this question, it was considered that the cause shewn by Wm. Mayrant in this case, was insufficient, and it is therefore decreed that the said Mayrant stands out in contempt of the court, and that an attachment must issue against him.

W. D. James.

On this case being mentioned to the judges (sitting in the Court of Appeals, in Equity) on the behalf of Mr. Mayrant, they were of opinion that the decision was correct, though as there could not be any formal appeal, in such a case, there was no regular judgment pronounced.

4 Desaus. 447

Case LXV.

Columbia.—Heard before Chancellor Desaussure.

JUDITH BARRET, by Her Next Friend, v. JUDAH BARRET.

(February, 1814.)

[Evidence ⇨460.]

Parol evidence to prove what property was intended to be comprehended in a deed of settlement received provisionally, but afterwards rejected. A marriage deed construed to comprehend property in expectancy, as well as that in possession, though the words are obscure.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. ⇨460.]

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[Husband and Wife ⇨31.]

\*There being no words in the deed expressly or clearly indicating that it was intended that the wife should have the sole and separate use of the settled estate, the Court of Appeals, (reversing the decree of the Circuit judge,) decided that the wife, who had separated from her husband, was not entitled to the separate use of the estate.

[Ed. Note.—Cited in James v. Mayrant, 4 Desaus. 608, 6 Am. Dec. 630.

For other cases, see Husband and Wife, Cent. Dig. § 185; Dec. Dig. ⇨31.]

[Husband and Wife ⇨179.]

Sales of part of the settled estate by the husband and wife, are irregular; and the court decreed the proceeds of the sales to be held to the same uses as the property had been. There being no trustees named in the deed, the court named trustees.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 711, 939; Dec. Dig. ⇨179.]

[Deeds ⇨93.]

[When the intention is manifest, it will control in the construction of a deed without regard to technical rules of construction.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 231; Dec. Dig. ⇨93.]

[Evidence ⇨390.]

[Parol evidence is inadmissible to add to, vary, or change the terms of a deed.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1719; Dec. Dig. ⇨390.]

The bill filed in this case was for the purpose of obtaining alimony out of the husband's estate, and also to establish and have the benefit of a deed executed between the parties immediately before marriage, which it was alleged, was intended to secure the property of the wife, in possession and in expectation, to her separate use.

The demand for alimony was abandoned at the hearing, there being no proof of such outrage committed by the husband on the person of the wife as would entitle her to recover alimony, and the husband offering to take her back and treat her kindly, which offer she had declined to accept.

The deed on which the rest of the case turned, was in the following words:

This indenture, made this nineteenth day of November, one thousand eight hundred and six, between Judah Barret, of the town of Columbia, and state of South Carolina, of the one part, and Judith Bookter, widow, of the other part, witnesseth, that whereas a marriage is about to be had and solemnized between the said Judah Barret and Judith Bookter: and the said Judith Bookter is willing and desirous of settling and securing her property in a particular way—That I, Judah Barret, do hereby covenant and agree to and with the said Judith Bookter, that in case the proposed marriage does take effect, then, and in such case, the following property, to wit, one negro girl, called Philis, five feather beds, the household furniture and plantation tools; as also all such parts or tracts of land, that the said Judith may be entitled to, in virtue of her former marriages with Frost and Bookter, together with all the

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stock of cattle, horses, hogs, and so \*forth, which the said Judith purchased at the late Jacob Bookter's sale, shall be, and remain, and also be limited in the following manner, to wit: To the said Judith, for and during the term of her natural life, and to such issue as she the said Judith may have by the said Judah Barret; and in case the said Judah Barret should survive the said Judith, and she should have no issue by him, then, and in such case, all and singular, the aforesaid property, is to descend to the said Judah Barret, his heirs and assigns forever.

And whereas the aforesaid parties, are at present unadvised, as to any thing further, that may be necessary to accomplish the above contemplated purpose: Now the aforesaid Judah Barret and Judith Bookter, do hereby covenant and agree, to and with each other, their heirs and assigns, that at any future time, and in case the proposed marriage should take effect, and this instrument of writing should prove inadequate to the purpose of securing the aforesaid property, as also any other property that may hereafter fall to the said Judith, in the manner and form herein intended, then, and in such case, such further and better assurance or assur-

ances shall be made by, and between the parties hereto, that counsel, learned in the law shall advise; and all right, title and interest unto the premises which the said Judah Barret may derive, or be entitled to, by virtue of his intermarriage with her the said Judith, shall cease, until the intention of these parties be completely accomplished and fulfilled.

In witness whereof, the parties hereunto, have set their hands and seals, the day and year above written.

In addition to the above, that I Judah Barret, do agree, that the money coming to the said Judith Bookter, for the crop made by her, and sold, shall go towards paying her debts to the estate of Jacob Bookter, for things purchased by her. And it is further agreed between the parties aforesaid, that the right which the said Judith Bookter has to certain negroes, which are conveyed by the said Judith Bookter to her children, but in which she has a life estate, that they shall be, and they are hereby, and forever guaran-

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teed and warranted unto the said \*Judith Bookter, by the said Judah Barret, and the said Barret is debarred and precluded from the privilege of selling, or otherwise disposing of them, so as to prejudice in any manner the right of her the said Judith's children, and so that the said life estate of the said Judith, be not destroyed, or in any manner impaired.

In witness whereof, the parties have hereunto set their hands, and affixed their seals, this twenty-fourth day of November, 1806.

Judah Barret, (L. S.)  
Judith Bookter, (L. S.)

Test.

Herman Kinsler,  
John Duke,  
John Campbell.

The first part of the deed appeared to have been drawn by the person first employed. The subsequent clause, beginning with the words, "addition to the above," are in the hand writing of Judah Barret, the intended husband. And the clause succeeding that, was drawn by Col. Chappel, as directed by Judah Barret.

The cause came to a hearing, and after argument, Chancellor Desaussure delivered the following decree:

This is a bill filed by a wife, by her next friend, against her husband, they having quarreled and parted, to have alimony out of the estate of her husband, and to have the benefit of a marriage settlement, made immediately before the marriage. The demand for alimony was however abandoned at the trial, so that we have only to consider the second claim.

The deed is imperfectly drawn, and was done by piecemeal. The first part by a professional man; then follows a clause inserted by Mr. Barret himself; and finally, the



last clause inserted at the desire of Mrs. Bookter, through her agent and Mr. Barret, by another professional gentleman.

The property to be settled was wholly the wife's, in possession or expectation. The principal question is relative to what property is comprehended in the deed.

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\*The deed was prepared by the counsel, at the instance of Mr. Barret, so that if there are any imperfections, they are attributable to him. And certainly there is some obscurity as to what was intended to be comprehended in it. To prove what property was intended to be comprehended in the deed, parol evidence was offered by the complainant, and opposed by the defendant. I heard the evidence provisionally, reserving the right to use, or reject it, as I should think proper on reflection. And if ever there existed a case, to prove the wisdom of the statute, in forbidding the reception of parol evidence, to explain a deed, this is that case. For one witness deposed, that Mrs. Bookter objected to the draught of the deed, because it did not expressly include the property she expected from her mother, (which is the property now chiefly in question,) and that she desired, and Mr. Barret assented, to an amendment of the draught, so as to comprehend that property. And that he, the witness, and the other witness, Mr. Harman Kinsler, and Mr. Barret, the intended husband, went in search of counsel, to have the addition made; and a clause was added. Also, that on their return to Mrs. Bookter, she said, when it was read, that it did not contain the property she meant; to which Mr. Barret answered, that it did, in a short way. The other witness, who appeared to me to deserve the confidence of the court, testified, that he was present at the whole of the times spoken of by the preceding witness, and he does not remember a word being said about the mother's property; or in short, any thing which the other witness deposed relative to it. That the instructions given to him by Mrs. Bookter, who gave him the deed, were to have an addition made to the deed, so as to comprehend the crop then on hand, and to secure the life estate she was entitled to, in property derived from her husband, Bookter, under a certain deed. That those instructions were given to counsel, who added a clause comprehending the crop, and the said life estate. And this appears to be so on the face of the deed.

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\*The contradiction in this case, demonstrates the wisdom of the statute, and shews the extreme caution which should be used in receiving parol evidence, to add to a deed. I feel bound to reject the whole of this testimony. But if I were at liberty to receive it, the contradictions would neutralize it, and prevent me from adding any thing to this deed on such testimony.

The case intended to have been made out by this parol evidence, has not then been made out. This brings us to the consideration of the deed itself. The first part conveys certain specified property. The deed then goes on to say, "and whereas the aforesaid parties, are at present unadvised as to any thing further," &c.

The last clause added by counsel, is in the following words, viz.

"And it is further agreed between the parties aforesaid, that the right which the said Judith Bookter has to certain negroes," &c.

At the time of the execution of the deed, Mrs. Bookter had a mother living, possessed of a good deal of property, from whom she had considerable expectations. The mother has since died, intestate, and the property expected, did come to her, of which Mr. Barret has possessed himself. The question is, whether the words "also any other property that may hereafter fall to the said Judith, in the manner and form herein intended," comprehended the property which afterwards came to Mrs. Barret on the death of her mother.

After mature consideration, I am of opinion, that they do comprehend that property.

The position of the words is of no importance, especially in a deed, so inartificially drawn. And if this construction be not given, these words can have no meaning or effect. The words certainly do evidently speak of, and refer to other property than that first spoken of and specified in the deed. And it manifestly refers to future acquisitions, for the words "also, any other property that may hereafter fall to the said Judith," cannot be satisfied by their application to property then possessed by Mrs. Barret, or to which she

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was entitled. Her ex\*pectations of any property, seem to have been from her mother only, and therefore probably that property was contemplated. But the words are broad enough to cover any property which might fall in to her, and were intended to secure the same to her. Her mother's property has so fallen in, and I think is secured to her by the deed. The words "in manner and form herein intended," do not, as was contended for defendant, limit the effect of the words, as to the property intended to be comprehended, but seem to have been intended to express the idea that the limitations of the property, which should fall in to Mrs. Barret, should be the same as were expressed in relation to the property, more particularly specified in the deed.

It was further contended for the defendant, that the deed contains no clause securing any property to the separate use of the wife; and that though the court is not scrupulous in requiring explicit or technical words, indicating that the property is to enure to the separate use of the wife, yet the deed must contain some expression shewing such intent,

otherwise the property will not enure to her separate use, but the marital rights will attach. This is in some measure true; but with qualifications. The evident intent of the deed was to secure the property of the wife to her separate use, and the court will catch at any expression, any where in the deed, to give effect to that intention. In the construction of articles, or of deeds with reference to articles, Courts of Equity will make the expression subservient to the manifest intention of the parties, either by controlling the strict and ordinary sense of the words, or by supplying necessary words. And I think the distinction taken by the counsel for the complainant is correct, that though a bequest or gift of property to a woman, *alimunde*, without words expressing an intent that it should be to her separate use, will let in the marital rights; yet, where the intended husband himself executes a deed to secure to his intended wife, her property, it is evident that a separate estate, beyond the control of the husband is intended: else the deed was unnecessary and is useless.

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\*I am of opinion, that upon the whole of this deed, executed by the intended husband, and his intended wife, it was intended that the wife should have a separate estate; and its general provisions are adequate to that end.

It was further contended, that Mrs. Barret had joined Mr. Barret in selling the real estate, and had released her inheritance to the purchaser. This certainly was an irregular act, and it may hereafter be productive of contests between the children and the purchaser.

But at any rate, the proceeds of the sale ought to be held to the same uses that the land itself was. The same may be remarked of the price of the two settled negroes, sold by Mr. Barret, with Mrs. Barret's consent. As to his having obtained a larger price than their value, from the desire of the purchaser to get the negroes, from motives of humanity, the inducement of the purchaser was of no importance. The slaves have produced a certain price, and that amount is liable to the uses of the deed. The clause for further and better assuring the property to the uses of the settlement, ought to aid, and give effect to the intent, so as to secure the proceeds of the sales of any of the settled property to the uses and purposes of the deed.

I have heretofore spoken of this paper as a deed; but it really does not deserve that name. It is a most inartificial paper, and ought not to be treated as any thing but a paper containing the heads of an agreement; and which is entitled to every aid from the court, to give full effect to the intent of the parties. No trustee is named therein, to protect the rights of the wife; but as the intended husband undertook to get a proper deed drawn, the court will attribute its im-

perfections to him, and will supply all its defects. A trustee will be appointed on her behalf.

As there are no creditors in this case, no objection can arise from others, as to the want of specification of the whole property, intended to be covered by the settlement.

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\*It is therefore ordered and decreed, that the case be referred to the commissioner, to ascertain the property belonging to the trust estate, by virtue of the marriage agreement, or articles mentioned in the deed; and according to the force and effect of the said agreement, as expressed in this decree. Also to ascertain and report what is due to the complainant, for the use or waste of any part of such property by the defendant.

It is also ordered, that the commissioner do devise and report such further conveyance or assurance, as may be necessary, for the defendant to execute, to carry the said agreement into effect.

It is also ordered, that Daniel Faust and Sterling Williamson, be appointed trustees for the complainant, as to the trust property, and under the decree of this court; and that they take immediate possession of the estate; and that the trustees do prevent both parties from having any agency or power over the same, so as to destroy any part of the capital of the settled property.

Henry W. Desaussure.

From this decree an appeal was made on the following grounds:

First,—Because the decree is wrong in ordering the defendant to account for the estate, which was acquired from complainant's mother, Mrs. Dougherty.

Second,—Because the decree makes defendant liable for lands, in which complainant had renounced her right of inheritance.

Third,—Because the decree makes the defendant liable for two negroes, which complainant herself joined in conveying away.

Fourth,—Because decree makes defendant accountable for the mules and stock which he raised.

Fifth,—Because the decree makes defendant accountable for the use of the estate, when by the terms of the deed itself, he had a right to the use of it.

Sixth,—Because the decree is contrary to equity.

Seventh,—Because there being no words of

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separate \*use to the wife, the defendant ought not to be divested of his legal rights.

Eighth,—Because the deed could only embrace the estate then in possession, and no other.

Walter Crenshaw, Deft's. Sol.

The appeal was heard, and the court delivered the following decree:

The great point made in this case respecting the property which came from the moth-



er, having been property disposed of by the decree, on which point it is affirmed, a subordinate question now arises; whether Judith Barret, the appellant, is entitled to a separate use, in the property settled upon her by the deed.

I find it laid down in the cases cited by the appellant's counsel, that it is necessary to shew a decided intention, that the husband shall have no interest whatever. *Lamb v. Nelney*, 5 Vezey, jr. 521. That there must be an expression of a separate use, or the marital right will attach—2 Vezey, 279. And further, that as implication is not to be set up against the claims of the wife, so neither is it to be pressed against the husband, so as to give a separate use to the wife—8 Vezey, jr. 377. Then the cases are very clear, that in decreeing a separate use, we ought first to find an expression of a decided intention to that effect in the deed; and that a wife shall not take a separate use by implication.

The strong ground taken by the counsel for appellant was that of intention. To this point they cited the case of *Lee v. Privaux*, 3 Bro. C. C. The legacy in that case was left to Sophia Lee, wife of Richard Lee, a bankrupt, with the following special power: "Her receipt in writing shall be a sufficient discharge to any of said trustees." The words, "notwithstanding her coverture," were omitted, and yet the master of the rolls decreed that there is a clear intent to be collected from the words of this clause, that the testatrix meant, that Mrs. Lee, though a married woman, should have the power to give a discharge so as to bar her husband.

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\*The words used in the marriage settlement, are by no means so strong as those recited from the will. The uses of the deed are declared in the following words: "The said Judith Barret being desirous of settling and limiting her property in a particular way, the property described, shall be limited to the said Judith Barret, during her natural life, and to such issue as she may have by the said Judah Barret, and in case the said Judah shall survive the said Judith, and she should leave no issue, the whole of the property is to descend to the said Judah."

Now the word property only is constantly used in the deed, and the sole intention appears to be to limit that alone, and not the separate use. There is nothing expressed about it; nor is the wife, as in the will mentioned, empowered to do any act, such as giving a receipt or discharge, which would constitute her a feme sole. Then as no decided intention is apparent in the deed, and there is clearly no expression to that effect on the face of it, we are bound not to resort to implication: and the consequence is, that the use was joint in the husband and wife, and the marital rights must attach.

An application has been made by her coun-

sel to the court for a share of the proceeds of the estate.

I am of opinion it should not be allowed, unless by way of alimony, for which she must file her bill and shew her right. The husband has offered to co-habit with her if she will return. In the case of *Brown and Clark*, 3 Vez. 166, the assignees of a bankrupt husband were taking the wife's fortune out of court; she would have been destitute, and the court decreed her a provision.—For this there was a good reason, the court would not suffer her to starve. But in the case of *Head v. Head*, 3 Atkins, 295, the same offer to co-habit was made by the husband as in the present case, and although 400*l.* was allowed, yet it was on the express agreement of the husband for the past time, and no future maintenance was allowed to the wife. To permit it in the present case, or any other thus situated, would be to encourage the wife to live separate from the husband.

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\*Therefore let the decree be reversed on the single point of the wife's being entitled to a separate use.

THEODORE GAILLARD.  
W. THOMPSON.  
THOMAS WATIES.  
W. D. JAMES.

I adhere to the decree given in the circuit court in all respects, except with regard to the annual income, on which I doubt. As my doubt ought not to be opposed to the opinion of my brethren, I concur with them.  
(Signed) HENRY W. DESAUSSURE.

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##### Case LXVI.

Union, Pinckney District.—Heard before Chancellor Thompson.

DAVID JOHNSON and Others v. L. THOMPSON.

(November, 1814.)

[*Husband and Wife* ⇐ 116.]

A father makes a deed of gift of personal property to his daughter, who was then a married woman. The court will infer that the intention of the donor was to give her a separate estate, which her husband had no right to dispose of in any way, though the deed was not explicit on that point.

[Ed. Note.—Cited in *Graham v. Graham's Ex'rs*, 3 Hill. 147; *McDonald v. Crockett*, 2 McCord, Eq. 132.

For other cases, see *Husband and Wife*, Cent. Dig. § 414; Dec. Dig. ⇐ 116.]

This case depended upon the construction of a deed of gift which a father made of certain personal property to a daughter who was then a married woman. Her husband disposed of the property—The complainants, who were the children of the donee, the daughter, contended that the father intended

to give a separate estate to their mother, not subject to the debts or the disposition of her husband. And of that opinion was the judge who tried the case, who decided accordingly.

From this decree there was an appeal, which was heard at Columbia.

After argument the court made the following decree:

We are of opinion that the decree of the Circuit Court ought to be affirmed. The property in dispute being given to the mother

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of the complainants after marriage, \*it may be fairly inferred from the words of the deed, that the intention of the father, the donor, was to give to her a separate estate, which her husband had no right to dispose of in any manner.

It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed.

(Signed) HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOS. WATIES,  
W. D. JAMES,  
W. THOMPSON.

Farrow and Gist for appellant.

Gist and Johnson for respondents.

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##### Case LXVII.

Abbeville.—Heard by Chancellor Thompson.

M. W. MOONE and Others v. STEPHEN HENDERSON, SARAH SMITH, and Others.

(November, 1814.)

[Wills ⚡506.]

The limitation of an estate to a son, and his heirs, but if any of testator's children should die without an heir, then his share to go to the rest of testator's children, is not too remote. The devise over to the rest of the children, shews that an indefinite failure of issue was not in contemplation. The testator used the word heirs, as synonymous with children.

[Ed. Note.—Cited in *Holeman v. Fort*, 3 Strob. Eq. 73, 51 Am. Dec. 665; *Smith v. Hilliard*, 3 Strob. Eq. 222; *Duckett v. Butler*, 67 S. C. 134, 45 S. E. 137; *Church v. Moody*, 98 S. C. 239, 82 S. E. 430.

For other cases, see Wills, Cent. Dig. § 1093; Dec. Dig. ⚡506.]

[Husband and Wife ⚡101.]

A husband surviving, made liable for devastavit committed by his wife, dum sola, whilst acting as executrix and trustee; though no judgment was obtained against the husband or wife during the coverture; the persons injured being minors, and no person to represent them, and to institute suits during the life of the wife. But the liability restricted to the amount of the property received by the husband in marriage.

[Ed. Note.—Cited in *Witherspoon v. Dubose*, Bailey, Eq. 167.

For other cases, see Husband and Wife, Cent. Dig. § 377; Dec. Dig. ⚡101.]

The principal question in this case, arose on the construction of certain clauses in the will of Andrew Lee, which were as follows:

"I give and bequeath to my son John Lee, certain lands and negroes, (enumerated in the will,) to him and his heirs." And in a

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subsequent clause, after other bequests \*to other children, the testator says, "If either of my aforesaid children should die with, (meaning without, as was agreed by the counsel,) an heir, then his share shall go to the rest of my children.

It was contended, in the Circuit Court, that the limitation over was too remote; but the Chancellor then holding that court, was of opinion and so decreed, that the limitation over was not too remote.

Another question was, whether Stephen Henderson was liable for a devastavit committed by his wife, dum sola, in her character of executrix and trustee, no judgment having been obtained against him during the coverture?

It was contended on the one hand, by the complainants, that the husband was liable to the extent of the devastavits committed, whether he had received in marriage property to that extent or not.

And on the other hand, that the husband was not liable at all, whatever he might have received, as no judgment had been obtained against him during the coverture: that being the settled doctrine of the court.

The circuit judge was of opinion, that under the circumstances of the case, the husband surviving was liable for the devastavit committed by the wife dum sola; but that his liability ought to be restricted to what he had received in marriage with her, and he decreed accordingly.

From this decree there was an appeal, which was argued at Columbia.

After hearing argument, the Court of Appeals delivered the following decree:

In this case, there are two objections made to the decree of the circuit judge, involving points which this court think necessary to be examined more fully than was done in the decision below. These are,

First,—Because it was decreed, that the limitation in Andrew Lee's will was not too remote.

Second,—That it was decided, that Stephen Henderson was only liable for the devastavit of his wife, dum sola, to the value of the property he received by her.

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\*The clauses of the will upon which the first objection arises, are in the following words: "I give and bequeath to my son — Lee, certain lands and negroes (therein enumerated,) to him and his heirs." And in a subsequent clause the testator says, "That if either of my aforesaid children should die with, (meaning without as is conceded,) an heir, then his share shall go to the rest of my children."

This is an executory devise, in which ev-



ery respect is to be paid to the intention of the testator.

There is no proof that the testator was in extremis; but there is abundant evidence on the face of the clause, that he was illiterate and without counsel. The words "to him and his heirs," in the first clause, give a fee; the second restricts the bequests, and limits the property over. He could not have meant by the word heir, an heir on the indefinite failure of issue; but he evidently meant a child, for he uses it in the same sentence as synonymous with children. But if he had used the word child instead of heir, (as was evidently his intention,) the limitation was not too remote: Besides, the children were all in esse at the time of the bequest, and the words "should he die without an heir," must be confined within the limits of their lives; for in the case of the contingency happening, the property was to go over to the rest of the children, which is nothing like a perpetuity.

On the second ground, it is necessary to state a fact, which is not mentioned in the decree below: The devastavit was committed by the executrix, while the children were minors, and there was no one to bring a suit, so as to obtain a judgment against the husband, during the coverture, and to bring the case within the strict rule of law. The wife acted as executrix and trustee, and consequently the devastavit was covinous.—There was, therefore, no laches imputable to the children, and the case itself is not one of that complexion which should be barred upon common principles.

For these reasons, I think the decree of the circuit judge correct, in deciding that the limitation over in the will was not too

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remote: and that the defendant Hender\*son is liable for the devastavit of the wife, dum sola, so far as he received property by her.†

The other parts of the decree are therefore affirmed for the reasons therein given; and the two last above stated, for the reasons herein adduced.

W. D. JAMES.

We concur in the above opinion.

HENRY W. DESAUSSURE.  
THOMAS WATIES.

†It was not understood that the Court of Appeals intended by this decree to break in upon the settled doctrine of the court, that the husband is not liable for debts or devastavits of his wife, committed dum sola, unless judgment be obtained during the coverture, though he may have received a large fortune with her in marriage. That doctrine has been too firmly established to be shaken where that is the sole question, unmingled with other equitable matter.—And it rests on this ground, that as the husband is liable for the debts and devastavits of the wife, incurred or committed dum sola, if judgments be obtained during the coverture, though he has not received a shilling in marriage with her; so on the other hand, he shall not be liable if judgments be not obtained during the cover-

ture, though he may have received a large fortune with her. The maxim, *vigilantibus non dormientibus leges subveniunt*, peculiarly applies. But in the case under the consideration of the court, there were peculiar circumstances which influenced the judgment given. The wife was executrix, and acted as trustee; and the persons injured by her acts were minors, and there was no person to bring a suit on their behalf, during the continuance of the coverture, and thus to fix the liability of the husband. Now as the rule which exempted the husband from liability for the debts and acts of his wife, unless judgment should be obtained during the coverture, was not a rule of positive law, but a rule of equitable decision, founded on the reasons above-mentioned, the Court felt itself at liberty to mould the rule to the purposes of justice, where the circumstances required it. But in doing so the court would not go further than to extend the liability of the husband in this case, to the amount of the estate received by him in marriage.

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\*Case LXVIII.

Columbia.—Heard by Chancellor Gaillard.

HARRIET BENSON, by Guardian, v. JOHN BRUCE and Wife, Administratrix.

(June, 1814.)

[*Executors and Administrators* ⇐104.]

Interest allowed on sums of money in the hands of an administrator, kept unnecessarily an unreasonable time.

[Ed. Note.—Cited in *Pace v. Burton*, 1 McCord, Eq. 250.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 424; Dec. Dig. ⇐104.]

[*Executors and Administrators* ⇐115.]

The administrator charged with furniture of the estate, kept and used by him for a long time, though he offered to deliver it up when suit was brought.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 467; Dec. Dig. ⇐115.]

[*Executors and Administrators* ⇐500.]

Commissions not allowed to an administrator who does not make regular annual returns to the Court of Ordinary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

This was a bill brought by complainant for a partition and account. The complainant, as stated by the bill, was the only child of Joshua Benson, deceased. Her mother had since intermarried with the defendant, John Bruce. The bill states, the defendants J. Bruce and wife to have had the management of the estate of Joshua Benson, ever since the death of the said Joshua. The answer admits the management of the said estate to have been in the hands of the said Mary Bruce, previous to her intermarriage with the said John; and in his hands since the said marriage.

This case was referred to the commissioner to report on the amount which might appear to be due the complainant; upon which reference the commissioner reported a large amount in favor of complainant.

To which report the following exceptions were taken and argued before the commissioner, and by him overruled, viz:

First,—The report was wrong in allowing interest, particularly as the testimony was, there were outstanding debts, and still are; and from the testimony, the commissioner ought not to have allowed interest in this case.

Second,—The defendant is charged too high for house rent, which charge is contrary to the weight of testimony adduced before the commissioner.

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\*Third,—The report is wrong in charging the defendant with the amount of unsold furniture belonging to the estate, as from the testimony it appeared that it was the mother of complainant that prevented a sale of the same, and that the defendant has preserved the same for complainant, and is ready to deliver it up to her. And further, the furniture has not been injured by defendant.

Fourth,—The report is erroneous in not allowing the said John Bruce commissions.

From which decision of the commissioner, the defendant appealed; upon the hearing of which appeal before the Circuit judge, it was decreed that the exceptions be overruled, and that the report of the commissioner be sustained.

This case came on, on four exceptions to the commissioner's report. The exceptions are overruled, and the commissioner's report sustained. Interest is allowed, because the administrator and administratrix kept the money of the intestate in his hands an unreasonable time. There was no necessity for their doing it, as the exigencies of the estate did not require it. The administrator and administratrix are charged with the furniture, at the appraisalment, as it appears that they kept it for their own use, in their own house, which was a tavern, having first sold such parts of the furniture as did not suit their purpose.

They are charged £65 per annum for house rent by the commissioner. Some of the witnesses say it was worth £70 per annum; others \$250.

Commissions are not allowed to the administrator and administratrix, because they did not account annually with the ordinary, as they ought to have done.

It is ordered and decreed, that the defendant do pay the sum reported to be due, by the commissioner; and that his report be confirmed.

The costs to be paid out of the estate.

(Signed) Theodore Gaillard.

The defendant John Bruce then moved the Court of Appeals to reverse the decree of

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the presiding judge, on \*the ground that the

said exceptions to the commissioner's report ought to have been sustained.

The Court of Appeals, after hearing, unanimously affirmed the decree of the Circuit Court.

Crenshaw and Egan for appellant.  
Hooker for respondent.

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Case LXIX.

Columbia, Richland District.—Heard by Chancellor Gaillard.

WILLIAM A. BELTON v. DR. THOMAS  
BRIGGS, GRAY BRIGGS and  
JOHN BRIGGS.

(June, 1814.)

[Evidence ⇐182, 183; *Lost Instruments* ⇐23.]

Parol evidence of the execution of some deeds for the conveyance of lands, and of the payment of the purchase money equal to the value of the fee simple, and of the house and papers of the purchaser being afterwards burnt, will establish the existence and loss of title deeds in fee simple to the land in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 602, 636; Dec. Dig. ⇐182, 183; *Lost Instruments*, Cent. Dig. §§ 54, 57; Dec. Dig. ⇐23.]

[*Ejectment* ⇐142; *Infants* ⇐30.]

A minor whose share in a tract of land was sold by his mother and brothers, who stipulated for his confirmation, is bound by their act, if after he comes of age, he, with full knowledge of all the facts, acquiesces for several years, and receives his share of a more valuable tract of land purchased by his mother, and paid for in part, with the proceeds of the sale of his land. This amounts to a confirmation, and the court will decree specific performance. Such person is liable to pay rent, from the time he retook possession of the land; and he shall not be allowed a deduction from the rent, on the ground that he has improved the estate, by clearing the wood.

[Ed. Note.—Cited in *Rainsford v. Rainsford*, Speers, Eq. 386, 393; *Ihley v. Padgett*, 27 S. C. 303, 3 S. E. 468; *Kinard v. Proctor*, 68 S. C. 287, 47 S. E. 390.

For other cases, see *Ejectment*, Cent. Dig. § 500; Dec. Dig. ⇐142; *Infants*, Cent. Dig. § 44; Dec. Dig. ⇐30.]

The bill filed in this case, was to compel the defendants to convey to the complainant a tract of land in fee simple.

The three defendants were brothers who had a joint estate in the land under the will of F. Briggs; but their mother Mrs. Briggs, was to hold it during her widowhood. She was desirous to sell the land, to enable her to purchase and pay for another tract in the neighborhood, from Mr. Dobbins, which she considered more valuable and beneficial to her family. Her eldest son, Gray Briggs, was of age. It is uncertain whether John was of age; and Thomas was a minor. She

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and her two eldest \*sons agreed with Jonathan Belton, the father of the complainant,



to sell the land to him for \$1,000, and they engaged that Thomas Briggs the minor, should confirm the sale when he came of age.

Jonathan Belton agreed to purchase the land, and gave his note for the purchase money, which was \$1,000, which was then considered to be the value of the land, to Mrs. Briggs, on the 27th of October, 1802, payable in December 1803.

The purchase was made of the land from Dobbins for the sum of \$2,475, and a conveyance made by him on the 28th October, 1802, to Mrs. Elizabeth Briggs.—The note of Belton was passed in part payment, by Mrs. Briggs to Dobbins, and was paid on the 8th January, 1804, and Gray Briggs gave his note for the balance of the purchase money.

Mrs. Briggs removed from the Briggs' tract to the Dobbins' tract in the year 1803; and Mr. J. Belton took possession of the Briggs' tract in 1803, with the consent of the family, and held it until 1812; after which Thomas Briggs got the possession. Mrs. Briggs, the mother, died in the year 1807. The three brothers, Gray, John and Thomas Briggs, sold and joined in conveying the Dobbins' tract to John Picket, by deed, dated 31st of March 1810. The consideration money was \$3,600.

No conveyance was produced from Mrs. Briggs to J. Belton, for the Briggs tract of land; but it was proved that some writings were drawn and delivered to him, and that the house of J. Belton was burnt after his death, about the year 1805, and most of the property and some papers were lost, and the complainant relied on the presumption of the existence and destruction of the deed.

The cause came to a hearing before Chancellor Gaillard.

Many respectable witnesses were sworn, who testified that the sale of the Briggs' tract of land, had been made by Mrs. Briggs, and her sons Gray and John Briggs, to Belton, for \$1,000, which had been paid by Belton, and was applied in part payment of the Dobbins tract of land. That they stipulated,

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that the minor son \*Thomas should confirm the sale; and that Mrs. Briggs and her family removed to the Dobbins' tract, and Belton took possession of the Briggs' tract, and held the same for a considerable time. And that Thomas Briggs was aware of the sale, and stated repeatedly after he came of age, that he was satisfied with the sale, which was necessary to enable Mrs. Briggs and her sons to purchase the Dobbins' tract, which was much more important to the family.

Also, that Thomas Briggs some years after he came of age, joined his brothers Gray and John Briggs, in selling and conveying the Dobbins' tract of land to J. Picket, for \$3,600, and received his share of the purchase money; and afterwards possessed himself of the Briggs' tract of land.

Some evidence was produced on the part

of the defendants to weaken the force of the testimony given on the part of the complainants; and particularly to prove declarations of Mr. Belton, that he had purchased no more than the estate which the widow had in the land. But the great weight of testimony proved that Mrs. Briggs and her sons Gray and John Briggs, sold the absolute estate in the land, and stipulated that Thomas Briggs should confirm the sale when he came of age:—Also, that the price given was the then value of the land; and that Thomas Briggs was satisfied at the time with his mother's and brother's acts, and considered it a good bargain;—and has availed himself of it since, by joining in the sale of the Dobbins' tract of land, and received his share of the purchase money; which tract was paid for in part, with the proceeds of the sale of the Briggs' tract, and was in reality the substitute for it.

Messrs. Hooker and Blanding, for the complainant, argued, that Dr. Briggs had confirmed the title made by his mother, by accepting a part of the Dobbins' tract, which had been paid for in part by the sale of the Briggs' tract; and that he was bound to fulfil his mother's contract, having received assets of her estate. If an infant himself, makes an exchange of lands, and continues in possession after he comes of age, he is bound

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by it.—\*Eq. Cas. Abr. 282. Thomas Briggs' acts, amounted to a confirmation of the sale.

Mr. W. F. Desaussure and Mr. Crenshaw for the defendants.—They argued, that there was no proof of any agreement in writing, nor no proof of what estate in the land was sold. It was more proper to suppose that Mrs. Briggs sold only her own right; some of the witnesses thought so. The answers deny that any formal titles were made; and the mere verbal acknowledgments of parties will not amount to a conveyance of real estate. See the cases of Potts v. Cogdell, decided in this court in 1795, and Askew v. Poyas, decided in 1802.

Let the complainants seek their remedy at law if they have any rights. The court will not enforce the executory part of a contract, to the prejudice of a person who was a minor; and whose rights did not accrue till the death of his mother in 1807. See the cases of Zouch v. Parsons, 3 Burr. 1804; Mansel v. Mansel, 2 P. Williams, 678; Harvey v. Ashley, 3 Atkins, 607; Ambler, 419; 1 Atk. 490; and Newland on Contracts, 12.

Chancellor Gaillard delivered the following decree:

The evidence in this case puts out of all doubt, that Mrs. Briggs and her sons Gray and John Briggs sold the land which is the subject of this suit, to W. Belton the complainant's father. That the sale was made for the purpose of enabling the Briggs family to purchase another tract from Mr. Dobbins. That Belton gave his note for the purchase

money, \$1,000, which at that time was the value of the land.

That he took possession of the land, and continued in possession of it many years afterwards. That the note given by Belton, formed part of the consideration of the Dobbins' tract, which cost \$2,475, and that Belton paid the note afterwards. Mrs. Briggs had an estate in the land sold during her widowhood. The fee simple of it was in her three sons, Gray, John and Thomas Briggs.

Thomas, when the sale was made to Belton, was an infant, but Mrs. Briggs, and Gray Briggs undertook that he should make titles for his part of the land when he

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\*should come of age. The title to the Dobbins' tract was made to Mrs. Briggs, but G. Briggs gave his note for the balance due for the purchase, after deducting the \$1,000 paid from the proceeds of the sale of the land to Belton. The land purchased by Belton has increased considerably in value. Unimproved land in that neighborhood, the witness Harrison says, has risen in value about one third. He thinks the land sold to Belton, now worth \$10 per acre.

Upon a re-survey, the tracts sold to Belton for 242 acres (the number of acres mentioned in the original grants,) are found to contain 304 acres, after deducting 58 acres taken off by an old survey.

Thomas Briggs insists on his minority, and resists the claim of the complainant: And unless he has done some act since he has come of age, the sale made of his land cannot affect him; but it is proved that he knew of the sale, and of the investment of the funds arising from it in the Dobbins' tract. He once pointed out to Mr. Peay, a witness, the corner tree of the land sold to Belton, and said, that that was the land they had sold Belton, or were about selling to him. And after his marriage, he said to Nettles, another witness, that they had made a good bargain in selling the land to Belton, and buying Dobbins'.

Mrs. Briggs, the mother, died in 1807; and after an acquiescence of three years in the sale to Belton, Thomas Briggs joined in conveying the Dobbins' tract on the 31st of March 1810, to W. Picket for \$3,600, and received his proportion of the purchase money. If the Dobbins' tract be considered as Mrs. Briggs', Thomas Briggs on her death could only take his third of it, subject to her engagement to Belton respecting the title; or if this tract be considered as a substitution of property for the land sold to Belton, in either case, Thomas is bound to make titles to the complainant.

The act which his mother did for him was for his benefit. He thought so himself, and acquiesced in it for several years after his

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mother's death; and by the sale of \*the Dobbins' tract, and the receipt of \$1,200 of the

consideration money, completely confirmed it.

The defendants must make titles to the complainant, and pay the costs of the suit.

Theodore Gaillard.

From this decree there was an appeal on the following grounds:

First,—Because there was no evidence of any conveyance of the land in dispute, from the defendants to Jonathan Belton the father of complainant.

Second,—There was no evidence of any other conveyance, than the conveyance of Mrs. Briggs' life-estate.

Third,—It was proved that Belton acknowledged that he had bought the widow's life-estate, and that was all he wanted.

Fourth,—It was proved that John Briggs and Thomas Briggs, two of the defendants in the above case, were minors at the time the sale was alleged to have been made.

Fifth,—Because the defendants being remaindermen under the will of Frederic Briggs, any conveyance they could have made was void ab initio, and incapable of confirmation.

Sixth,—Even if the parties had made the alleged conveyance, the minors had a right upon their attaining full age to make their election, and insist on having the land itself.

Seventh,—There was no evidence of any conveyance, but the vague and uncertain declarations of some of the defendants, which ought not to deprive the defendants of their real estate.

The appeal was heard in November 1814.

Mr. W. F. Desaussure for the appellant, insisted, that there was no sufficient evidence of the quantum of estate sold by Mrs. Briggs; and no evidence of any conveyance by deed; and certainly none that Thomas Briggs agreed to the sale at the time; and if he had, he was then a minor and incapable of con-

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tracting. The \*proofs of confirmation are very slight, and they are altogether parol. His answer denies the alleged confirmation; and that answer is entitled to credit, for it is not contradicted by two positive witnesses, or one witness and strong circumstances. See *Cooth v. Jackson*, 6 Vezey, 39.

The acts of a party to be construed into confirmations, must be done with that view and for that purpose, explicitly and clearly—1 Atkins, 489, *Smith v. Low*. There are none such in this case.

Loose parol acknowledgments, imperfectly expressed, and more imperfectly remembered, ought not to be allowed to be confirmations, to affect and convey real estate. And as to his sale of Dobbins' tract, and receiving part of the purchase money, that does not amount to a confirmation of the sale of the Briggs' estate. There was no necessary connection between them. His mother bought the Dobbins' land. He inherited it from her with his brothers; and he had a right



to sell it and take his share of the money. It cannot be construed a confirmation, but by raising a presumptive substitution of one tract for the other; which is too loose and vague for the transfer of real estate.

There is an essential difference between enforcing the specific performance of a contract, and protecting a defendant, who asks nothing else of the court. This is not a case for specific execution.

Mr. Hooker and Mr. Blanding for respondents.—Mrs. Briggs, the mother, and the two eldest sons, sold the land to Belton. The witnesses prove the fact. The price corroborates their testimony, that it was in fee simple. Deeds were executed, but the house of Belton was burnt, and papers destroyed. The Court will raise the presumption that the titles were thus lost. They had a right to sell two thirds of the estate in their own right; and they stipulated that Thomas Briggs should confirm the sale. Possession was given to Belton, who held many years. The price was paid by Belton, and applied by Mrs. Briggs to pay in part for the Dobbins' land; which has been sold since Thomas Briggs came of age, and he received his

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share \*of the money. He knew all those transactions, and said that he approved it; and his acquiescence for three years after coming of age, and his accepting his share of the Dobbins' tract, amounted to a complete confirmation of the sale. By accepting the Dobbins' land, under his mother, Thomas Briggs agreed to perform her stipulation made in his behalf. He must renounce any share in the Dobbins' tract, before he can have any part of the Briggs' tract. The deed between the brothers say, they took by inheritance from their mother. If Thomas Briggs did not mean, in accepting the Dobbins' tract from his mother, to confirm her acts, he meant to commit a fraud, which this court will not sanction. See *Ambl. 419*; *3 Atk. 607*; *1 Vern. 132*; *2 Vern. 225*.

But this court will do more than was done by the Circuit Court. It will enlarge the decree, and order an account of the rents and profits, from the time that Thomas Briggs took possession of the land. They were warned by Mr. Peay, of the nature of Belton's rights and claims; and yet persevered. They are bound to account.

The Court of Appeals made the following decree:

We are of opinion that the Dobbins' tract of land mentioned in the decree below, as purchased by Mrs. Briggs and Gray Briggs, was a substitution for the tract of land sold to complainant's father, and which is the subject of the present suit. That Thomas Briggs was indeed a minor at the time the substitution was made; but still the busi-

ness was transacted by his mother and two brothers, with his knowledge and approbation; and further, that it was for his benefit. After Thomas Briggs came of age, he acquiesced in the transaction for three years, and afterwards joined in the conveyance of the Dobbins' tract, and received twelve hundred dollars, as his portion of the purchase money.

By this act, he confirmed the substitution, and is bound to make titles to the complainant, for lands sold to his father.

For these reasons, and other good reasons contained in the decree of the Circuit judge,

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we are of opinion that \*it ought to be affirmed; and that Thomas Briggs, who was the opposer of the equity of this case, do pay all the costs incurred therein.

HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES,  
W. D. JAMES,  
W. THOMPSON.

An order of reference to the commissioner having been made, to ascertain what rent was due and payable by Thomas Briggs—the commissioner afterwards made a report, stating what appeared to be the rent due.

The defendant Thomas Briggs, filed an exception to the report, on the ground that he had improved the land, and was entitled to compensation therefor, in extinction of the rent, or as a deduction therefrom.

The exception was argued in the Circuit Court, before Chancellor Desaussure, who delivered the following decretal order:

This case comes on upon the commissioner's report, allowing rent to be paid by defendant to complainant, \$210.

A single exception was put in, that defendant ought not to be charged with rent, because he had improved the place, and was not compensated for the same.

There can be no doubt in this case. As soon as the decree in favor of Belton ascertained the title of the parties, the right to demand rent, and the obligation to pay it, arose of course, and the exception does not question this. The only questions then are, have the defendants put any valuable improvements on the plantation, and are they entitled to any deduction from the rent on that account?

The only improvements of any importance alleged, was the clearing part of the land, which was fully proved. Whether this clearing was of any benefit to the complainant, is at least doubtful. The witnesses differed on that point; and upon the whole of the evidence, I am inclined to think, that though

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the clearing the land was trouble\*some and costly to defendants, it was not beneficial to complainant, who wanted timber land for

his adjoining plantation. But I am not prepared to say, that a man taking possession of his neighbor's land, even though he did not intend a trespass, but under color of title, and clearing it, would be entitled to compensation for his labor, because other persons might think such clearing an advantage to the owner. The owner is the best judge whether he will have his land cleared or kept in wood. And any person officiously cutting down his timber, so far from being entitled to compensation for his labor, might find himself mulcted in damages for his officiousness. I do not think that would be correct under the circumstances of this case; but I do think that the defendants are not entitled to compensation for an unwarranted act of doubtful benefit to the complainant. Mr. Briggs knew that the title to the land was in dispute.

The commissioner's report must be confirmed.

(Signed) HENRY W. DESAUSSEURE.

From this decretal order an appeal was made, by Mr. Crenshaw for T. Briggs; but the appeal was dismissed.

#### 4 Desaus. 474

##### Case LXX.

Columbia.—Heard before Chancellor Desaussure.

WAMBURZEE, CHARLTON and Others, v. KENNEDY, ROBINSON, MCREIGHT and Others.

(February, 1814.)

[*Discovery* ⚡3.]

A suit will be sustained in this court, for the recovery of slaves, and their increase, and for an account of their hire and labor, by persons who have been long ignorant of their rights, and who could not readily or certainly identify the slaves and their issue, but by a discovery in this court. The relief is more complete here.

[Ed. Note.—Cited in *Young v. Burton*, McMul. Eq. 260.

For other cases, see *Discovery*, Cent. Dig. §§ 3, 4; Dec. Dig. ⚡3.]

[*Limitation of Actions* ⚡102.]

A third person purchasing slaves, and taking an absolute bill of sale from the vendor, with knowledge that he had no more than a right to a temporary use of them, whilst the absolute right of property was in minor children, shall be considered as a trustee for the children. And the statute of limitations will not run in favor

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of such a purchaser, or \*those claiming under him as volunteers, until the children entitled discovered their rights. But purchasers from the first purchaser, for valuable consideration, without notice, shall be protected.

[Ed. Note.—Cited in *Swan v. Ligan*, 1 McCord, Eq. 232; *Van Rhyn v. Vincent's Ex'rs*, Id., 314; *Thayer v. Davidson*, Bailey, Eq. 420; *Thrower v. Cureton*, 4 Strob. Eq. 159, 53 Am. Dec. 660.

For other cases, see *Limitation of Actions*, Cent. Dig. § 503; Dec. Dig. ⚡102.]

[*Limitation of Actions* ⚡177.]

[Though a bill against a purchaser for the recovery of trust property does not charge fraud in the sale, plaintiff may set up fraud to rebut a plea of the statute of limitations.]

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 665; Dec. Dig. ⚡177.]

[*Trusts* ⚡357.]

[Cited in *Franklin v. Creyon*, Harp. Eq. 252, to the point that the conveyance of one holding land in trust to a purchaser without notice for a valuable consideration passes the legal title discharged of the trust.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 539; Dec. Dig. ⚡357.]

[*Trusts* ⚡357.]

[Where a trustee gave the trust property to his children, by will, charging them with small sums for the purpose of equalizing the legacies, it was held that the children were not purchasers so as to protect them against the trust.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 548, 549; Dec. Dig. ⚡357.]

The complainants filed their bill in January 1812, for the discovery of certain slaves and their increase to which they set up a claim, and for an account of the hire and labor of said slaves, for a number of years.

Several of the defendants admitted in their answers that they had possession of some of the slaves in question, which they claimed and had held many years, under the will of Mr. Alexander Robinson, deceased, who bequeathed them to his sons and sons in law, and they insisted that the said Robinson had purchased the slaves who were the parents of those in question, in the year 1789, for valuable consideration, from D. Charlton, who had a good right to sell the said slaves.

One of the defendants, McCreight, was a purchaser of one of the slaves from Robinson, at a full price, without notice of any claim: and the defendants all relied on the statute of limitations.

It was proved at the hearing of the cause, that the complainants claimed under a deed dated 21st March, 1781, executed by James Munford, which in consideration of love and affection, and of £1,000, conveyed a number of slaves to his cousins, the Charltons, the children of D. Charlton; but that the said slaves should remain in possession of the said D. Charlton, till his youngest son, Arthur, should attain 21 years of age, when they should be divided among the said children.

It was proved on the part of the defendants, that Alexander Robinson had purchased the slaves in question from D. Charlton, who gave an absolute bill of sale for them, dated 18th Feb. 1789, for 150 guineas. The bill of sale included only part of the negroes conveyed by Mr. Munford to the Charltons. It was recorded on 22d July, 1793—And Mr. Robinson had possession of the slaves till he died, which was in the year 1800. And he bequeathed the said slaves to his chil-



dren, who are the defendants, except one slave, whom he sold to the defendant McCreight, for valuable consideration.

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\*It was proved that Mr. Robinson was apprized, previous to his purchase, by Mrs. Munford, that Dr. Charlton had a right to dispose of the services of the slaves till his youngest son Arthur should come of age, and no longer; and he was made acquainted with the deed of gift to the children.

D. Charlton died in the year 1791, and his widow and children removed to Georgia soon after. The widow died, and the children have lived there ever since.

Mrs. Munford stated that she supposed the children did not pursue their claims till recently, because they were ignorant of their rights, and of the circumstances for a long time; and ignorant of the residence and situation of Robinson.

The defendants relied on the statute of limitations. Alexander Robinson having purchased the slaves in 1789, and held them till his death; and his children and legatees since his death: and no suit till 1812.

Several objections were made by the complainants to the operation of the statute of limitations in this case. The two first were that the right of action did not accrue till Arthur Charlton was of age, and that the children were absent from the state.

But the court was of opinion that these objections could not prevent the operation of the statute, because the right of action accrued on A. Charlton's coming of age, which was at least as early as in the year 1802; and no suit was instituted till 1812.—And by the provisions of the statute of limitation, four years only are given to a claimant after coming of age; and five years to an absentee, after the right of action accrued, and much longer than those periods had elapsed.

Another ground of objection to the operation of the statute, as a bar to the claim of the complainants, was that Mr. Robinson purchased the slaves, and took an absolute bill of sale for them from D. Charlton, though he was particularly apprized that D. Charlton had no more than a temporary interest in them, and that the absolute right of property was in the children of D. Charlton, the complainants. That this amounted

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to a legal fraud in \*the purchaser, and the statute of limitations would not run in such a case, until the discovery of the fraud by those interested and wronged by it. And that in fact the Charltons were young children at the time of these transactions, and had not come to a knowledge of their rights till very recently before the suit instituted.

The facts stated were contested at the hearing, but were proved to the satisfaction of the court, by indisputable evidence.

And the court was of opinion, "that the taking an absolute bill of sale for the slaves

purchased from D. Charlton, when the purchaser knew that he had no right to sell them for more than a term of years, was at least a legal fraud." The effect of which was, "that it raised a trust in Robinson, for the benefit of the young Charltons."

"The destruction of the estate or interest in the estate of the cestui que use is a breach of trust, and it makes no difference whether the settlement or trust deed be founded on a valuable consideration, or marriage, or a voluntary settlement, or a will. It was said by the defendant's counsel, that Dr. Charlton was not a trustee, and there was no trust estate. Certainly there is nothing expressed in the deed of a formal trust. But it is the settled doctrine of this court, that where one person is in possession of property, which he is bound to deliver to another, and he fails to do so, equity raises an implied trust, which is subject to the rules and principles of trust estates. The doctrine of trusts is far more extensive, than is usually apprehended. It goes to this length, that whatsoever is the agreement, concerning any subject, real or personal, though in form and construction purely personal, and sueable at law only; yet in this court it binds the conscience; and wherever persons agree concerning any particular subject in a Court of Equity, as against the party himself, and any claiming under him, voluntarily, or without notice, raises a trust. See *Legarde v. Hodges*; 1 Vez. jr. 478. It is true, that if the legal estate was in the trustee, and he sold and conveyed the trust property to a purchaser with-

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out notice, and for a \*valuable consideration, such purchaser would hold the property discharged of the trust, and the remedy of the injured cestui que trust would be against the trustee. But in case of a purchase for valuable consideration, with notice of the trusts, or a voluntary conveyance without notice, the purchaser or voluntary grantee would hold the property liable to the trusts. See the important case of *Mansell v. Mansell*, decided by Lord Chancellor King, assisted by Lord Chief Justice Raymond and Lord Chief Baron Reynolds, reported in 2 P. Wms. 678, 681.

In fact, Dr. Charlton cannot be said to have had from the operation of the deed, the legal estate in him, whilst the equitable estate was in the cestui que trusts; for the direct legal estate was to the children, with a temporary right of possession interposed for the father; so that it would not be easy to shew that the legal estate was in Dr. Charlton, of the entire interest, which would protect a purchaser from him, even for valuable consideration, and without notice. But Dr. Charlton undertaking to sell the whole interest, and Mr. Robinson to buy the same, though both knew that he had no right to do so, raises up by implication, a trust in the purchaser for the benefit of the children.

Mr. Robinson was, indeed, a purchaser for valuable consideration; but it was with notice of the true rights and interests of the parties; and therefore he held the property subject to the provisions or uses of the deed, in favor of the young Charltons. And as the sons and sons in law of Mr. Robinson took as volunteers under his will, they must be responsible; even though they had no notice of the transactions in question, and of the rights of the parties; though there is a presumption even of that, from their connection with Mr. Robinson, and from the knowledge of several of the family, that he put the negroes out of the way to avoid the claims of the Charltons, and from Mr. Alex. Robinson, the son, removing to the western country, with some of this property.

It was faintly urged, that some of the children of Mr. Robinson, having paid his estate £15 a piece, for their respective shares

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of these negroes, in pursuance of \*his will, that this placed them on the footing of a purchaser for valuable consideration.

It does not strike me in that light;—this was a mere family arrangement to equalize the legatees; and if such an arrangement should be permitted to sanction the claim as purchaser for valuable consideration, the most fraudulent purchaser might protect the property in the hands of his family for the most trivial consideration.—All that could be pretended, would be, that they should be reimbursed these small advances, in accounting for the use and labor of the negroes; but they have their remedy against Mr. Robinson's estate.

Mr. McCreight stands on a different footing. He is really a purchaser from Mr. Robinson for valuable consideration without notice, and is entitled to the protection of the court. The complainants cannot recover against him; though they may be entitled to recover the value against the estate of Mr. Robinson.

This transaction then, being considered fraudulent, and raising a trust in Mr. Robinson for the young Charltons, we come to the question, whether, in such case, the statute of limitations is allowed to operate?

I take the law on that subject to be as follows: As a rule, the statute of limitations does not operate in cases of fraud and of trusts; but as soon as the fraud is discovered, it commences to run; and if the parties neglect to commence their suits, within the statutable limitations, they are barred. This doctrine is laid down in the case of *Booth v. Earl of Warrington*, decided in the House of Lords, with the assistance of all the judges. 13 Viner, 542, case 3d, and much more fully reported in 1 Brown's Parl. Cases, 449. And the doctrine is supported by Lord Chancellor King, in the case of the *South Sea Company v. Wymondsel*, reported in 3 P. Williams, 143, 4, 5. See too 1 Washington's

Reports, 145, 9. It is true, the statute shall operate in cases of trust, in favor of an absolute stranger, for the rule, that the statute of limitations does not bar a trust estate, holds only as between the cestui que trust and trustees; and not as between cestui que

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trust and trustee on one \*side, and strangers on the other. 4 Bac. 473; 2 Eq. Cas. Abridged 579; 1 Brown, C. C. 554, *Townsend v. Townsend*.

Let us then apply this law to the facts proved. It appears that Dr. Charlton died in 1791, and his widow removed to Georgia very soon after, whilst her children were very young; and the mother died in a short time.—They were at a distance from the scene where these transactions had taken place, and from those persons who could give them information on the subject. Mrs. Munford, who together with her husband, might have informed them of their rights, and of the unjust sale made of their negroes, swears expressly, that she believes the Charltons did not know of their rights, nor of these transactions. And this proves, at least, that she and her husband had never communicated to them, their knowledge of these facts. There is a strong presumption then, that the Charltons had not discovered the fraud till recently. They state in their bill, that they were not informed till within one year of filing their bill; and there is no proof on the other side, to induce a belief, that they had any earlier knowledge. Then it would seem that though the statute of limitations will run even in cases of frauds, from the time of the discovery of the fraud, the statute has not had time to operate in this case, since the discovery of the fraud. The suit has been brought within the legal limitation. Fraud was not expressly charged in this bill of complaint; but the facts stated, and supported by proofs, made out a case of legal fraud, against which the statute of limitations does not run; and if a formal charge of fraud was necessary, the court would give leave to amend—3 P. Williams, 144. And this would be done even at law. *Dougl. 654, Bree v. Holbeck*.

It was stated as a ground of defence, that the children of the negro woman *Ursa*, born during the time Dr. Charlton was entitled to hold possession of the negroes, would belong to Dr. Charlton.

This did not seem to be much relied upon. If it should be desired to carry up this question to the Court of Appeals, I have no dif-

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ficulty in giving my opinion. It \*has been considered a question of difficulty, and different decisions have been given in different states. But I have made up my judgment on the subject, after a pretty full examination of it. My opinion is, that the issue of female slaves in all cases not controlled by the deed or will, go over to the remainder



man, though born during the continuance of the particular or intermediate estate.—Should the point be carried up, I shall be prepared to support my opinion, with the reasonings and authorities on the point, meanwhile I refer to the institutes.—Liber 3, tit. 1, §7; Digest lib. 7, tit. 1; lib. 22, tit. 1.

But independently of the general doctrine, I apprehend the circumstances of this case, and the words of the deed would be decisive. The deed gives the negroes directly and absolutely to the young Charltons. It was a perfect gift, and if the deed had stopped there, would have taken effect immediately. But it goes on to postpone their right, by declaring that until Arthur, the youngest child, should attain twenty-one years of age, the negroes should remain in the possession of Dr. Charlton, the father. Whatever may be the general law, I think that in this case, Dr. Charlton has no right to the children born during his right of possession.

It was objected by the defendants, that the complainants had plain and adequate remedy at law, and were not entitled to relief in equity. But the remedy at law was very doubtful. The complainants had no personal knowledge of the negroes, nor what children Ursa had, nor in whose hands they were. They obtained some information by summoning witnesses, but it was imperfect. The confessions in the answers have added to the lights. I do not think there was such plain and adequate remedy at law, as ought to preclude the complainants from coming here. An account is yet to be had, and can be had much better here than at law. And this single suit covers the whole case in the court; whereas many suits must have been brought at law.

As Alexander Robertson was proved to be dead in the western country, and as Simon Robertson has not confessed any thing, and

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nothing has been proved against \*him; and as Wm. McCreight is a purchaser for valuable consideration without notice, no decree can be made against them.

With respect to the other defendants, John Kennedy, Joseph Robertson, Samuel Miller and Samuel Banks. It is ordered and decreed, that they do severally deliver up the negroes claimed by the complainants, and either proved or confessed to have been in the possession of the said defendants: to wit, John Kennedy shall deliver to the complainants the woman slave named Suckey and her children: Joseph Robertson, the negro man slave named Sykes; Samuel Miller, the negro man slave named Prince; Samuel Banks, the negro man named Cuba. And that the said defendants do severally account for the hire and labor of the said slaves, from such time after the death of Alexander Robertson the father, as they respectively came into possession of the said negroes;

and that all just and reasonable allowances be made to them in such account.

Henry W. Desaussure.

From this decree there was an appeal on the following grounds:

This suit was brought to recover several negro slaves stated to be in the possession of the defendants, and for an account of the use of them. The negroes were Sharper and Ursa and her children.

John Kennedy defendant, admits he is in possession of Suckey, reported to be a daughter of Ursa, and of two of Suckey's children.

Joseph Robinson admits he is in possession of Sykes, reputed to be a son of Ursa.

Simon Robinson denies being in possession of any negroes claimed.

Banks admits he is in possession of Cuba, called a child of Ursa.

McCreight's answer is unnecessary in this appeal. The defendants who answered, insisted that the negroes were formerly the property of Alexander Robinson, deceased, who died in ——— and that they held them

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by \*virtue of his will.—That said Robinson bought them of one Dr. Charlton, (who is named in complainants' bill as having them, together with some right and interest in them) for a valuable consideration, and without any notice that other persons than Dr. Charlton had any interest in them. They also insisted on the statute of limitations.

The complainant's claim was founded on a bill of sale of James Munford, made 21st March, 1781, which shewed that in consideration of love, &c. to the children of Dr. Charlton, and in consideration of 1,000*l*. Virginia money, paid by Dr. Charlton, he conveyed Ursa and Sharper and other negroes, to the said children, to remain in the possession of the said Dr. Charlton, till Arthur, the youngest of the children, should be 21 years of age.

To clear the case of the statute of limitations, the complainants proved, that they removed into Georgia about the year 1791, before Arthur came to the age of 21 years, at which age he did arrive in 1802 or before.

The complainants also gave in evidence, by Mrs. Munford, that old Mr. Robertson enquired of her about the title to the negroes before he purchased them, and that she told him the nature of the title. She was examined by commission, and on this enquiry, she was asked if she knew Robertson? and it appeared fully by her answer, that she did not and could not; so that the result of her knowledge was, that some person, who she thought was Mr. Robertson, asked her about the title.

To rebut the probability that he speculated on the chance of the title, or bought with such a knowledge, it was proved that he was a steady honest laboring man, never accustomed to buy in such a way, or to risqué, or wrong any person. It was also proved, that when he made the bargain, Dr. Charlton told

him they were secure and good property; but that there was no discussion or mention of any reason why they might turn out to be bad property. That Robinson lived in Fairfield, and Dr. Charlton and Mrs. Munford in Camden; and the bargain was made in Fairfield.

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\*It was proved on the part of defendants, that Mr. Robinson paid the full value of the negroes, took an absolute bill of sale from Dr. Charlton for them in 1789, and used them till his death, about fourteen years ago, and that the defendants who took them by his will, paid 15*l.* a piece for them, by the terms of his will.

It appeared also, that the negroes in Dr. Charlton's bill of sale, came from the estate of a Mr. Hall, of whose will Mrs. Charlton was an executrix, and there was no evidence that there had been any legal partition of Hall's estate, or any act of the executors of Hall, to vest these negroes in Mrs. Munford, who claimed them under this will, and whose husband made the bill of sale. It was therefore submitted, that the sale by Dr. Charlton to Robinson, was a transfer by the executor of Hall's will, and the first act that vested the negroes in any person; and although the complainant now produced a bill of sale by Munford, upon which it might be that Dr. Charlton had admitted Munford to have a disposing right; yet there was no evidence that he ever saw that bill of sale, or accepted property under it.

The defendants could not admit that Munford ever had any right in the negroes, or that his bill of sale gave the complainants any right.

This fact as well as some other material ones, depended on the evidence of Mrs. Munford; and her evidence was objected to on the ground of her husband's interest. It was insisted that if the bill failed, especially if it failed for want of Mr. Munford having any title, he would be liable, on the express warranty in his bill of sale, to indemnify the complainant.

Mr. Wamburzee, without his wife, had released Mr. Munford, and J. Charlton had also released him. (Some questions occurred whether these releases were sufficient)—Mr. Cleland, who was at first a party to the bill, had not released Mr. Munford. His name was on the bill at the time of trial, but it was found that there was leave given by the court to strike it off.

The court admitted the evidence of Mrs. Munford, and decreed for the complainants

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to recover the negroes, \*in the possession of Bank, Kennedy, Joseph Robinson, Samuel Miller, &c.

The defendants, therefore, appeal on the following grounds:

First.—That the case was barred by length of time.

Second,—That Mrs. Munford was an incompetent witness.

Third,—That on the question of Mr. Robertson's having purchased with a knowledge of the complainant's supposed right, her testimony ought not to govern the case where it appears from herself, that she could not have known Mr. Robinson from any other man.

Fourth,—Dr. Charlton had a right to sell those negroes, by virtue of his wife's executorship.

Fifth,—The complainants' solicitor, having considered Mr. Cleland and wife as no party to the bill, there should be a deduction in the recovery, for his right to the negroes.

Sixth,—The suit ought not to have gone on, without Mr. Cleland and wife being made parties to the bill; and no fact was ever proved to the court, to shew that there was any reason to strike them out, except to carry through Mrs. Munford's evidence, without a release from them.

Seventh,—That the defendants did not hold the negroes subject to any trust, so as to take the case out of the statute of limitations.

Eighth,—That they paid a valuable consideration for the negroes, without notice of any claim upon them.

Ninth,—It was not proved that the complainants lately came to the knowledge of their claim.

Tenth,—There was sufficient and adequate remedy at law, if the complainants had any right.

November, 1814.

The appeal was argued, and the court delivered the following judgment:

We concur in the decree given in this case by the Circuit Court for the reasons therein stated.

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\*It is therefore ordered and adjudged, that the said decree be affirmed.

(Signed) HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOS. WATIES,  
W. D. JAMES.

Judge Thompson, differing from his brethren, delivered the following opinion:

In this case there is no testimony conclusive to my mind to induce me to think there was either an actual or legal fraud, and therefore the statute of limitations ought to prevail. The evidence of Mrs. Munford may have been founded in misapprehension, and there are circumstances to induce the supposition that she was mistaken, or had forgotten; for no person who had any knowledge of Robertson's prudence and circumspection, could for a moment suppose that he would have given the full value of the negroes, under a knowledge that he was purchasing only an estate for years. Moreover, it was proven by Mrs. Cameron, that at the



time Dr. Charlton and Robertson were concluding the contract, the latter asked the former if the property was clear of all incumbrances, and was answered in the affirmative.

W. THOMPSON.

#### 4 Desaus. 486

#### Case LXXI.

Columbia, Richland District.—Heard by Chancellor Gaillard.

PETER M'GUIRE and Wife, and Others, v.  
HENRY M'GOWEN and Wife, Administratrix of John Compty.

(June, 1814.)

[*Infants* ⚡39.]

A man who had married the widow and administratrix of an intestate, and acted on the estate, and was acting guardian of the minor heirs, applied to the court of common pleas, for a partition of the estate, to one third of which his wife was entitled. The court ordered a division of part, and a sale of the remainder, as recommended by the commissioners. At the sale, which was public, he became the purchaser of the principal real estate. That purchase being contested by the heirs, two of the judges were of opinion, that he had a right to become the purchaser at a fair authorized sale, at a full

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price. A third \*concurred, on the ground that his having an interest, coupled with the trust, authorized him to become the purchaser at such a sale. The fourth judge was of opinion, that he had no right to purchase at all. The court being divided on the particular circumstances of this transaction, (only four judges present,) the appellant took nothing by his motion.

[Ed. Note.—Cited in *Stallings v. Foreman*, 2 Hill, Eq. 405.]

For other cases, see *Infants*, Cent. Dig. § 85; Dec. Dig. ⚡39.]

[*Trusts* ⚡17, 18.]

A resulting trust may be established by parol evidence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 19; Dec. Dig. ⚡17, 18.]

[*Executors and Administrators* ⚡379.]

In another case the question arose, whether an acting executor, who had not qualified, could become the purchaser at an authorized sale of the personal estate of his testator, for his own benefit. He had an interest to about one fifth of the value, and applied to the court of ordinary for leave to sell, which was granted, though there were no debts, and the sale was made at an improper season when the crop was growing. The executor purchased the whole; but apparently at a full price. Two of the judges were of opinion that the sale ought to be set aside, on the broad principle of his incapacity to become a purchaser. A third concurred, on the ground of the abuse of his authority, though having an interest he might become a purchaser. The other two judges were in favor of the general authority to purchase; and of this particular sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1545; Dec. Dig. ⚡379.]

[*Judgment* ⚡426.]

[Errors in proceedings leading up to judgment afford no ground for equitable relief.]

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 804; Dec. Dig. ⚡426.]

This bill was filed by the children of the late John Compty, one of whose daughters had married Peter M'Guire, for an account of their father's estate, and for the discovery of the title of their father to a certain lot of land in Columbia, which they alleged had been suppressed; and also to set aside a sale of a tract of land, on Broad River, a little above Columbia, and commonly called the ferry tract.

The questions in this cause involved a great variety of matter respecting the accounts of the administratrix and her husband, their management of the estate of Compty, and charges against the children. But only two of the points in controversy furnish proper materials for a report. These related to the lot of land in Columbia, the title to which the complainants alleged had been suppressed; and to the ferry tract, which the complainants alleged had been improperly sold, and bought in by the defendant, Henry M'Gowan, at too low a price.

On these points the bill stated, that John Compty, the father of the complainant, was seized at the time of his death of a considerable real and personal estate; and dying intestate in February 1799, left a widow, who afterwards intermarried with Henry

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M'Gowan, and two \*minor children by a former wife, to wit, Charles Compty, and a daughter Rebecca, who hath since intermarried with Peter M'Guire. That the said John Compty in his lifetime, purchased a house and lot on Senate street in Columbia, and took possession under some title from the grantor; which the complainants charge came into the possession of the defendants, and hath been suppressed by them. That the widow administered on the estate, and took possession of the whole thereof; and after her intermarriage with Henry M'Gowan, they applied to the Court of Common Pleas for a partition of the real estate, and obtained a recommendation from the commissioners, for a sale thereof, which report was confirmed by the court, whereupon the valuable tract of land near Columbia, called the Ferry Tract, was sold at auction, and purchased in by Henry M'Gowan, at a price below its intrinsic value; and he now claims the same as his own, though he held out to the public, that he was purchasing for the heirs of John Compty generally; by which he was enabled to purchase the land at so low a price.

The bill prays relief.

The defendant Mrs. M'Gowan, in her answer, admitted the statement of John Compty's family to be correct; and that she administered on his estate; and on her marriage with Henry M'Gowan, she delivered him the papers and title deeds of the estate. That she knows none of the particulars of the purchase by her husband M'Gowan, of

the ferry tract of land, except that he told her he had purchased it at a price which she thought exceeded the value. She never heard him say he had bought in for Compt's children. She knew nothing of her own knowledge of the purchase of the house and lot in Columbia, by her first husband, Mr. Compt; but was informed by him, that her father Mr. Stanly, had purchased it for her. She did not know of any bond to make titles for the house and lot.

The defendant Henry M'Gowan, admitted the facts admitted by his wife in her answer. That after his intermarriage with the widow Compt, he acted on the estate of John Compt, and kept it together, and made reg-

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ular returns to the ordinary. He denies that the transactions relative to the affairs of the estate and the interests of the children therein, were done without a guardian to the children, for he himself was their acting guardian; and he presumed the commissioners appointed by the court would do justice to the children. That the son Charles Compt has approved the transactions relative to the estate since he came of age; and that the complainant Peter M'Guire, who married Rebecca Compt, has taken his share of his wife's land, which was allotted to her in the partial division which was made of the real estate. That the defendant Henry M'Gowen became the purchaser of the ferry tract, at a public sale made by order of the Court of Common Pleas, on his application for a partition, and the recommendation of the commissioners, that a sale should be made of it. That he became the purchaser at the price of \$2,500, which he considered an extraordinary high price. He denies that at the day of sale, he gave out, or pretended, that he purchased the ferry tract of land for the children of John Compt.

He also states, that with respect to the house and lot in Columbia, Fitzpatrick, at the instance of Mr. Stanley, made him titles; Stanley having purchased the lot for his daughter. He denies that he knows anything of a bond of Fitzpatrick, to make titles to Compt, or that he ever knew of such deeds, or destroyed them.

At the hearing of this cause, much evidence was given, a great part of which had relation merely to the pecuniary affairs of the estate, and have no application to the important points made in the case relative to the landed estate.

The evidence which relates to the ferry tract, is extracted from the notes of the judge who tried the case; and is also stated briefly in this decree.

John Wyche—Says, he was present at the sale of Compt's ferry.—M'Gowen told the witness he had purchased the ferry for Compt's children. This was some short time after the sale. Upon being accused by Mrs.

M'Gowen, that he intended to defraud the

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children \*of Compt, he declared he did not. He thinks that M'Gowen said after the sale, that the ferry was worth from 7 to 800 dollars per annum; but he did not say whether clear of expenses or not.—(The sale was in the latter part of the year 1803.)

Frazer—Says, he was present at the sale of Compt's ferry—Soon after the sale, M'Gowen's brother-in-law was finding fault with him, for purchasing the ferry, saying he had given too much for it—Upon which M'Gowen said he had purchased it for the children of Compt.

Bush—Stated, that the ferry in the year 1803, produced about \$400—The receipts of the ferry amounted to that sum. When he rented the ferry, he gave \$300 per annum for it, and for the flat, rope and slave to attend it. He does not think the value of the ferry has encreased.

Col. Hutchinson—Says he was present at the sale of Compt's land—(Ferry tract.) M'Gowen bought it—witness bid \$2,000 for M'Gowen, who thereupon bid \$500 more. Witness thought the ferry worth \$1,500, and he would not give more for the ferry now than M'Gowen gave for it. M'Gowen has been in possession of the ferry every since his purchase. He thinks the ferry worth more than the land now.

Mr. Bynum—Stated that he was present at the sale of ferry tract. It was the general opinion that M'Gowen gave more than the value of the property. He should have thought the ferry separate from the plantation of very little value at that time. Thinks Compt's ferry, with the land, worth \$5,000.

Col. J. Taylor—Stated that he had desired to own Compt's ferry, but he did not attend the sale, as he was led to believe from some conversation, that it would sell for more than it was worth. He thinks \$1,500 the value of the ferry and land at that time. The ferry then was of no great value. He does not believe that any man within fifty miles of Columbia would have given for it then what M'Gowen did. He believes M'Gowen has been in possession ever since the sale.

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\*So much of the decree as relates to the lands, is as follows:

The first point in this case relates to the proceeds of the lots of land in Columbia, sold by M'Gowen. These, the complainants claim, and to support their claim they produced Mr. Stanley, who says that Maj. Compt told him he had purchased Everingham's lot for him; but for his, Compt's wife, Stanley's daughter. The purchase was made from Fitzpatrick, who was Everingham's agent. Stanley says that after Everingham had made titles to Fitzpatrick, Fitzpatrick told him (Stanley) that he, Fitzpatrick, was ready to make titles according to his obligation. A paper was also produced in evidence, and



signed by Fitzpatrick, dated in June, 1799, in which he speaks of the lot which he had sold to Stanley M'Gowen having married the widow Compty, titles for the lot were made to him. The lot was paid for by Compty. On this ground the complainants contend that there was a resulting trust in their favor. Where a purchase is made in the name of one person, and the purchase money is paid by another there is a resulting trust in favor of him who made the payment.

Resulting trusts are saved by the statute of frauds and perjuries, and stand upon the footing they did before that act. Now, before that act, a bare declaration by parol would prevent any resulting trust. Here there was a trust declared, which is acknowledged by Stanley, consequently there is no resulting trust.

The second point relates to the ferry tract purchased by M'Gowen. The complainants contend that they are entitled to the benefit of this purchase. This land was sold under proceedings in a writ of partition, and bought by M'Gowen at the price of \$2,500.—The sale was ordered upon the return made by commissioner for the purpose of a division. M'Gowen in right of his wife was entitled to one third of the land, or the proceeds which should arise from the sale of it.

It is contended for the complainants, that the sale is void:

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\*First,—On the ground of irregularity in the proceedings in partition had in the Court of Common Pleas. If so, there is nothing to prevent the complainants from recovering in an action at law. I give no opinion as to these proceedings; if they are irregular, it is for the Constitutional Court to correct them.

The Court of Common Pleas has concurrent jurisdiction with this court in cases of partition, even where minors are concerned; and it is not for this court to reverse their acts. If the defendant, M'Gowen, had practised any fraud at the sale, that would furnish a distinct ground of equity, which this court might proceed upon; but no fraud appears in the transaction, and it will be time enough to make M'Gowen account for the profits of the land when complainants shall have established their right to it.

The second ground on which it is contended that the complainants are entitled to the benefit of this purchase, is, that M'Gowen was the guardian ad litem of the complainants. This ground is inconsistent with the first, for it waives the irregularity in the proceedings, and puts the complainant's claim upon this proposition, that a trustee cannot purchase the estate of his cestui que trust. It is unnecessary to notice the cases which were cited upon this point, as the principle upon which they turn, does not apply here. The sale was made under the authority of the Court of Common Pleas. M'Gowen was entitled to a third of the lands,

his wife's share. The sale was made for a division of the property, in pursuance of the recommendation of the commissioners, and was perfectly fair; and the land brought \$1,000 more than it was worth. The only witnesses who spoke of the value of it at that time, were Col. Hutchinson, and Col. John Taylor; and they concur in the opinion, that the value of it was \$1,500.

Mr. Wyche and Mr. Frazer say, that they have heard M'Gowen say, he bought the land for the heirs of Compty. Wyche heard him say so on his being accused by Mrs. M'Gowen, of intending to defraud Compty's children; and Frazer, on being found fault with by his

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\*brother-in-law for making the purchase. Mrs. M'Gowen in her answer, says, that when M'Gowen returned from the sale, he said he had purchased the land, at which she was quite dissatisfied; and well might she have been so, for Col. Taylor says, that no man within fifty miles of Columbia would have given for it what he M'Gowen did. M'Gowen's subsequent acts do shew that he purchased for himself; and it would expose his conduct to the suspicion of unfairness to suppose otherwise. Col. Hutchinson, as M'Gowen's agent, bid for the land \$2,000, and upon this bid, M'Gowen bid \$500 more. As M'Gowen was entitled to a third of the proceeds of the sale of the land, if he were acting for Compty's children, he should not have bid upon the bid of his agent.

The rent of the ferry paid to M'Gowen before the partition must be accounted for. The commissioner must make up the accounts according to the principles contained in this decree. Theodore Gaillard.

From the decree of the judge holding the Circuit Court an appeal was made, on the following grounds, applicable to the important points of the case relating to the land:

First,—Because his honor erred in decreeing on the parol evidence of Stanley, as to the declarations of Compty, when Stanley himself testified that the contract of purchase was in writing, which he had seen with defendants since the death of Compty, and which they ought to have produced, or the conclusion in law and equity ought to have been against them.

Second,—Because, although the defendant answered that there was no bond nor other writing respecting the purchase, within their power or knowledge, yet they produced on the trial a paper signed by Fitzpatrick, in 1799, long after Compty's death, which recites the original contract, which shews that they had interfered and altered the contract; which should have induced his honor to have compelled the production of the original, or to have concluded against defendants.

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\*Third,—Because his honor decreed that the parol declaration made by Compty to Stanley, was sufficient in law to pass his

interest in the said house, and lot to Mrs. Compty.

Fourth.—Because the plaintiffs proved a title in themselves to the ferry plantation, and defendants could not prove that title removed from plaintiffs, by reason of there being no record in the pretended partition.

Fifth.—That if the record had been good, yet plaintiffs ought to have the benefit of the purchase, according to M'Gowan's own declarations, from the manner of purchase, and from the length of time before he charged himself with the land, and from the circumstance of his never getting the sales ratified or confirmed by the court, whereby to perfect a title in himself: And moreover, from both defendants' answers, in which they swear, Henry M'Gowan, that he never said he bought the plantation for the children, and Mrs. M'Gowan, that she never heard him say so; both which were directly contradicted by Wyche and Frazer.

Sixth.—Because his honor has said, that the complainants have a remedy at law for the recovery of their rights to the ferry plantation, although this court has a concurrent jurisdiction with the Court of Common Pleas, in partition, which seemed to have influenced his opinion with regard to the ferry tract.

November, 1814.

The cause came to a hearing in the Court of Appeals, and was fully argued.

The Chancellors differing in the views which they took of the questions under discussion, delivered their opinions separately.

I have given this case further consideration, and am satisfied with the decree I pronounced in it, in the Circuit Court. The evidence of Wyche and Frazer has made some impression. Their evidence is, that they heard M'Gowan say, he bought the land for the heirs of Compty. This declaration was made to the witnesses separately. Loose declarations made many years back, are not much to be relied on, where they are not supported by other evidence. The declara-

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tions in this case do not, I think \*deserve that any weight should be given to them. The occasions on which they were made, suggest the purpose intended by them. Wyche says he heard M'Gowan say so, on his being accused by his wife of intending to defraud Compty's children. Frazer says he heard him say so on his being found fault with by his brother-in-law, for making the purchase. These declarations shew too, that Mrs. M'Gowan and Mr. M'Gowan's brother-in-law both considered him as having purchased for himself; and Mrs. M'Gowan's answer confirms this, for in it she says, she was dissatisfied with M'Gowan for having made the purchase. There is an inconsistency in what Wyche says passed in his presence, for if the purchase were a bad one, and

certainly it was generally so considered at the time, and Mrs. M'Gowan was displeased with her husband for having made it, as she believed he had for himself, the accusation of intending to defraud Compty's children, who by the bye were not hers, seems unaccountable.

This charge would have been better founded had the purchase been made for the children, as it cost one thousand dollars more than two very good judges of its value thought it was worth; and as M'Gowan having, by his agent Col. Hutchinson bid \$2000, bid on that sum \$500 more. M'Gowan had no right to buy for the children of Compty. Col. Taylor was not at the sale; he wished to get the land, but understanding that M'Gowan would give for it more than he thought it was worth, he concluded that his attendance at it would be useless. At the sale M'Gowan was considered as bidding for himself; and his acts in the whole course of his administration of Compty's estate, shew unequivocally that he made the purchase on his own account. But he was the guardian of Compty's children, appointed by the Court of Common Pleas to represent them in the division of their father's estate; and being so, it is said he could not purchase for himself. Why? Because a number of cases say that a trustee shall not be allowed to purchase the estate of his cestui que trust. This is a correct principle, laid down as broadly as it is; but it does not

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apply to \*sales made under the order of the Court of Common Pleas, for division among parties interested in estates. That court has concurrent jurisdiction with the Court of Equity on this subject; and the power of appointing guardians to enable it to bring all parties regularly before it in cases of partition, is expressly given to it by an act of the Legislature. Having exercised jurisdiction in this case, and confirmed the report of the commissioners acting under their authority, this court is not competent to revise their acts. What is done in that court, may become the subject of discussion in the Court of Equity; but then it must be on grounds which call for the interference of this court, and render it necessary for the attainment of complete justice.

The principle to be collected from the cases which say that a trustee shall not be allowed to purchase the estate of his cestui que trust, is this, that a trustee shall not be allowed to derive any advantage to himself from the relation in which he stands to his cestui que trust, nor be exposed to any temptation to betray his trust; that relation being intended not for his benefit, but for that of his cestui que trust. The extension of this principle to sales made under the authority of the Court of Common Pleas for the division of estates, would answer no one purpose for which it was adopted.



It is evident that M'Gowan and his wife had a right, as parties interested, to a division or sale of the land, as the case might be. The writ of partition is *ex debito justitiæ*; his being the guardian of Compty's children did not affect the sale in any manner; and surely did not preclude him from exercising the rights he acquired by his intermarriage with the widow of Compty.

THEODORE GAILLARD.

I have had great doubts on three points of this case, and I greatly regret that we have not had the benefit of the assistance of the judge, who did not hear the argument, as well on account of the intrinsic difficulties of the case, as of the difference of opinion which prevails upon the bench.

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\*With respect to the house and lot of land, I think that the evidence is sufficient to establish that they were bought for Mrs. Compty. There was no evidence which shewed any title in Mr. Compty. Mr. Stanly, the only witness called by the complainant, stated that the former owner or holder of the lot of land, agreed to convey it to him; but that he was to hold it merely as a trustee of Mrs. Compty, now Mrs. M'Gowan. This testimony must either be rejected or received. If rejected, then there is no evidence to show that Mr. Compty had any sort of interest in the land, under which his children could claim any title, or demand any account of the rents and profits: And the title such as is derived from the agreement of Fitzpatrick, would vest in Stanly himself. But if the evidence be admitted, then Stanly declares voluntarily a trust, (which he could have been compelled to do,) not in favor of the children, but of Mrs. Compty, who has since married M'Gowan. This is not the case put at the bar of the admission of parol evidence, to contradict a deed, which the court could not permit: but it is evidence of a declaration of trust, consistent with the deed. Stanly says, the agreement is indeed to convey to me, but I acknowledge I have no interest: I am merely to hold as trustee for Mrs. Compty. And no document is produced in contradiction to this. I am therefore of opinion, that on this point, the complainants did not make out a case, to entitle them to recovery; and that therefore, the decree as to the house and lot ought to be affirmed.

The question respecting the Ferry tract of land, is much more difficult. It involves a point of great magnitude and delicacy. It is, whether a person standing in the relation which Mr. M'Gowan did to the children of Mr. Compty, who were orphans and minors, and in the possession and management of their father's property, and at least the actual, if not the legal guardian, is at liberty

to become a purchaser of that property at a sale made at his instance. The courts look with great jealousy at the conduct of a party so situated, and many cases decide, that

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an agent, trustee or guardian shall not \*become the purchaser of the property under his care under any circumstances. The court will not enquire into the fairness of the transaction, but denies him the right to purchase, as the best security for the party confiding. The case of Fox and Mackreth, stated in 2 Brown's Chancery Cases, which was more fully argued and occupied more of the time of the Court of Chancery and of the House of Lords than almost any other case on record, goes that whole length. The case of Crow and Ballard, reported in 3 Brown, is equally strong. The cases in 5 Vez. jr. 678 and 707, and 6 Vez. jr. 617, and 631, are to the same purpose; and in one of them a purchase even at a sale made at auction, was set aside. There is no doubt great wisdom in the rule; and I would on no account shake it, in cases coming plainly within it, and where no circumstances made it necessary to depart from it. Let us then examine the circumstances of the case under our consideration, and see if there be nothing in them which should induce us to hesitate in the application of the rule.

M'Gowan, on marrying the widow of Mr. Compty, became interested in her right in the estate. Those interests were blended with the children's. He found them orphans and minors, living with their mother-in-law. Humanity required of him that he should take care of them and their property. He did so. Hence his relation to them, as an acting guardian. But this did not take away his legal right to have a partition of the estate. The court to which application was made for partition, acted according to its acknowledged and concurrent jurisdiction in ordering a sale. Shall he then be debarred the right of becoming a purchaser at that sale of property in which he and his wife have an interest in common with the children? If he should be so debarred, it would be a prejudice to his rights and his interests, and might even be injurious to the interests of the children.

I am inclined to think, that under these circumstances, the strictness of the rule in Fox and Mackreth's case ought not to be applied; and that he ought not to be entirely prohibited from becoming a purchaser.

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It will be \*a sufficient security to the children, and the purposes of justice, which is the object of the rule, that the validity of the purchase should be made to depend on the fairness of the transaction and the fullness of the price.

Let us then examine the case by those

criteria. The sale was made under the authority of a court having competent jurisdiction. It was not made privately, or at an unusual time or place, but at the time and place prescribed by the statutory provision for all sales made under judicial authority. It was open to all to become bidders. It was then so far regular and fair. If we look to the price, there is a difference of opinion, as to the fullness of it. But the great weight of testimony is with the purchaser, M'Gowen. Witnesses of integrity and knowledge of the property were decidedly of opinion that the price actually given by him was above the value of the property; and in confirmation of that opinion, no other bidder came nearly up to that price. One witness of integrity and intelligence certainly was of a different opinion. But he seemed to look rather to what it might be worth hereafter, than to its present value. This mode of considering the subject, would have been an abridgment of the right of any of the parties in interest to obtain by legal process, a partition and sale of the property, to which they were entitled, and to oblige them to wait the event of a speculative encreasing value. I think the evidence of the fullness of price quite sufficient. Some stress was laid upon the declarations of M'Gowen, that he had purchased for the benefit of the children of Compty; and they certainly threw such a cloud over his conduct, that if I had not been otherwise satisfied that the proceedings were fair, and the purchase at a full price, I should have willingly laid hold of those declarations, to have set aside the sale, or to have made him a trustee for the benefit of the children. But these declarations were loose and inconsequential, and were contradicted by all the acts of the case.

Upon the whole therefore, I do not perceive that there was such error in the decree as to induce me to reverse it. I repeat that I have

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had great doubts and difficulties, and I am not sure that I have come to the right conclusion; but I am bound to give my best judgment on the case, and that judgment leads me to affirm the decree on this point.

With respect to the question of the rents and profits of the ferry tract before the sale, I concur entirely with the decree.

I am therefore of opinion, that the decree should be affirmed on all the points.

HENRY W. DESAUSSURE.

I concur with the majority of the court on the general law and its application upon the point of M'Gowen's power to purchase; but disagree with respect to the declaration of trust. Frazer and Wyche, whose testimony has not been impeached, swear positively, that shortly after the purchase, M'Gowen told them he had purchased the ferry tract, for Compty's children. This I think a suf-

ficient declaration of trust, and vests the estate in them absolutely.

I am therefore of opinion, that the decree, so far as relates to the ferry tract, should be reversed. In other respects it ought to be affirmed.

W. THOMPSON.

In this case several points have been disposed of by my brethren, which meet my concurrence.

But there remains one, in which unfortunately I differ from them in opinion. This is, with respect to the legality of the purchase of the ferry tract made by the defendant M'Gowen. The price paid for the land was said to be a good one at the time of the sale; but the ferry has since improved greatly in value, and is likely to keep pace with the growth of Columbia. The defendant was entitled to one third of the tract, in right of his wife, who was the widow of Compty, when he married her. The children were minors, and he applied to the Court of Common Pleas for a partition. To obtain a division of the estate was no doubt for his interest, but in seeking this, he was also bound to

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attend to that of the children. \*He was administrator of the estate, and was appointed by the court guardian ad litem of the minors, and in this double capacity, he must be considered by this court as a trustee; and though perhaps not a trustee to sell, yet the sale was made by his procurement, and he acted for the children. He purchased the land at public sale, and there was no unfairness; but this will not affect the principle which applies almost universally. The rule is not to permit a trustee to purchase a trust estate, while the connection between him and the cestui que trust continues; because by the situation in which he is placed, he has opportunities of discovering advantages in the property which might have escaped the rest of mankind. Now the situation of this defendant was particularly opportune to discover the value of this property, for he alone knew the custom of the ferry, and its increase; and he alone was in the habit of receiving monies for ferriage, which being in small sums, and easily disposed of, might easily have been secreted from the knowledge of the rest of mankind. But he had many other advantages over the minors besides a knowledge of the true value of the property. In his own right, and by representing them, he had the sole power of nominating four of the commissioners who recommended the sale. I know not who they were; they were no doubt good men, but I speak abstractly upon a general question. As the court is not generally acquainted with persons in the vicinage, he might perhaps influence the choice of the fifth commissioner. This is by no means unusual, and thus he might have



the whole of them his particular friends. Then a sale of the ferry tract was recommended by the commissioners, and was made. The defendant was entitled to retain one third of the purchase money, and to have credit for it; and therefore he could buy upon easier terms than any other person. He might give out privately that he was about to purchase for the minors, and thus stop the mouths of many, who otherwise would have become bidders. In short, this case is surrounded with dangers to the children. He

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was in loco parentis, his wife \*was the step-mother, and they had no others to look to for protection, and though there was no fraud, yet, it is the danger of fraud in similar cases that I am seeking to avoid. During the whole transaction, the minors are at the mercy of the guardian—their whole property is in his hands, they are not free to act, they are under his authority—they are bound to obedience; and it is not until they come of age, or claim the protection of this court, that they can call upon him to do justice. See Sugden's Law of Vendors, from p. 393 to 398. Also Newland on Contracts, 459 to 466. This case is very similar in principle to that of the assignee of a bankrupt, who purchases the bankrupt's estate; upon which the case ex parte Reynolds was cited by the counsel from 5 Vez. jr. 707. Such cases also abound in the subsequent vols. of that work. In the principal case, the sale was made by authority of the court; so in a case of bankruptcy, the assignees have no power but what is derived originally from the Lord Chancellor. The assignee is a trustee for the creditors, and has an opportunity to deal for his benefit, more amply afforded, and more out of the reach of investigation; and he has the bankrupt at his mercy. Thus likewise in the present case, the administrator is a trustee for creditors, and has the minors at his mercy. And yet it is laid down, "that without reference to the circumstance of advantage gained or unfairness practised, and whether the sale be by private contract, or by auction, that an assignee under a commission of bankruptcy, as he is a trustee for the benefit of creditors, and of the bankrupt, cannot purchase the bankrupt's estate; and is more particularly within the general principle." Newland on Contracts, 462, 3. But as I have compared the present case of an administrator, to that of an assignee, to give it support, so in other cases the assignee is assimilated to an executor for the same purpose. Ex parte Lacy, 6 Vez. jr. 625, ex parte James, 8 Vez. 337. But further, there is a rule laid down by Lord Hardwicke, which I think very strong upon this point. That where a trustee for persons, not sui juris,

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becomes both buyer and seller, the \*court

will, under no circumstances whatever, be they never so fair between the parties, establish a purchase of that kind, unless the transaction is legitimated by an act of the court, or some public act. Sug. 393, 4. Now the defendant in this case was virtually the seller, for the sale was made by his procurement; and the purchase made by him, while guardian for others not sui juris, has not been legitimated by any court; nor can it be, by the public manner in which the sale was made, for "the publickness of a sale ought not to sustain a purchase, which cannot otherwise be supported;" 10 Vez. jr. 394. But finally, it is laid down by high authority, "that this general rule stands much more upon general principle, than upon the particular circumstances of any individual case. The purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases;" 8 Vez. jr. per Lord Eldon. This authority appears to me to be conclusive. It is certainly more safe to require the trustee to divest himself of his character as such, by order of the court in which he applies for leave to sell, before he should be permitted to purchase; and by this means to prevent all the consequences of his acting both for himself and the cestui que trust. But there are other reasons for opening the sale of this property. Defendant said in the presence of certain witnesses that he had purchased for the children, and he rendered no account of the purchase, to the ordinary, for three years after the sale. He ought therefore to be bound by his declarations, and ought not to be allowed such a length of time to speculate about the purchase.

Upon the whole, I am decidedly of opinion that the decree of the Circuit Court, upon this point, should be reversed, that a re-sale of the lands should be ordered; that they should be set up at the price at which they were bought by the defendant; but that he should be held to his purchase if a better price cannot be obtained.

W. D. JAMES.

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\*Starke, Clifton and W. F. Desaussure for the complainant.

Chappell, Hooker and Harper for the defendants.

The much contested question, whether trustees, agents, guardians, executors, or others in confidential situations can legally become purchasers for their own benefit, in any and what cases, came again before the Court of Equity in the case of Perry and wife, v. Samuel Dixon, executor of J. Dixon, deceased; and it is deemed advisable to report that case in a note at this place, in order to put the profession in pos-

session of all that has been yet done on this important subject in the Court of Equity.

Camden.—Heard by Chancellor Waties.

JAMES PERRY and Wife. v. SAMUEL DIXON,  
Executor of John Dixon.

(June, 1817.)

[*Executors and Administrators* ¶75.]

[Cited in *Stallings v. Foreman*, 2 Hill, Eq. 405, 406, 407, to the point that executors and administrators should not be regarded as mere trustees.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 324; Dec. Dig. ¶75.]

The object of the bill was to set aside a sale of personal estate, made by the defendant, who was the executor of John Dixon, and entitled to a share of the estate, on his own application to the Court of Ordinary, at which he became the purchaser of the great bulk of the property. The complainant, Mrs. Perry, the wife of James Perry, was the daughter of John Dixon, and entitled to a distributive share of his estate.

There was some doubt whether the defendant Samuel Dixon had qualified regularly as executor; but the proof of his having acted as executor, was such as to satisfy the mind of the judge, and the principal question for his decision was, whether an executor could become a purchaser for his own benefit, at a sale of the estate of his testator.

After hearing argument on the case, Chancellor Waties delivered the following decree:

There have been several questions made in this case, but the decision of one will preclude the necessity of the consideration of any other. The defendant is the executor of his father, John Dixon, deceased, and also the guardian of the complainant, Mary Perry, who is his sister. He obtained, in conjunction with his co-executor, William Dixon, an order from the Court of Ordinary for Kershaw district, to sell the whole of the personal estate of his father; and on the sale thereof purchased the whole on his own account. It is objected, that he is not legally competent to do so, and I think the objection is a sound one. I am aware the practice of executors in purchasing at their own sales of estates, has generally prevailed throughout the state, and that it has not yet been determined that such purchases are illegal; but it is a practice in direct violation of a general principle of equity, which has been recognized in other instances in this court, and perhaps in no instance do all the reasons apply more strongly than in this. An executor, whether authorized by will or by an order from the ordinary to sell

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\*an estate, becomes thereby a trustee to sell; and it has been fully settled, that a trustee to sell is under a legal incapacity to purchase for himself. One reason for this is, that he cannot be both the seller and the buyer. But the wisdom of the rule consists principally in the protection it affords against any breaches of duty in the trustee, and is founded on the nature of the situation in which he is placed with respect to the trust estate. This gives him an opportunity of knowing the value of the property better than the rest of the world; and if he were permitted to become the purchaser, he would be frequently under the temptation to conceal his knowledge of the value, that he might gain an advantage in the purchase; and this he might do in most cases without any danger of its being discovered

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that he had possessed such ex\*clusive information at the time of the purchase. The rule therefore is not suffered to depend on whether any advantage has been gained by the trustee, for although the greatest fairness might be sometimes observed, yet, in most cases, there might be the greatest unfairness, without the possi-

bility of proving it by satisfactory evidence, as in the case put by lord Eldon in his reasoning in the case *ex parte*, Lacy 6 Vez. 627, "suppose a trustee should discover by means of his situation a coal mine under the trust estate, and locking up this knowledge in his own breast, should contract with his *cestui que trust*; if he chose to deny it how could the court try it against this denial." The following authorities may be also referred to in support of the rule; 5 Vez. 658; 6 Vez. 617; 8 Vez. 337 and 346; 10 Vez. 392 and 400; 5 Vez. 678. The situation of an executor gives him great advantages. The property in his hands belongs to minors, who must often be totally ignorant of its value; and he may have it in his power to manage the sale of it in such a way as to defy all future investigation. As the reasons therefore of the rule apply to an executor in their full force, I think the case before me should be governed by it, and this without any regard to the circumstances of fairness in the purchase, which the counsel for the defendant have relied on. The great policy of the rule ought to outweigh any such considerations; and the character of a trustee to sell, which belongs to an executor, and which induces such strong temptations to breach of duty, ought to incapacitate him from buying on any terms any part of an estate entrusted to him.

It is therefore ordered and decreed, that such part of the personal estate of J. Dixon, deceased, as may now be in the possession of the defendant, S. Dixon, be resold, and the said defendant do pay to the complainants out of the product thereof, the share to which the said Mary Perry may be entitled; also, that he account to them before the commissioner for her share of the profits of the said estate, since the death of the

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said John \*Dixon. And further, that the defendant do account to the complainants for the share of the said Mary, in such other part of the personal estate as he may have disposed of. Also, that he pay the costs.†

(Signed)

Thomas Waties.

From this decree there was an appeal, the principal ground of which was the following:

In this case the following facts appeared in evidence: It was charged in the bill that defendant was executor of John Dixon deceased, and in evidence of it, an application to the ordinary with this defendant's name thereto, but subscribed by the ordinary, together with one Wm. Dixon, who did qualify. The answer denied that he was executor, and a memorandum from the ordinary stated that he had never qualified; and it was also in evidence, that his brother had the principal direction of the sale.

It was in evidence that there was a permission given by the Court of Ordinary, under which the sale was made—It was upon a credit, and the property sold for a high price; this defendant was a legatee under the will, and two of the husbands of legatees under the will were present at the sale and bidding.

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\*Under this statement of facts, the defendant appeals on the grounds First,—that he was not an executor, or acted as such at the time of the sale.

Second,—That his honor mistook the law in

† Note by Judge Waties.—The civil law is equally explicit on this subject. Tutors, guardians, and other administrators, can purchase nothing of the goods of minors and other persons who are under their charge, neither directly in their own names nor by the interposition of other persons. 1 Domat. 72. Tutor rem pupilli emere non potest. Siper interpositam personam rem pupilli emerit, in ea causa est ut emptio nullius momenti sit, quia non bona fide videretur rem gessisse. L. 5, § 3, ff do Auct. et Cons. Tut.



deciding that an executor could not be a purchaser at his own sale.

Third.—Admitting that he could not generally, yet that this case formed an exception to the general rule, the sale being made by a court of competent authority, and the executor personally interested in the sale.

Fourth.—That the sale was acquiesced in.

Fifth.—That his honor mistook the law in deciding that the defendant should pay all costs.

James S. Deas, Solicitor for defendant.

On this appeal the cause came to a hearing, and was argued by Mr. Deas for the appellant, and by Mr. Blanding for the respondent.

The court differing in opinion, Chancellor Waties declared his adherence to the decree he had delivered in the Circuit Court.

Chancellors Desaussure and James delivered their opinions separately, in affirmance of the decree.

The decree of the Circuit Court in this cause, setting aside the purchases made by the defendant, at the sale of the personal estate of his testator, is in my opinion correct. But I am not prepared to go the whole length of the principle on which it proceeds. That would exclude executors and administrators from purchasing on their own account, at sales of the estates under their charge, in any case whatever; and thus place them entirely on the footing of mere trustees. Perhaps a wise policy would place them on that footing,\* where they had no interest; but where they have an interest in the property it would seem to be too severe a rule to prohibit executors and administrators from purchasing at such sales, at least to the extent

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of their interest; and if \*prohibited from purchasing altogether, even for the benefit of the other heirs, who might be incapable from minority, or other circumstances from protecting their own interests, that might be very prejudicial. I would therefore permit executors and administrators to purchase for themselves at sales of the estate, in which they have an interest, to the extent of that interest, provided the sale was made by proper authority, and conducted fairly, and a full price was given. And I would also permit them in all cases to purchase for the benefit of the heirs, or others interested, to prevent a sacrifice of the property.

In the case under consideration, the defendant, Samuel Dixon, had an interest to a little more than a fifth part of the property, but he purchased nearly the whole amount of the property. Mrs. Perry was a minor, under the guardianship of this executor, and could not protect her rights. He was bound as her guardian, to have taken care of them, but he did not. He made a bargain for himself, which has turned out very advantageously.

It is true that the price given does seem to have been a full one at the time, but that does not affect the question, where a trustee, or guardian, or executor, makes purchases of the estate on his own account, and for his own benefit. There are very strong reasons to believe that the sale was not intended to be a fair one, for the order for sale was obtained irregularly, and beyond the bounds of the jurisdiction of the Ordinary; as there was no pretense of any necessity to sell, in order to pay debts, or to preserve perishable property; and the sale was made at a most improper season, well calculated to diminish the amount of the sales.

I am therefore of opinion that the sale ought to be set aside, and that the decree of the Circuit Court should be affirmed.††

HENRY W. DESAUSSURE.

†† See 1 Maddock's Chancery, 91. 18 Vez. 170, Burden v. Burden.

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\*In this case I am of opinion the facts shew that there was unfairness in the sale:

First.—In the making it at all, there being no debts due by the estate, and no heirs of age at the time to claim a division.

Second.—In the time of the year when it was made; the crop being on the ground, and sold in that state.

I am also of opinion, that the decree of the Circuit Court is correct on general principles.

W. D. JAMES.

It is ordered and adjudged that the decree of the Circuit Court be affirmed.

HENRY W. DESAUSSURE,

THOMAS WATIES,

W. D. JAMES.

Chancellors Gaillard and Thompson differed from the majority of the court, and were of opinion that the decree ought to be reversed. But they did not then furnish their reasons in writing.

The order made by the majority of the Court of Appeals, was, that the decree of the Circuit Court should be affirmed.

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\*Case LXXII.

Columbia, Richland District.—Heard by Chancellor Gaillard.

SIMON TAYLOR and ELIZA, His Wife, v. J. MAYRANT, W. HAMPTON, MARTHA DAVIS and Others.

(February, 1813.)

[Discovery ⇨3.]

A demurrer for want of proper parties overruled; all the parties necessary to the purposes of justice being before the court. Demurrer on the ground of plain and adequate remedy at law overruled; because a discovery was wanted, and the relief was more complete in this court.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. ⇨3.]

[Appeal and Error ⇨1178, 1217; Equity ⇨382.]

After a decree in the Circuit Court of Equity, the Court of Appeals not being satisfied, ordered that an issue should be sent down from the Circuit Court of Equity, to the Circuit Court of law, to try the facts of the case. The jury found a verdict upon the issue directed, for the complainants. The proper place to move for a new trial, is in the Court of Equity, and not in the Constitutional Court of Law. But the Court of Appeals in Equity refused to order a new trial, and decided the cause itself on the merits, confirming the verdict of the jury in part and setting it aside in part.

[Ed. Note.—Cited in Mayrant v. Miller, 8 Rich. 284; Sinclair & Kiddle v. Moore, 1 Hill, Eq. 441, 442, 443; Shaw v. Cunningham, 9 S. C. 273; Woolfolk v. Graniteville Mfg. Co., 22 S. C. 336; Rynerson v. Allison, 30 S. C. 538, 9 S. E. 656.

For other cases, see Appeal and Error, Cent. Dig. §§ 4605, 4717; Dec. Dig. ⇨1178, 1217; Equity, Cent. Dig. § 819; Dec. Dig. ⇨382.]

[Trusts ⇨89.]

The decree of the court supported a trust of personal estate, raised on parole evidence, which proved that the personal property in question was purchased with the funds and for the benefit of an infant, though the bill of sale was taken in another person's name; and though there

were no written, but merely parole declarations of trust made by the agent who purchased, and the third person in whose name the bill of sale was taken.

[Ed. Note.—Cited in *Gaines v. Drakeford*, 51 S. C. 38, 27 S. E. 960; *Rogers v. Rogers*, 52 S. C. 391, 29 S. E. 812; *Miller v. Saxton*, 75 S. C. 245, 55 S. E. 310.

For other cases, see *Trusts*, Cent. Dig. §§ 134-137; Dec. Dig. ⚡89.]

The court ordered a settlement by the husband of the property recovered.

[Ed. Note.—Cited in *Myers v. Myers, Bailey*, Eq. 31.]

[*Trusts* ⚡63¾.]

[Cited in *Ex parte Trenholm*, 19 S. C. 135; *Brown v. Cave*, 23 S. C. 257, to the point that a resulting trust cannot be raised by construction.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 91, 92, 98-100; Dec. Dig. ⚡63¾.]

The bill stated that Col. Douglas Starke, one of the executors of General Wm. Henderson, who was the father of Mrs. Taylor, placed in the hands of W. R. Davis, at his instance, some funds of the estate of General

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Hen\*derson, for the purpose of purchasing some slaves for Miss Henderson, niece of said W. R. Davis, who was then an infant, about six years of age, and has since intermarried with Simon Taylor. And the said W. R. Davis promised that he would make such purchase, for that purpose. That in June, 1791, the said W. R. Davis, purchased at the sheriff's sale in Camden district, nine slaves, formerly belonging to the estate of Jared Neilson, and paid for them with the funds aforesaid, and took a bill of sale for them, in the name of his sister, Miss Ann Davis, (now Mrs. Bay,) who was informed at the time that the intention was that she should hold the said slaves in trust for their niece, Miss Henderson. And the bill of sale was delivered to her on that trust. That

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\*the slaves remained in the hands of W. R. Davis till his death, which took place in the year 1798.

That after his death, Gen. W. Hampton, on the supposition that the said slaves belonged to the said W. R. Davis, applied to Mrs. Bay to execute a bill of sale for the said slaves and their issue, to himself and Mr. John Mayrant, in trust for the wife and children of the said W. R. Davis; which she at that time refused, alleging that she was bound to hold them in trust for Miss Henderson. But her husband, Mr. W. Bay, finding there was no trust expressed on the face of the bill of sale, which was absolute to his wife, afterwards made a bill of sale of said slaves without any consideration to Gen. Hampton and John Mayrant, in trust for the widow and children of the said W. R. Davis,

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who are defendants \*in this suit. That the defendants, or some of them, took possession

of the said slaves, and claiming them under said deed of trust, have held them and received the rents and profits of their labor.

That Miss Henderson being then very young, was unacquainted with these facts and with her rights; but that having intermarried with the complainant, Simon Taylor, they came to a knowledge of their rights within four years of the filing their bill of complainant, to establish their claims.

The bill prayed for a discovery of the deeds, and of the said slaves, and their encrease, and for an account of the rents and profits of their labor; and that the defendants should deliver up the said slaves and

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their encrease \*to the complainants, and execute proper deeds to convey the same to complainants.

The bill was taken pro confesso against the trustees, and several of the other defendants for want of answers.

Some of the infants answered by their guardian ad litem pro forma, and set up the plea of the statute of limitations.

W. Davis, one of the sons, demurred to the bill, because there was no equity contained therein; and because there was plain and adequate remedy at law, if the complainants had any rights, and also for want of proper parties. The demurrer was overruled, on the ground that the bill made a proper case for relief in equity; and a discovery and account being sought, more complete relief could be had in this court. Also, that all

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the parties \*essential to the justice of the case, were before the court.

The said W. Davis, afterwards filed his answer to the bill, in which he stated his ignorance of the facts charged in the bill, and his disbelief of the allegations made; and he relied on the statute of limitations, as a bar to the relief sought by the complainants.

At the first hearing of the case, several collateral points were made by the defendant's counsel, which were overruled by the Circuit Court, and the Court of Appeals affirmed the decretal order.

Afterwards the cause came to a hearing on the merits, and a great deal of parol evidence was offered to prove that Col. Douglass Starke had delivered certain funds to W. R. Davis, to purchase certain slaves, which are those now in question, for Miss Henderson. That W. R. Davis had applied said funds to the purchase of the slaves in question, for Miss Henderson, and that after the purchase, the said Mr. W. R. Davis in-

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formed \*Col. D. Starke, J. Newman and others, that he had made the purchase in question for Miss Henderson, with the funds furnished him for her benefit.

Evidence was also given by Col. D. Starke, that he had not given any information of



these transactions to Mr. Simon Taylor, or his wife, till recently, and within four years past; and Mrs. Taylor was too young when they took place to have known any thing of them, without information.

The bill of sale from the sheriff of Camden to Miss Ann Davis, for said slaves, dated 7th June, 1791, for the negroes in question, was produced in evidence. It appeared to be an absolute bill of sale to her.

Mrs. M'Nair, and several witnesses proved that Mrs. Bay had acknowledged that she had no interest in the slaves included in the bill of sale of the 7th June, 1791, made to her by the sheriff of Camden district, (except in one of them, which had been bought with her money, and was included in the same bill of sale with the rest,) but that the same were purchased for Miss Eliza Henderson, though she afterwards delivered up the bill of sale from the sheriff to her brother, W. R. Davis.

The slaves in question were also proved to be in the possession of the defendants.

On the other hand Mr. W. Bay testified that he had always understood, both from Mr. Davis, and from his (the witness) wife, that the slaves in question were purchased for the use of Mr. W. R. Davis' children, though the bill of sale was taken in the name of his sister; and that in consequence of that, he, after his marriage with Miss Ann Davis, made a bill of sale of the said slaves to Gen. Hampton and Mr. Mayrant, in trust for those children, without any compensation.

Mrs. Bay testified, that she did not know of the purchase of the slaves at the time it was made, but the sheriff's bill of sale was delivered to her, and she kept it for the use of her brother's children; but she paid the purchase money for them. Her brother said he intended to give one of the female slaves, named Affy, to Eliza Henderson, but that he

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would not be forced to it. The deed of \*trust in favor of her brother's children was not made by her till two years after his death, and has been since burnt accidentally. She did not remember having told Mrs. M'Nair, that all the slaves in question were to be settled on Miss Henderson.

Mr. Blanding testified, that Mrs. Bay had informed him that when the bill of sale from the sheriff was delivered to her, she was told the slaves Affy and Letty, included therein, were for Miss Henderson; but she did not remember certainly as to the rest. And that when she was first asked to sign a deed, conveying all the slaves (except one which she claimed) in trust for her brother's children, she had refused, and insisted that Affy and Letty should be secured to Eliza Henderson, but that she was afterwards prevailed on to do it by her husband.

The bill of sale from the sheriff to Ann Davis, and the deed conveying all the slaves to

trustees, for the benefit of W. R. Davis' children, were reciprocally admitted in evidence.

February, 1813.

The cause having been argued before Chancellor Gaillard, he delivered the following decree:

The substance of the complainant's statement in their bill is this: That Col. Douglass Starke, the executor of Henderson, put Wm. R. Davis in possession of funds belonging to the estate of Henderson, for the purpose of laying them out in the purchase of negroes for Eliza Henderson, the infant daughter of Gen. Henderson. That Capt. Davis laid out these funds accordingly, and that the negroes purchased, nine in number, were transferred by the sheriff of Camden district by his bill of sale, dated the 7th June, 1791, to Miss Ann Davis. Ten negroes were included in this bill of sale, but one of them, January, is not claimed.

The consideration expressed in the bill of sale for the negroes, is sixty pounds. Miss Davis, now Mrs. Bay, does not claim these negroes. She conveyed them some years after Davis' death in trust for his children. The complainants say they are entitled to those negroes, they having been bought with the funds of Henderson's state, for Eliza

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Henderson, now Mrs. Taylor. If they \*have supported their case by the evidence which has been advanced, they are entitled to the negroes; but in my judgment, they have not done it. The evidence does not satisfy my mind that the purchase was made either with the funds of Henderson's estate, or his daughter's.

The bill must therefore be dismissed with costs.

Theodore Gaillard.

From this decree an appeal was made on the following grounds:

First,—That the evidence was sufficient to support the bill, and to prove that the fund applied in the purchase was furnished by the executor of General Henderson.

Secondly,—That there was sufficient evidence of a declaration of trust in favor of the complainants, made by Capt. W. R. Davis, and by Mrs. Ann Bay, under whom the defendants claim.

On hearing this appeal argued, the Chancellors present unanimously delivered the following decretal order:

As there is much contradiction in the evidence which was given in this case, and the truth of the facts greatly depends on the credibility of the witnesses, we are unanimously of opinion, that a trial at law would enable the court to form a more satisfactory judgment in the case.

It is therefore ordered and adjudged, that the Circuit Court do direct an issue at law, to enquire whether any, and what funds

were received by the late W. R. Davis for the purpose of purchasing negroes at the sale of the estate of Jared Neilson, for the benefit of the complainant's wife, and whether the negroes for which the bill of sale was given by Wade Hampton, the sheriff, to Ann Davis, (now Mrs. Bay) or any part of them, were purchased by the said W. R. Davis for the use and benefit of the said complainant's wife.

It is further ordered, that the answers and written testimony read in this case be received as evidence in the trial at law, and that the witnesses on both sides be examined *de bene esse*, so that the trial shall not be

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delayed \*if the personal attendance of the witnesses cannot be procured.

(Signed) W. D. JAMES,

HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES.

In pursuance of this order of the court, an issue was directed and made up between the said parties, which was tried in the Court of Common Pleas, sitting in Richland district, and the jury found a verdict in the case: Whereupon the Court of Common Pleas certified to this court, the verdict so found by the jury, which was in the following words:

"We find that the late Wm. R. Davis received the sum of 60*l.* for the purpose of purchasing negroes at the sale of the estate of Jared Neilson, for the benefit of complainant's wife, Mrs. Eliza Maria Taylor; and that the negroes Susanna, Jeffry, Hezza and Sarah, children of January; a man Derry, his wife Hannah, her daughter Letty, a woman Affy and her child Bess, for which the bill of sale was given by Wade Hampton (then sheriff of Camden district) to Ann Davis, (now Mrs. Bay) were purchased by the said W. R. Davis for the use and benefit of said complainant Mrs. Taylor."

On the coming up of this verdict, in favor of the complainants, Mr. Goodwin, counsel for the defendants, moved in the Court of Appeals that the cause should be stricken off the docket of causes in the Appeal Court, on the ground that the party aggrieved by the verdict had a right to move for a new trial before the Constitutional Court at Law, which was the proper place, and not here.

May, 1814.

But the court decided unanimously, that by the settled course of the court, every application for a new trial in the case of an issue directed out of the Court of Equity, must be made before the Court of Equity, which directed the issue, because the verdict is to satisfy the conscience of this court, and therefore overruled the motion to strike off the cause.

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\*Mr. Goodwin then contended that this

court ought not to take up the case, but should send the cause down to the Circuit Court of Equity, where the motion for a new trial ought to be made, and not in this court, which being a Court of Appeals could not make original orders, but must in every case act upon an appeal, from some order made by the Circuit Court.

Mr. Blanding for the complainants, insisted that this Court ought to hear and decide the motion for new trial. That when the cause had been heard below, and a decree made by the Circuit Judge in Equity, against the complainants, an appeal brought the case up to this court; and the court on argument, not being satisfied, directed that the Circuit Court should cause an issue to be made up, to have the verdict of a jury on the facts, and prescribed what issue should be made and tried. That this issue was to satisfy the conscience of this court and not of the Circuit Court.

That if the cause should be sent down to the Circuit Court of Equity, and the verdict should satisfy the judge who should then hold that court, he would be obliged to reverse the decision of the judge who had first tried the cause, whereas this court alone can reverse or affirm the decrees of the Circuit Court.

The court was of opinion, that the motion should properly be made in this court.

After argument of the appeal, the court pronounced the following decree:

In ordering an issue in this case, we were under an expectation that new evidence might be procured, and that more truth and certainty would be obtained as to the facts. But the verdict which has been returned, appears to be founded even on less evidence than was before in the possession of the court, and cannot be received as altogether conclusive. As there is no probability, however, of having more light in the case, we shall not order another issue, but form the best judgment we can, upon the imperfect testimony before us.

The complainants claim certain negroes purchased in the name of Anne Davis, at a

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sheriff's sale of the estate of Jared Neilson, on the ground that the purchase was made with funds placed in the hands of William R. Davis, to be laid out in the said purchase, for the benefit of Eliza Henderson, now one of the complainants. The evidence is sufficiently full to establish the claim of the complainants to the negroes Affy and Letty. Mr. W. R. Davis applied to the executor of Gen. Henderson, to furnish him with funds to purchase these particular negroes for Eliza Henderson. It appears that he received sufficient funds for this purpose, partly from the executors and partly from the said complainant's mother: That he purchased these negroes with several others in the



name of Ann Davis, now Mrs. Bay—and that he afterwards declared to the executor that he had made the purchase “according to his arrangement.” He also declared to another witness, Mr. Hunter, at the time of the purchase, that he intended Affy and her family for Miss Henderson. This fact receives strong support from the declarations of Mrs. Bay, to two respectable witnesses, and is in some degree confirmed by her own testimony, given on the hearing of this cause in the Circuit Court.

We feel, therefore, bound to give effect to the verdict in favor of the complainants, as respects the negroes Affy and Letty. But the evidence relating to the rest of the negroes included in the bill of sale, is too vague to support the verdict as to them, and to authorize the court in declaring that a trust in them, results also to the complainants. It appears from the authorities quoted, that a resulting trust cannot be raised by construction: It must be grounded on plain proof of the application of the funds of the party for whom it is raised.—There being no such proof in this case, as it relates to the other negroes, the verdict must be considered as having been found in this respect without evidence, and especially as there is some evidence on the other side, that Mr. Davis intended to purchase the other negroes for the benefit of his own children.

It is therefore ordered and adjudged, that the decree of the circuit court be reversed, as it affects the right of the negroes Affy and

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Letty, which said negroes, with their \*issue, are declared to be the property of the complainants, and are ordered to be delivered up to them: That the bill be retained as to the said negroes, and that the trustees and other defendants who have possession of them, do account for the profits of their labor, before the commissioner, who is directed to make all proper and reasonable allowances in deduction from the said profits.—The parties on each side must pay their own costs.

HENRY W. DESAUSURE,  
THOMAS WATIES,  
W. D. JAMES,  
W. THOMPSON.

The minds of a majority of the court being satisfied as well from the finding of the jury, as from the evidence in the Circuit Court, that the complainants have satisfactorily made out their statement in the bill, I concur in this decree.

THEODORE GAILLARD.

The Court also made the following additional order:

It is further ordered and decreed, That it be referred to the commissioner of the court of Columbia district, to report the terms of a settlement of the said property on the

complainant Eliza Maria Taylor and her issue, by the complainant Simon Taylor.

(Signed) HENRY W. DESAUSURE,  
THEODORE GAILLARD,  
THOS. WATIES,  
W. D. JAMES,  
W. THOMPSON.

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\*Case LXXIII.

Laurens, Washington District.—Heard by Chancellor Desaussure.

EZEKIEL ROWLAND and Others, v. RANDAL SULLIVAN and Others.

(June, 1814.)

[Deeds ⇌ 72.]

The court will not set aside voluntary deeds to some members of the family of the donor, to the exclusion of others, on the allegation of undue influence exercised over great feebleness and imbecility, unless those allegations be made out fully and clearly by proof. Inequality in the division of a man's property among his children, is not a ground to set aside the deed; nor does it furnish conclusive presumptions of such imbecility as ought to affect them.

[Ed. Note.—Cited in *Kirkley v. Blakeney*, 2 Nott & McC. 547; *DuBose v. Kell*, 90 S. C. 208, 71 S. E. 371.

For other cases, see *Deeds*, Cent. Dig. § 191; Dec. Dig. ⇌ 72.]

The principal object of the bill in this case is, to set aside several deeds executed by the late James Sullivan, in the month of April 1809, by which he disposed of several negroes and other property, to several of his children and grand children, and particularly a deed of gift to his grand son, Randal Sullivan.

Two of the complainants, who are daughters of the late James Sullivan, insist that the division of his property made by these deeds among his children and grand-children, was so grossly unequal and unjust, that he would never have executed them, if his mind had not been in its dotage, and if advantage had not been taken of his extreme infirmity of body and mind.

A great deal of testimony was given on this point. Several witnesses on the part of the complainants, deposed that they knew James Sullivan well; and that they did believe him so reduced by age and infirmity, that he was not competent to the full exercise of his faculties, and to dispose of his property with that sound judgment, which was proper; and the witnesses believed him to be easily influenced by any person, in whom he had confidence, to do whatever was required of him. One of the witnesses thought his weakness amounted to childishness; and several of them deposed that one of the subscribing witnesses had expressed a similar opinion of him, in relation to his conduct about a spring of water, which the old man had.

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\*On the other hand, several witnesses on the part of the defendant swore, that they had known James Sullivan many years, and down to the time of his death. That they thought him perfectly sound in mind, and competent to the full exercise of his faculties, at the time of the execution of the deeds in question.

The three subscribing witnesses to the deeds, gave a very full and particular account of the execution of them. They stated that old Mr. Sullivan had previously requested their attendance for the execution of certain deeds: that he was perfectly sober, and collected, and gave his instructions to one of the subscribing witnesses how to draw the deeds, and to whom the property should go. No suggestions were made to him by others. That the deeds were carefully read over to him, and that he executed them deliberately, and without any sort of influence being exercised over him, that they saw or believed. That he was sound and rational, and knew perfectly what he was about, and repeatedly afterwards expressed his satisfaction that the deeds were executed.

With respect to the inducements to Mr. Sullivan's giving so much of his property as he did to Randal Sullivan, a number of the witnesses swore, that both Mr. Sullivan and his wife, expressed the greatest satisfaction at the conduct of this grand son; and declared, that he had been a faithful and laborious servant to them, and had done more for them than all their children, and had saved and made more for them, than all the rest put together; and that he was resolved he should have the most of his property. The witnesses did not consider old Mr. Sullivan as under an undue influence of Randal Sullivan;—but acting under a sense of gratitude for long services and kindness.

It was also proved, that Mr. James Sullivan, gave to his son Larkin Sullivan, the property contained in the deed to him, because he was his only surviving son, for whom he thought himself especially bound to provide.

With regard to the complainants, Mr. James Sullivan repeatedly declared to sev-

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eral of the witnesses, \*that he had done enough for these sons-in-law and would do no more.

This is the substance of the testimony. I do not think it necessary to state it more in detail at present.—Should it be thought necessary to carry up this cause to the Court of Appeals, I will there state the evidence fully in detail.

The rule is, that the complainant must make out the case to entitle himself to relief: the chief burthen of proof lies on him. Here are deeds regularly executed. To defeat them the complainant must shew that they were improperly executed. It is not enough to shew that a parent has made an

unequal, or if you please, an unjust division of his property among his children. The civil law doctrine of *inofficiosum testamentum*, does not prevail in our code, even in cases of wills. A man has a right by our law, to dispose of his property by deed or will as he pleases. Some incompetency of mind, shewing an incapacity at the moment of executing the deed or will, or some imposition practised on the testator or donor, must be proved to authorize the courts to exercise the high power of setting aside deeds or wills regularly executed.

The question then arises, has any thing like this been shewn in the case under consideration? Upon a careful examination of the testimony, I do not think there has been sufficient proof to warrant my setting aside the deeds in question. There is certainly some testimony, which if it stood alone, would induce strong doubts of the strength and capacity of Mr. Sullivan's mind, about the time of the execution of the deeds in question. But the great weight of testimony, and more especially that of the subscribing witnesses, who saw the real state of Mr. Sullivan at the moment of the execution of the deeds, is in favor of the deeds. That is the critical moment, which must always be regarded in such questions. For even in cases of actual derangement, if it be satisfactorily proved, that the deed or will was executed in a clear lucid interval it shall be valid. If I had any reasonable doubts, I might be induced to send this case to a jury, because there is a diversity of evidence,

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and it is \*wholly in the breast of the court to order an issue or not. But I cannot affect what I do not feel; and when I consider the delays to which issues out of this court are frequently subjected, I am not disposed to direct issues, unless in cases manifestly and imperiously demanding it; which I do not think this case does: For without imputing any discredit to the witnesses of the complainant, who appear to be worthy of credit, I do not think they have made out such a case as entitles the complainant to the relief prayed for. The defendant's witnesses, as numerous, and, to say the least, equally entitled to credit, have spoken with such precision as to the state of Mr. Sullivan's mind, at the time of the execution of the deeds, that I cannot get rid of the force of their testimony. And if it were at all proper to go into the motives of Mr. Sullivan, (except so far as to furnish a presumption of the unsound state of his mind, by shewing the unreasonableness of his preferring some of his descendants, and rejecting others,) I think that the witnesses have stated such facts as justify what he did, and upon which he manifestly acted. Upon the whole, I am well satisfied, that these deeds cannot be shaken, and that they must be allowed to have their legal effect and operation.

With regard to the deed executed by Mrs.



Sullivan, after the death of her husband, there is certainly more difficulty, inasmuch as some of the witnesses speak very strongly to her imbecility and incapacity. Others, however, and among these the subscribing witnesses, depose, that though weak and infirm, she knew very well what she was about, and executed the deed from choice and with deliberation, and without any sort of apparent undue influence. I am bound, therefore, to say that I cannot, upon such testimony, overturn such a deed. I will add too, that the particular object of the bounty of the donor and his wife, seems to have had peculiar merit in his long continued and faithful services to them, of which they were eminently sensible. It would be extraordinary to say, that a preference to such an object, was either unjust in itself, or furnished such evidence of imbecility of mind, as ought to shake the deed.

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\*It is therefore ordered and decreed, that the complainant's bill be dismissed with costs.  
Henry W. DeSaussure.

From this decree an appeal was made, which was heard and fully argued before all the judges in equity.

The Court of appeals unanimously affirmed the decree.

#### 4 Desaus. 522

#### Case LXXIV.

Abberville.—Heard before Chancellor Desaussure.

B. T. SAXON and Wife v. JOSEPH BARKSDALE and J. C. GARRET.

(June, 1814.)

[*Equity* ⇨237.]

Demurrer overruled by the answer.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 492; Dec. Dig. ⇨237.]

[*Executors and Administrators* ⇨158.]

An executor has no right to sell a specific legacy unless the debts of the testator require it; and least of all to pay his own debts. The statute of this state makes it necessary for executors to apply to the Court of Ordinary to sell personal estate.

[Ed. Note.—Cited in *Thackum v. Longworth*, 2 Hill, Eq. 274.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635; Dec. Dig. ⇨158.]

[*Executors and Administrators* ⇨158.]

An executor having an interest in part of the legacy, does not authorize him to sell more than his own share.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635, 646½; Dec. Dig. ⇨158.]

[*Limitation of Actions* ⇨72.]

The statute of limitations will not run in favor of a purchaser for valuable consideration, who had knowledge of the rights of the

parties, nor where he held as tenant in common, and during the minority of the other party.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 330-338; Dec. Dig. ⇨72.]

An account decreed.

[*Equity* ⇨235.]

A demurrer assigning for cause new matter which forms part of the subject of defense, is bad.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 511; Dec. Dig. ⇨235.]

[*Vendor and Purchaser* ⇨231.]

[Where a will is properly recorded, the record is notice of the will to all purchasers of property given thereby.]

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 529; Dec. Dig. ⇨231.]

[*Wills* ⇨748.]

[A court of equity is the proper tribunal in which to establish and recover a legacy.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1918; Dec. Dig. ⇨748.]

The bill of complainants states in substance the following case:

That Elizabeth Barksdale, in the year 1798, made her last will, and bequeathed two slaves, named Dick and Lett, to her two nieces, Martha and Polly Barksdale. The testatrix named her brother-in-law, J. Barksdale (father of the two nieces) executor of her will, and died soon after, leaving her will in full force. Polly Barksdale, one of the legatees, died an infant, and her sister, Mrs. Saxon has administered on her estate. Joseph Barksdale proved the will and qualified thereon; took possession of the two slaves, Dick and Lett, and sold the man Dick at private sale to J. C. Garrett, and received

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\*the purchase money, which he has applied to his own use. It is alleged that Mr. Garret had seen the will, and had full information of the title which Barksdale had to the said slave. That Garret was requested soon after the sale to return the said slave Dick, and receive another from Joseph Barksdale in his room, as the complainants had a legal claim to the slave, or part of his value. But Garret refused to do so.

B. T. Saxon married the legatee, Martha, in Oct. 1812, and demanded of Garret an account and distributive share of the value of said slave, and an account for his hire and labor.—The bill prays for general relief.

The will of Mrs. Eliza Barksdale was made an exhibit, and it is comprised in a few words.

It bequeaths two slaves, Dick and Lett to her sister's two children; and it appoints her brother-in-law executor. Several answers were put in. The administrator of Polly Barksdale answered that there were no assets, and no debts of that estate. The answer of Joseph Barksdale admits the will and probate, as alleged by the bill of complainant. Also, that he qualified as executor, and took possession of the slaves. That

Polly and Martha, his two daughters, were the nieces and legatees of Mrs. Eliza Barksdale, and that Polly died soon after the testatrix, under age and intestate; and that he, the executor, pawned or pledged the slave Dick for the sum of \$200 to Mr. Garret, in whose possession, he remained and worked for the use of the said money about 7 or 8 years, at the end of which period he sold the said fellow to Mr. Garret for \$416. He admits that he sold the slave for his own private advantage, as he conceived he had a right to do so, having acquired by the death of his daughter Polly an interest in the said property, to the amount as he believes of the value of Dick; and that he delivered to his daughter Martha, the girl Lett, as her right and property, and has never claimed her since. That at the time he first pledged Dick to Mr. Garrett, he was of more value than the woman Lett; but at the time of the sale, Lett having a child, they were equal

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in value to Dick: \*and she has had four children since, who are all in complainant's possession.

James Barksdale also answers, that he does not know whether, at the time he pledged the slave Dick to Mr. Garret, the latter knew that the negro was bequeathed to defendant's children; but that at and before the actual sale, it was made known to him; the defendant having produced to him a copy of the will, and informed him of the death of his daughter Polly, whereby he derived his claim to the said property. Defendant after the sale, sent word to Garrett to return the said slave and to receive another in his room, for the reason stated in the bill, which he refused to do.

The defendant Garret demurred to the bill on the ground, that at the time he purchased the slave Dick, the said Barksdale had a right as executor to sell the said slave Dick, to discharge the debts of the testatrix; also, that at the time of the purchase of the slave Dick, Polly Barksdale one of the legatees was dead, and her father thereby entitled to an interest in the said slaves, Dick and Lett.

Mr. Garrett also answered the bill, and admitted that he purchased the slave Dick, from Joseph Barksdale, executor aforesaid, having previously loaned him money. That defendant cannot say how much of the money loaned, or of the amount of the purchase was applied to the payment of the debts of the testatrix, Eliza Barksdale, or to the maintenance of the legatee, Martha Barksdale, during her minority, and before her marriage. But he believed at the time he made the purchase, that the said Joseph Barksdale was authorized under the will to sell said slave, as there were debts due and owing by the testatrix, as he was informed and believed. That the defendants had the slave Dick in possession 7 or 8 years, on pledge, before he purchased him absolutely; and that he knew

nothing of the claim of complainants until long after he had loaned the money, nor until the time of the purchase, and was then informed of the death of Polly and of the claim of Joseph Barksdale, and knew of no other method of obtaining the money original-

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ly \*loaned. That in the event of sufficient power to sell as executor, the interest which J. Barksdale had acquired in the slaves Dick and Lett, and her increase by the death of Polly Barksdale, was fully equal to the value of the man Dick, to wit, \$416, which was the sum the defendant paid for said man.

There was no evidence given in this case; but it was agreed that the testatrix, Eliza Barksdale, owed no debts of any importance; and that there had been no partition in this case, except that Mr. J. Barksdale voluntarily delivered the woman Lett to his daughter, then a minor, and kept Dick to himself.

We must take up the demurrer in this case in the first instance. I have no hesitation in overruling it, for the demurrer assigns for cause, matter which forms part of the ground of defence, on the facts of which the defendant can have the full benefit on the hearing, as well or better than on the demurrer. Besides, this is a speaking demurrer, and it is also followed by an answer which overrules the demurrer. I now go into the merits of the case.

This is a suit brought by a legatee for the recovery of her share in the slave Dick, specifically bequeathed to her and her sister; but sold by the executor to the defendant, Mr. Garret, for a full consideration.

If the executor had a right to sell this personal chattel, specifically bequeathed, there is an end of the question, and Garret had a right to purchase, and to keep the slave.

This question has been a good deal agitated, and decisions apparently contradictory have been made. It certainly seems that the case of *Savage and others v. Humble*, decided by the House of Lords in 1703, (reversing the decision of the Court of Equity, as reported in 2 Vern. 444,) did deny the executor the power to sell or mortgage the specific legacy, unless expressly to pay debts where other assets were wanting. See 1 Bro. Par. Cas. 71. But this decision of the House of Lords is strangely said to have been overruled by the Master of the Rolls in *Ewer and Corbet*,

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2 P. Wms. 148, followed \*by several other cases; such as *Elliot and Merriman*, decided by the Master of the Rolls, in 1740, reported in 2 Atk. 41, *Nugent v. Gifford*, 1 Atk. 463, decided by the Lord Chancellor, both of which were cases of creditors, and not of specific legatees. So in the case of *Mead and Orrery*, decided by Lord Hardwicke in 1745, reported in 3 Atk. 235. This was the case of residuary legatees; and there the Lord Chancellor recognizes the distinction between residuary and specific legatees. The Lord



Chancellor concludes, that as the executors had the legal right, as there is no color of fraud, and as two of the executors who had no interest in the assignment joined in making it, and as there was a purchase for a valuable consideration, there is no pretence to set aside the assignment in favor of residuary legatees. See p. 244 of the reporter. In *Langley v. Earl of Oxford*, reported in *Amb.* p. 17, decided by Lord Hardwicke, in 1743, he was of opinion that a specific legatee of a mortgage should not be prejudiced by a settlement made by the executor with the mortgagor; but the case of *Ewer and Corbet* being cited, he paused, and we hear no more of the case. Two cases are reported by Brown in his *Chancery Cases*, one of them is *Scott and Tyler*; 2 Bro. C. C. 431, in which one of the questions made, was whether an equitable assignment of a specific legacy, by an executor for his own private debt was effectual against the legatee. It was much argued by the counsel, and the cases examined and sifted; but when the court was about to give its opinion on that point, it was stated that a compromise had taken place. The other is the case of *Andrews v. Rigley*, 4 Bro. C. C., 425, decided by the Master of the Rolls; and to be sure that judge did decide on the circumstances of that case, that an executor or administrator may, when there are debts, sell the testator's term, specifically devised, and the court would not relieve, even under some suspicious circumstances; but the court relied expressly upon the great length of time and long possession by the purchaser. All these cases, however, turn upon the executor's power over the personal estate of the testator, to dispose thereof as he pleases,

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where there is \*no fraud. The Lord Chancellor puts it on that ground in *Nugent and Gifford*, and *Ithel and Beane*; so in *Scott v. Tyler*, 2 Bro. C. C. 478, and 4 Bro. C. C. 136. But even with this strong leaning to support the authority of the executor, as to the personal estate, there is a disposition manifested, to shake those acts where tainted with the least appearance of unfairness; and the Master of the Rolls expressly says, in *Andrews v. Rigly*, 4 Bro. C. C. 136, that it is no where decided, that the executor can sell a term specifically devised, for his own debt.

I apprehend that our law stands upon a different footing from the English law. It does not attribute to the executor or administrator the absolute power to dispose of the estate of the testator or intestate. On the contrary, by an act of the legislature, of March 1789, it is enacted, that when it shall be requisite to make sale of any part of the personal estate of testator, or intestate, either for a division, payment of debts, or to prevent the loss of perishable articles, application shall be made to the court of the county, or ordinary, as the case may be, where the will was recorded, or administration granted;

whereupon such court may refuse, or grant such order for sale, regulating the time, place and credit to be given in such manner, as to do impartial justice to all persons interested therein.

This law manifestly intended to take away that absolute power of the executor or administrator over the property of the deceased, which he before held, and obliges him to consult and be guided by a court of justice, to warrant his selling any part of the property, even perishable articles. It is not pretended that Mr. Barksdale, the executor, applied for, or obtained power from the ordinary of the district to make the sale he did, and the will gives no power to sell. He then acted without authority, and his act is void; and there was no reasonable ground for him to sell a property specifically bequeathed, even if he had continued to hold the general power; for no debts of the testator are shewn to have existed to make a sale necessary.

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Mr. Barksdale says \*in his answer, that he does not know whether the money paid by him was applied to pay any debts of the estate or the maintenance of the legatees. But he does not shew that any debts existed, and the father was not at liberty to sell the legacy of his child, in order to maintain her. He was bound to maintain the child out of his own funds. As far as appears the money was received by the executor, and applied to his own use. There is not a tittle of proof of the application of a cent of it to the payment of any debts of the testator; nor has Mr. Garrett the excuse that he did not know that the property was specifically bequeathed to the children. The presumption is, that he was informed, as he was intimate with the parties and lived near them. But the will was notice to all the world; and being recorded in the district, was accessible to him; and his answer admits that about the time of his purchase, he knew of the situation of the property, and bought it to make himself whole, for money previously loaned to Mr. Barksdale. But it is said the executor on the death of one of the legatees intestate, became entitled to a moiety in the share of that child so dying, whence his power to sell is inferred. He certainly did acquire the interest stated; but the consequence does not follow, which is insisted upon; he might sell his own share, but not the share of the co-legatee.

It was insisted that a partition has been made, and that the man slave he sold to Mr. Garrett, fell to his share; and that he could sell him. But no legal partition was made, and the minor could not assent to any. It was solely the act of the executor.

It was insisted for defendant, that he has had possession long enough to give him title, under the statute. But this is not so, for the long possession of seven or eight years, was merely a loan or hiring, to pay himself

by the labor of the slave for the \$200, loaned by Mr. Garret, to the executor. He did not then claim the negro as his own, nor till a recent purchase. Besides, the complainant, Mrs. Saxon was a minor, and the statute could not run, and he held after the purchase

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a moiety, \*which was Barksdale's share, as tenant in common with the legatee, who was entitled to the other moiety.

It was added, that there was a remedy at law, and that complainant should have gone there for relief. She is suing to establish and recover a legacy, and this is the proper court for her to come to; and she asks an account which she is entitled to. As the slave appears to have been sold at a fair price, I will not set aside the sale, merely to set him up at a new sale.

It is therefore ordered and decreed, that the defendant do pay to the complainant one half the amount of the purchase money agreed to be given for the slave Dick, and also interest thereon, from the time of the sale, and that the costs be paid by defendant.

#### 4 Desaus. 529

Case LXXV.

Laurens. Washington District.—Heard by Chancellor Desaussure.

HENRY RUFF and Others v. the Executors of J. A. SUMMERS.

(June, 1814.)

[*Executors and Administrators* ⇨495.]

The court cannot allow executors commissions or any other charge for the delivery of specific legacies to the legatees, whatever trouble may have attended the service. The statute is explicit that executors are not to be allowed any charge for any services, but a percentage on money received, and money paid away. If more is claimed by the executor for extra services, the statute directs him to make up an issue and try it before a jury. The statute is too explicit to admit of any other mode.

[Ed. Note.—Cited in *Deas v. Spann*, Harp. Eq. 176; *College of Charleston v. Willingham*, 13 Rich. Eq. 203; 209; *Jones v. Jones*, 39 S. C. 252, 17 S. E. 587, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2103; Dec. Dig. ⇨495.]

In this case the testator, Mr. I. A. Summers, being possessed of a very considerable estate, disposed of the same by his last will and testament, chiefly in specific legacies; and he imposed the duty on his executors of dividing his estate, according to his will, and supplying the loss of any of the specific legacies, by the purchase of other property in its place. This has accordingly been done, and the estate has been settled, and the legacies delivered over to the persons entitled to them.

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\*There were few or no debts; yet the whole personal estate was appraised; and the executors have charged commissions of

five per cent. on the amount of monies actually received and paid away; and of two and a half per cent. on the amount of specific legacies delivered over to the legatees, and they have deducted these commissions out of the money which was in their hands.

The object of this suit is to recover from the executors the amount of the commissions charged on the delivery of the specific legacies, and to oblige them to distribute the same among the complainants, who are the children and legatees of the late Mr. Summers the testator.

The complainants insist, that the executors are entitled to no commissions, but what are allowed by law, and that the law provides for the payment of no services, but what consist in the receiving and paying away monies of the estate, in debts or pecuniary legacies; and expressly declares, that if executors think themselves entitled to greater compensation than the law allows, they shall apply to the court of Common Pleas to have their claims decided upon by a jury.

The defendants insist, that though the compensation provided by law, extends only to the commissions on the money received and paid away, on behalf of the estate, yet there are other services in the management of an estate, and in the delivery over of specific legacies, which justly entitle executors to compensation. And that the law directing an application to the Court of Common Pleas, and a jury, does not apply to the case of specific legacies, so as to bar executors from coming to this court for relief, or from defending themselves in this court when they have made deductions of reasonable commissions for extra services.

It has always appeared to me that the ground for compensation to executors being made by law to rest solely on the foundation of money received and paid away, was not a perfectly reasonable rule; in as much as there is often great service performed by executors, when only small sums of money

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are received and paid away. But I do apprehend the law to be clear on that point; and I do not feel myself at liberty to depart from it. I do not sit here to make law, but to administer it; and the judgment of every individual judge must yield to the public will, distinctly or intelligibly expressed, by existing laws. And I apprehend the act of the legislature, prescribing a particular mode of trial on the application of executors, does apply to all cases which can arise. I feel, therefore, that I am precluded from granting extra compensation. If I were entirely at liberty on this subject, the leaning of my mind would be to grant some moderate compensation, for delivering over specific legacies; though perhaps I should pause even on that, for the general usage as far as I



have known it, has been against the claim; and the general usage and construction is seldom without some reasonable foundation. Upon the whole, I am of opinion, that the executors were not entitled, as the law stands, to deduct out of the funds of the estate of Mr. Summers, any sum for compensation for the delivery of the specific legacies to the legatees; and that they must account for the sum deducted by them, that it may be distributed among the complainants.

It is therefore ordered and decreed, that the defendants do pay over to the complainants the sum retained by them for commissions on the delivery of the specific legacies to the legatees, to which the executors are not legally entitled, together with interest thereon, from the settlement of the estate, to be distributed according to the respective rights of the children of the late Mr. Summers.

(Signed) Henry W. Desaussure.

From this decree the defendants appealed, and gave notice that they would move at the next sitting of the Court of Appeals at Columbia, to reverse the aforesaid decree, on the following grounds, to wit.

First,—Because the court was not bound by the act of the 25th of May, 1745, nor was it thereby precluded from exercising a discretionary power in affixing the compensation, which was proper and reasonable to

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have \*been allowed the defendants in this particular case, provided it did not exceed 5 per cent.

Second,—Admitting the Court was bound by the act above alluded to, yet all the facts directed by that act to be tried by a jury, were admitted before the court, originally brought there by the complainants themselves, who elected the tribunal before which they would investigate the righteousness of their demand: the court ought, therefore, to have done what a jury would have been bound to do upon similar or the same evidence before them.

Third,—Because, if at any stage of the case, the court had discovered that the intervention of a court of law, or the verdict of a jury was necessary to the complete justice of the case, the court ought then to have suspended its decree and directed an issue to have been made up and tried, and have modelled its decree in conformity to the verdict of the jury, on that point, or those points directed to be tried.†

Fourth,—Because the court ought not to have decreed the payment of costs out of the pockets of the defendants.

Fifth,—Because the court ought not to have decreed the payment of interest upon the amount retained.

Caldwell, defendants' solicitor.

December, 1814.

The appeal was heard by the Judges Desaussure, Gaillard, James and Thompson, who, after argument, unanimously affirmed the decree of the Circuit Court.

#### 4 Desaus. 532

Case LXXVI.

Union, Pinckney District.—Heard before Chancellor Desaussure.

JOSEPH TUCKER v. the Executors of HENRY STEVENS, Deceased.

(June, 1814.)

[*Husband and Wife* ⇐116; *Perpetuities* ⇐4.]

A deed of gift of certain slaves was made by a brother to his sister, E. D. and her heirs lawfully begotten; but she stipulated by signing the deed, that she would not claim any

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right to said slaves or \*their increase, longer than her own life: and that at her death the said slaves and their increase should return to the donor and his heirs, unless she should have heirs of her body lawfully begotten; in which case, if any of them survived her, the said slaves were to go to such survivors, to be equally divided, &c. She married and had issue who are living. Her husband mortgaged one of the slaves to secure a debt due by him.

The limitation over is not too remote. The donee took an estate for life, with remainder to her children who might survive her. On her marriage the marital rights attached on the property; and there being nothing in the deed to constitute a separate estate, the husband's pledge is good to the extent of his wife's interests; but no further. The children and executors of the husband, including these slaves in the appraisement of his estate, could not vary the rights.

[Ed. Note.—Cited in *Powell v. Brown*, 1 Bailey, 102; *Brummet v. Barber*, 2 Hill, 551; *Hill v. Hill*, Dud. Eq. 82; *Duke's Ex'rs v. Dysches*, 2 Strob. Eq. 358; *Jaggers v. Estes*, Id. 362, 49 Am. Dec. 674.

For other cases, see *Husband and Wife*, Cent. Dig. § 414; Dec. Dig. ⇐116; *Perpetuities*, Cent. Dig. § 18; Dec. Dig. ⇐4.]

The object of this bill is to have the benefit of a mortgage or pledge of a slave named Peter, made by Henry Stevens in his life time, to secure the repayment of a sum of money, to wit, \$270, which Joseph Tucker loaned to him, together with interest.

The defendants admitted the loan of the money, and the pledge or mortgage of the slave in question; but they state, that they as executors had never claimed the negro as part of the estate of their deceased father and testator; and that the slave has always remained in the possession of Elizabeth Stevens, the widow of the testator, who claims him under a deed from her brother, Thomas Davis deceased, dated the 24th of June, 1796, by which several negroes were given to her, and upon her decease, were to go to her children; and that her husband had no right to the said negro, nor power to mortgage

†No issue was asked for by the counsel, at the hearing in the Circuit Court of Equity.

him: and that the complainant must have had notice of the claim of the said Elizabeth, before he loaned his money on that security, as it was notorious in the neighborhood.

A copy of the deed of the 24th June, 1796, under which the defendant claimed, was offered in evidence, and was, after some discussion, received by the court.

By that instrument it appeared, that Tho. Davis for and in consideration of the natural love and affection he bore his sister, Elizabeth Davis, and in consideration of five shillings, granted and sold to her and her heirs lawfully begotten, certain slaves named in

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the deed: \*and the said Elizabeth Davis agreed to hold the said slaves and their increase during her own life; and at her death, the said slaves were to return to the said Thomas Davis and his heirs, unless the said Elizabeth should leave an heir or heirs lawfully begotten of her body, in which case if such heir survived her, the said slaves and their increase should belong after her death, to such surviving heirs to be equally divided among them.

It was proved that the slave Peter was one of the increase of the said negroes; and it was also proved that the slaves under the deed were in the possession of Elizabeth Davis before her marriage with Henry Stevens; and several of the witnesses swore that it was known to them, and they believed in the neighborhood, that the slaves were entailed to Mrs. Stevens' children, but none of them could say whether this was known to Mr. Tucker the complainant. Other witnesses who lived in the neighborhood, knew nothing of the limitation of the negroes to the children, under the deed, till recently. One of the witnesses was offered a mortgage of some of the negroes by Mrs. Stevens, if he would lend money to her husband; and he was present when the mortgage was made to Tucker: but nothing was stated to Tucker of the negroes being a separate estate of the wife.

The slaves included in the deed and their increase, were included in the appraisement of the husband, Mr. Stevens' estate, by the executors, who are the children of Mr. and Mrs. Stevens.

Mr. Stevens died, leaving alive his wife and several children, who are still living.

This case was argued beyond the value of the property in question. The deed was not very regularly drawn, but its intent cannot be mistaken, and the intent of the parties must be pursued in deeds as well as in wills, only that the court will not go so far in liberal construction to reach the intent in the former case, as in the latter. But the intent here is plain; the brother Thomas Davis, meant to give his sister, Elizabeth Davis, and she agreed to accept and hold, a life estate in certain slaves and their increase; and if

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she left issue of her \*body at her death, such

issue should take the slaves; if not, they were to return to Thomas Davis.

The limitation, it was insisted by the complainant's counsel, was too remote and void: but upon a careful review of the deed, I do not think so. There is not a feature in the deed which gives the idea that any limitation was intended beyond the proper boundaries established by law. The limitation is to a person then living, for her life, and to the issue of her body who might survive her; and in case of no such surviving issue, the property was to return to her brother, the donor. The wife of Mr. Stevens then had a clear life estate in the slaves under the deed, and no more. By the marital rights, Mr. Stevens acquired an entire interest in the personal property of which his wife was possessed, and could dispose of the same to the extent of his interests; and he has pledged one of the slaves under the deed to pay a just debt.

But it was insisted, that it was a separate estate in the wife, in which the husband had no right, and over which he had no control.

There is, however, nothing in the deed which marks this property, as intended to be a separate estate in the wife: There are no express words in the deed which declares that it shall be free from the husband's control, and not liable to his debts; and there is nothing in the nature of the property whence the court could infer an intent that it should be to the separate use of the wife, as the case of a gift of jewels for the personal use of the wife would be; as in *Graham v. Londonderry*, 3 Atk. 393.

I admit, that if the court could see any grounds on which to place this property as a separate estate, the want of technical words, or the want of a trustee, would not prejudice the wife. The husband should be construed a trustee; and technical words are not necessary, as is stated by the lord chancellor in *Darby and Darby*, 3 Atkins, 399. But this is a plain gift of personal property to the wife for her life before the coverture, to which the marital rights of the husband attached on the marriage taking place. The

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reports in the neighborhood as to \*this being a separate estate in the wife, were not brought home to the complainant Tucker; and if they had been, that would not have altered the rights of the parties.—Neither can the appraisement of the negroes as the absolute property of the husband's estate, and not merely during the life of the wife, vary the rights of the party and take away the right of the children after the death of the mother: it was a mere mistake. If the law of Virginia differs from our own in any respect, it might have had an influence on this case, as the deed was executed there; but I am not aware of any difference on the points in question, and none was suggested at the bar.



It is therefore ordered and decreed, that the slave named Peter, in the bill mentioned, be sold by the commissioner at public sale, for and during the life of Mrs. E. Stevens, the widow of the late Henry Stevens, on a credit of six months from the day of sale; the purchaser to give bond and good security for the purchase money, and for the return of the said slave Peter, to the children of Mrs. Stevens at her decease. And it is further ordered, that if the price which said negro may bring at such sale, be not sufficient to pay the debt due to the complainant and the costs of suit, that it be referred to the commissioner, to ascertain and report the balance of the debt and the assets of the estate of Henry Stevens, liable to this debt.

Costs to be paid by the defendants out of the estate of Henry Stevens.

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Case LXXVI.

Union.—Heard by Chancellor Gaillard.

WILLIAM WILLBANKS et al., Administrator of S. Simpson, v. JAMES DUNCAN, (son of Alexander.)  
(February, 1814.)

[Execution 171.]

This court will give relief by perpetual injunction against a judgment at law, obtained by an assignee on a bond to make titles to land, where no conveyances had been made or offered, conformably to the bond, till after the judgment had been made; the representatives

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of the \*obligor being now ready to make the conveyances; and that, notwithstanding an adverse possession and claim by a third person.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. 171.]

[Specific Performance 95.]

Under the circumstances, the court thought the assignee bound to take the title with all its risks and imperfections.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. 95.]

[Equity 401.]

The court will not direct the commissioner to examine the title where it sees that to be unnecessary.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 873; Dec. Dig. 401.]

[Specific Performance 3.]

[Land was sold, and bond was given by the vendor, conditioned for a conveyance on payment of the purchase money; but before payment, or conveyance, the vendor died intestate. The purchaser, having paid the price, sued the administrator of the vendor at law on the bond, and recovered judgment. On a bill by the administrator, proceedings on the judgment were stayed, and the vendee compelled to take the title and pay costs of both suits.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 3; Dec. Dig. 3.]

[Specific Performance 95.]

[Upon a sale of land, a bond was given by the vendor, conditioned for a conveyance upon payment of the purchase money; but before

payment the vendor died, and the vendee delivered the bond to the administrator of the vendor, and put him in possession of the land, to secure the payment of the purchase money. The administrator sold the land, claiming authority from the first purchaser; and afterwards such first purchaser, with knowledge of the second sale, paid the purchase money, and the bond for a conveyance was redelivered to him. Held, that he was bound to take the title, notwithstanding the second sale; such sale, if authorized by him, being binding upon him, and being void if unauthorized.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 265; Dec. Dig. 95.]

[Specific Performance 22.]

[Cited in D. C. Roddy & Co. v. Elam, 12 Rich. Eq. 345, to the point that the vendee under contract for sale of land may, upon tender of purchase price, compel conveyance against vendor or his assignee with notice.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 51, 53; Dec. Dig. 22.]

This cause came to a hearing before Chancellor Gaillard, who made a full statement of the case in his decree, which he delivered after the argument.

The bill states, that on the 11th day of August, 1796, Samuel Simpson sold to John Simpson a tract of land, of 88 acres, and gave a penal bond, in the sum of 100*l.* sterling, with a condition to make titles to the said John Simpson, whenever he should make the last payment for the same. The said John went into peaceable and quiet possession thereof, and there continued to live, occupy, possess and enjoy the same until the month of May, 1802, at which time he left the same, and went beyond the limits of this state. That the said Samuel departed this life intestate, on the 17th of October, 1797, leaving a widow and five children. That about the — day of November following, William Wilbanks and Nancy Simpson, widow of the said Samuel, administered on the estate of the said intestate; and that about the — day of May, 1802, a few days before the said John left the state, he delivered to the said William the said bond, requested him to take possession of the said land, until he paid up the amount of the purchase money, which he still owed for the land, and for which two notes of hand, payable to the intestate, were in the hands of the said William, as administrator of the said Samuel, for the amount of one hundred and twenty-eight dollars, with interest thereon; and he at the same time requested the said William to dispose of the same if he could do so, and pay off the two notes. That the said William did take the said land into possession, and held it as security for the purchase money of the same. That James Duncan, on the — day of —, 1802, had the land levied on as the property of the said John, and sold for a small sum by the sheriff of

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Union district, to satisfy an execution belonging to the said James, and received sher-

iff's titles. That about the month of October, 1807, the said John Simpson returned to this state, and some time in the February following, called on the said William, discharged the said two notes, and took the said bond. That upon the 29th February, 1808, the said John assigned the said bond to the said James, upon which the said James commenced an action as assignee against the said William and Nancy, the administrator and administratrix of the said intestate. And at March term, at a court held for Union district, recovered \$428, with costs; from which verdict the said William and Nancy appealed to the Constitutional Court, which came to a hearing upon the ——— day of Dec. 1811, at which time the appeal was dismissed, and the judgment below confirmed. The complainant therefore prayed an injunction to stay proceeding, and that the said James Duncan may be decreed to receive titles for the said land.

The case as stated in the brief has been made out. Much that took place previous to the 29th February 1808 does not require a particular consideration, as the interest of the defendant only commenced at that time, and is derived altogether from the assignment of Simpson, for no claim is set up under the sheriff's title in 1802. Duncan, as assignee of Simpson, takes his place; let us see the situation in which Simpson stood when he made the assignment.

Wm. Jackson says, that Simpson informed him just before he quitted the state, that he had left the bond and the other papers with Wilbanks. That he was going away, and that if he did not return, he, Wilbanks, must take that and make the best of it; and that he owed \$6000. A few years after, Simpson returns to the state, which was in 1807; he told Starns and other witnesses to whom he was indebted, that he had authorized Wilbanks to sell the land; that he had sold it to Gamblin, and that he was satisfied with the sale; and that his subsequent conduct furnishes evidence that he approved of what Wilbanks had done for him; for with a knowledge of it, and Gamblin's possession,

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he took up the notes \*which were out for the land, and received from Wilbanks the title bond which had been left with him. Wilbanks appears from the testimony in the case to have acted a friendly part towards Simpson, who had good reason to be satisfied with the manner in which he had discharged his trust. If Wilbanks put Gamblin in possession of the land by the authority of Simpson, Simpson could not complain of it; and if the sale of the land was made by Wilbanks, not as agent of Simpson, but as administrator of S. Simpson, it was void, and could not give Duncan a right to come upon the assets of the intestate's estate for the penalty of the bond. It has been urged against a specific performance, that this contract has lain dor-

mant for many years; but it must be recollected that until 1808, when Simpson took up his notes, he had not a right to ask for a legal title for the land. At that time Samuel Simpson, from whom he purchased it was dead, and he could not get a good title but through the medium of this court. Instead of suing the bond, Duncan should have applied to this court for a title, and having obtained it, he might have brought his action against Gamblin, who says he bought the land from the administrator; knowing he had no right to sell, and that the title bond to it was out. It is not the fault of the widow and children of Samuel Simpson, that Duncan did not pursue his proper course.

The commissioner must draw out a title for the land to Duncan, to be executed by the widow and children of Samuel Simpson, by their guardian, and delivered to Duncan, who must release the verdict and costs at law, and pay the costs of this suit.

(Signed)

Theodore Gaillard.

May, 1814.

From this decree there was an appeal. The brief furnished the court by the appellant, stated, that it appeared in this case from the statement in complainant's bill, the defendant's admission of facts, and testimony produced on the trial; that Samuel Simpson sold a tract of land to John Simpson for fifty pounds. That John Simpson paid twenty pounds of the purchase money, and gave his notes for the balance, payable

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in one and two years, \*that Samuel Simpson gave his bond to John Simpson, bearing date in the year of ——— conditioned to make titles to John Simpson or his assigns, on the last payment of the purchase money. That John Simpson went into the possession of the land, improved it, and then left it. That Samuel Simpson died before the last payment was made. That William Wilbanks administered on his estate, and that the said William was the acting administrator. That the said William took upon himself as administrator, to sell the land, and did sell it to John Gamblin, and put him in possession of it, who now holds, and has had the possession for eight years. That John Simpson in ——— paid to the said William the balance of the purchase money for said land, who held his note as administrator aforesaid. That James Duncan the defendant, after the payment of the purchase money, purchased the said bond from John Simpson, and paid him \$590, and took an assignment of the same. That the defendant then applied to Gamblin for the possession of the land, who refused to deliver it, saying, he had purchased the land from Wilbanks. That the defendant then offered to deliver the bond to any person if he could get possession of the land. That he offered the bond to Wilbanks if he would give him the possession of the land,



who refused. That the said William alleged that he was authorized to sell, by John Simpson, but it was proven by J. Simpson he never authorized him, and it was proven by Gamblin, that he sold the land as the property of Samuel Simpson, deceased. It was also proven that Wilbanks was present when the assignment was made to Duncan, and never informed him of his sale of the land, or that he was authorized to sell by John Simpson. That Duncan, who was an innocent purchaser for a valuable consideration, and could neither get his money nor the land, brought his action on the bond as assignee of John Simpson against the administrators of Samuel Simpson. That on the trial of the cause, the condition of the bond, and all the equitable circumstances were gone into before the jury, and the jury found a verdict for Duncan for \$428, and would have given a verdict

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for more, but \*that that amount was the penalty of the bond. On the suggestion of the court, Duncan took a verdict for it. That the defendant's case at law was conducted by able and experienced counsel, who had or might have had all the benefit this court could give them. That after this verdict, the complainants filed their bill to stay proceedings at law, and compel Duncan to take a title for the land.

It appeared further on the trial in equity, that Wilbanks had rented the land to several persons before the sale made by him to Gamblin. That he had received rent for several years for the benefit of the heirs of Simpson. That Gamblin paid to the heirs thirty dollars, as part of the purchase money; and that his contract with Wilbanks was that he was to pay the heirs as they came of age.

It also appeared that the land now was injured by the cultivation of Gamblin, and not worth much more than half what it was when Duncan purchased the bond. There was no evidence given on the trial (in equity) that Samuel Simpson, or his heirs had a title to the land, nor was there any title, or abstract of title submitted.

The court decreed, that Duncan should release his judgment and costs at law, and receive a title from the heirs of Samuel Simpson, and pay the costs of this suit.

The defendant therefore gives notice, that he will appeal to the Court of Appeals, to be holden at Columbia; and will then move to reverse or change the decree of the court on the following grounds:

First,—That Duncan had a right to sue at law on the bond; and if he had not, the defendants at law ought to have pleaded in bar to his action, and as they did not do so, equity will not relieve where there was a redress at law, if the party neglects to plead or mispleads.

Second,—Because the law had provided a particular remedy in this case, and equity

will not extend or grant a further one. And under that particular remedy, the condition of the bond was submitted to the jury with all the equitable circumstances.

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\*Third,—Because, there was no evidence given of any title in Samuel Simpson, or his heirs, or any title, or abstract of title submitted to the court, although the purchase money was paid.

Fourth,—Because the land is of less value at this time than when Duncan purchased the bond, and the situation of the contract changed.

Fifth,—Because the court decreed a specific performance on the application of the representatives of the vendor.

Sixth,—Because the improper and illegal conduct of Wilbanks in the sale of the land, prevented Duncan from getting the possession of it.

Seventh,—Because the decree is contrary to equity and good conscience, in compelling Duncan to pay the costs in equity, when the heirs of S. Simpson had received eighty dollars on account of the sale of the land to Gamblin, and Wilbanks the administrator had received several years rent, which was sufficient to defray complainants costs; which sum the heirs and administrator were not entitled to, if Duncan is obliged to receive the land, as he is entitled to all the mean profits since the sale.

Gist defendant's solicitor.

The appeal came to a hearing, and was argued by Messrs. Gist and Hooker for the appellants, and Mr. Creswell for the respondent.

Mr. Gist, for appellant.—The administrator of Samuel Simpson had no power to sell the land to Wilbanks. Duncan had a right to sue the bond.—1 Fonbl. 144, 5; 1 Vern. 119; 2 Vern. 325, 696.

Where the law provides a particular remedy, Equity will not give a further remedy.—2 Eq. Cas. 246; 1 Fonbl. 148, 9; Cas. T. Talb. 173, 4. See Acts of Assembly, p. 213.—This act gave a remedy; and operates to prevent the necessity of going into courts of equity, and the complainant having a remedy at law, cannot come here.

Courts of equity will not decree a purchaser to take a title which is even dubious.

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1 Fonbl. 178. There was \*no grant, no deduction of title from the grantee to Samuel Simpson; and here is an adverse title shewn in another party, which the purchaser could not get rid of. See 1 Fonbl. 361, 2, 384.

If the court does not take care that a good title should be made out, Duncan will lose his money and the land too. The decree should have provided that the title deeds should have been given up by Simpson's heirs.—The possession by Gamblin was adverse as to Duncan, but not as to the heirs of Mr. Simpson who are minors.

The land is not of such value as it was when sold, by Gamblin's wasting it.

The court will never decree specific performance in favor of the vendor, unless the vendee wants the thing in specie: at least not under the circumstances of this case.

Decree is wrong as to the costs at law, at all events, as he was entitled to sue at law: He had a right to go there.

Wilbanks, the administrator, is to blame in all the transactions of this case.

If the decree be not reversed it should be amended, by the commissioners being directed to inspect the title, and see that it is a good one, and that the deeds be given to the purchaser.

Mr. Creswell, for respondent.—Probable title is sufficient ground to found a decree for specific performance.—2 Pow. on Con. 37.

Possession has been in J. Simpson from 1796, till 1802, when he went away; and the administrator of Samuel Simpson, (Mr. Wilbanks,) sold to Gamblin, who has been in possession ever since and has made some payments.

The vendee is liable to all accidents to the subject of the contract, unless vendor be in default.—Pow. on Con. 56, 61.

The possession of Mr. Gamblin could not run against the minor children nor against Duncan.

Mr. Hooker for Mr. Duncan.—Let the decree be what it may, there is no reason to fix the costs on Duncan. Duncan could not get the title without trouble and costs. He asked even possession till he could get a title—

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but it \*was not given him—nor a title. Duncan had a right to sue on his bond—he did so, and cannot be blamed for it: and still less to be saddled with costs. The heirs are minors to this day, and it is not known that they desire or will give him a good title. Duncan did not take the penalty of the bond; but a verdict for damages under our act of assembly. The heirs have received rents.

It is too late for the heirs to come now to insist on specific performance, after the verdict at law for non-performance and after Duncan had solicited the performance of the contract. The court exercises the power of enforcing specific performance cautiously. The case of a contract to make titles on one side, and the other party giving a note for money, is not a case for enforcing specific performance against these.

Wilbanks is liable to the children, if he has acted improperly as to the estate of which he is the administrator, so that the children cannot suffer.

The court upon consultation, being of different opinions, the majority of the judges delivered the following decree:

May, 1814.

The defendant has appealed in this case on various grounds, but the principal objections

to the decree are these: First,—That the title of the complainants to the land contracted to be sold is a defective one, and the defendant therefore ought not to be compelled to receive such a title. And Secondly,—That the defendant ought not to be charged with the costs.

We think that the first objection ought not to prevail, for the reasons given in the decree; and for the further reason, that if the title has been impaired by the adverse possession of Gamblin, it is the fault of the defendant, who, it appears, knew at the time he purchased that Gamblin was in possession. He should, therefore, have brought his bill for a specific performance, which would have enabled him to bring an action at law for the recovery of the land, in time to prevent the possession of Gamblin, from ripening into a title for any part. It is not necessary under the circumstances stated, to refer this case to the commissioner, to enquire whether

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the \*complainants can give a good title. This is the ordinary practice of the court, but such a reference would here be useless, for the nature of the title is distinctly seen, and the defendant for the reasons already given, must take it with all its difficulties.

As to the costs, we are of opinion that these ought to be paid by the heirs of Samuel Simpson, and not by the defendant, because, a title from them could not be obtained without a suit. They should also pay the costs on the judgment obtained by the defendant on the title-bond, for he had a legal right to sue, and it is sufficient that the court compels him to accept the title in lieu of the damages recovered.

It is, therefore ordered and adjudged, that the decree be affirmed, except as to the costs, which must be paid by the complainants out of the estate of Samuel Simpson.

THEODORE GAILLARD,  
THOS. WATIES,  
W. D. JAMES.

The two other judges delivered the following opinion:

I have considered the case with attention, and regret I cannot agree with my brethren in affirming the decree of the circuit judge.

It does not appear to me that we are at liberty to deprive James Duncan of the benefit of his judgment at law, on the bond to make titles, which he held by assignment, and which he had a right to sue, unless we see that he is secured in a good title to the land. As I do not perceive that he is secured in that respect, I cannot consent to make the injunction against his judgment at law perpetual. The substantial object of the complainant's bill in the Circuit Court, was to compel Duncan to accept a title to the land in lieu of the judgment on the bond to make titles, or in other words, to accept a specific performance of the contract. In all such cases, it appears to me to be the



duty, and it is the course of the court, to see that the title offered is free from all reasonable objections. In the present case, I do not think that the complainant's title

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is free from objection. I think \*that it is quite probable that the adverse possession of Gamblin may be supported, and defeat the title. This reasonable doubt, I think, ought to prevent the court from forcing Duncan to accept the title and give up his judgment on the bond to make titles. I am, therefore, of opinion that the decree of the circuit court ought to be reversed.

(Signed) HENRY W. DESAUSSURE.

I concur in the above opinion.

W. THOMPSON.

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#### Case LXXVII.

Orangeburgh.—Tried before Chancellor James.  
Ex parte JAMES E. GLEN.

(June, 1816.)

[*Insane Persons* ⇐24.]

The Court will not set aside an inquisition taken under a commission of lunacy, obtained with a view to set aside the marriage of the alleged lunatic, when the jury have found that the woman was not an idiot or lunatic, though of weak understanding. Some irregularity in the proceedings of the commissioners and jury, will not induce the court to set aside the inquisition, and to order a new one, in a case of such delicacy, and when the court is satisfied that substantial justice has been done.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 31; Dec. Dig. ⇐24.]

[*Marriage* ⇐7.]

[Mental imbecility may be sufficient to incapacitate a person for binding his estate, without rendering him incapable of contracting marriage.]

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 25; Dec. Dig. ⇐7.]

Maria Robinson was alleged to be a young woman of a very weak mind. Her father had bequeathed her certain property, with a contingent limitation over to her sister, who intermarried with James E. Glen the petitioner. Maria Robinson intermarried with John Frederick, and has had issue by him. The marriage took place at her sister's house, and no objections were then made by her relations. Afterwards James E. Glen obtained an order from a Chancellor at Chambers, grounded on affidavits, for a commission de lunatico inquirendo, respecting the said Maria Robinson, alias Frederick. The jury made an inquisition, and returned that the woman was neither an idiot nor a lunatic, but was of weak mind. Whereupon a petition was presented by Mr. Clifton, on behalf of James E. Glen, to the Circuit Court of Orangeburgh, and a motion was

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made to quash this \*inquisition, and the re-

turn made thereon, and to order a new writ, on the ground of irregularity in conducting the inquisition, principally on account of the commissioners and the jury refusing to allow further time to procure witnesses to prove the idiocy or lunacy of Maria Robinson. But Chancellor James, then holding the Circuit Court, rejected the motion, and confirmed the inquisition; because it appeared to him that substantial justice had been done in the case, notwithstanding there might be some irregularity in conducting the proceedings; and because of the delicacy of the subject, and the impossibility of restoring the woman to her former condition; more especially too, as it did not appear that she had been entrapped and carried off from her friends, but had been married at her sister's house, and the ceremony performed by the very person whose testimony was now wanted to prove her idiocy or lunacy.

From this opinion and judgment of the Circuit judge, an appeal was made, and Mr. Clifton for the appellant, furnished the following brief:

This was a motion to quash an inquisition of lunacy. A writ had been issued to inquire into the idiocy or lunacy of Maria Robinson, otherwise called Maria Frederic. It appeared that Maria Robinson had intermarried with John Frederic. It was stated also in the affidavit of Benjamin Tarrant, that Maria Robinson was an idiot, and never possessed a mind capable of taking care of herself and her estate; and that Frederick had married her by the interference of her sister, Mrs. Millhouse. This writ had been ordered by a judge at Chambers, and upon the meeting of the commissioners and jury, they proceeded to examine the woman herself; and then Mr. Clifton who attended for the petitioner, requested the commissioners to adjourn (it being late in the afternoon) in order to hear further evidence the next day; and he produced several letters to shew that the commissioners having delayed acting to so late a period, and that he having had a very short notice of their intention to execute the writ, he had not had time to produce the necessary witnesses. This motion was opposed by Maj. Felder,

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\*who appeared for John Frederic, the pretended husband, who urged that the commissioners had no right to adjourn from day to day, and as the petitioner could not shew subpoenas served on the witnesses, they ought not to do so. The motion for adjournment was overruled, and the case was heard without witnesses on the part of the petitioner. The commissioners examined a Mr. Millhouse, her brother-in-law, upon which another question arose, "whether the jury were bound to return, or report the real state of her mind, or whether they were bound to return idiot or not, lunatic or not." Mr. Clifton

insisted on the former, and Mr. Felder for the latter form of return.

The witness was asked if she was an idiot according to the definition read? Who replied she was not. The jury found accordingly that she was neither idiot nor lunatic; but of weak mind. Clifton then moved the court upon affidavits to quash the inquisition, and to order a new writ, which was overruled by his honor, and the inquisition affirmed.

From this order the petitioner appeals on the following grounds:

First,—That the inquest ought not to have been affirmed; the affidavits exhibited, shewing that the commissioners precipitated the conclusion of the case, refusing to adjourn for further evidence.

Second,—Because the commissioners restricted the jury to find and return that she is idiot or not, lunatic or not, without shewing the real state of the mind.

Third,—Because the commission well lies to enquire of the sanity or insanity of a woman, though pretended to be married, when found to be incapable of contracting or transacting the common affairs of life, or never to have been of sound mind.

Mr. Clifton contended that where there is any misconduct in the commissioners, in executing the writ, the court may quash it, and order a new commission. *Ex parte Roberts*, 3 Atk. 6, 169, 170, 174. They have power to summon witnesses as incident to their office. *Ex parte Lund*; 6 Vez. jr. 784. *Ex parte*

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*Pounufort*, 3 Atk. \*170, 174. *Ex parte Ashton*, 171, 174. And the enquiry may be made as to the state of a married woman at the time of the alleged marriage. 5 Vez. 832. 8 Vez. 65.

The appeal was heard at Columbia, and the court delivered the following judgment:

A petition was preferred to the Circuit Court to quash an inquisition taken under a commission to enquire whether Maria Robinson, who married John Frederic, was a lunatic or not. The petition charged misbehaviour in the commissioners and jury, in hurrying the proceedings and refusing to allow sufficient time for procuring witnesses. The Circuit Court rejected the application and confirmed the return; and this appeal is now made on the same grounds which before were insisted on.

There is no doubt that any misbehaviour in the execution of a commission, is a good ground for quashing it, and the circumstances shewn in this case would induce us to order a new commission, if the regularity of the proceedings were alone considered. But it appears to us from the examination of Mrs. Frederic by the commissioners, that another inquisition is not necessary. The answers given by her, certainly shew some understanding, although a defective one, and

these afford higher evidence of the true state of her mind, than the opinions of any witnesses on the subject could do. There may possibly be so much imbecility, as to render her incapable of making contracts which would bind her estate, but this imbecility does not appear to exist in so great a degree as to incapacitate her from contracting marriage, which seems to be the chief object of the petitioner. It is also a strong reason against any further interference, that she was not enticed away from her friends, but was married in her sister's house, in which she lived, and the ceremony was performed by the very person who the petitioner states to be his principal witness. If the petitioner, who has a contingent remainder in the estate of Mrs. Frederic, wishes to secure it from waste, he must file his bill for that purpose; but the court will not, as the case now presents itself, subject her to another inquisition.

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\*It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed.

THOMAS WATIES.

HENRY W. DESAUSSURE,  
W. D. JAMES.

#### 4 Desaus. 550

Case LXXVIII.

Columbia.—Heard by Chancellor James.

WM. BALLARD and Wife v. S. TAYLOR,  
Sheriff, et al.

(February, 1815.)

[*Husband and Wife* ⇐29.]

By the proviso to the act of 1792, relative to the recording marriage settlements, the non-recording within the limited time, does not vitiate the settlements, so as to let in debts contracted before the marriage; but those incurred after the marriage, must be paid out of the settled property, included in the unrecorded settlement.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 158–168, 205, 882; Dec. Dig. ⇐29.]

[*Husband and Wife* ⇐110.]

No technical words are necessary to create a separate estate. Any words indicating that intention are sufficient.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 396–407; Dec. Dig. ⇐110.]

[*Husband and Wife* ⇐110.]

[A marriage settlement stated that “the property of each was to remain as if no marriage had taken place,” and that “the husband should have no power to sell,” etc., “any part of the same without the consent of the wife,” and then “she alone should be the disposer thereof.” *Held*, that this was a settlement to the separate use of the wife.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 405; Dec. Dig. ⇐110.]

The dispute in this case is between the complainants, who claim under articles made previous to the marriage, and the defendants, who are creditors, and have been enjoined.



The deed of settlement, or articles, was made on the 15th of October, 1810, and does not appear to have been duly recorded, agreeable to the act of 1785, "to oblige persons interested in marriage deeds and contracts to record the same in the secretary's office," nor agreeable to the act of 1792, for amending the same. But the question in this case, arises under the proviso of the latter act; which declares, that where a settlement is made previous to marriage, nothing in the act contained shall be construed to make the property liable in default of recording it duly, to the debts contracted by the husband previous to marriage: but only, to such debts as shall have been incurred subsequent to marriage.

In order to ascertain what debts of the husband were contracted before marriage, I ordered it to be referred to the commission-

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er, with instructions, to open the \*liquidated debts, and to go back to the original date of each contract. Proceeding upon this principle, he has reported, that the debt of Lazarus & Florence was contracted previous to marriage, as also, were all the notes submitted to the consideration of the court; except the second note due to Lesley, for \$80, which was after marriage.

The debts previous to marriage could not have been incurred upon the faith of the wife's property: As to them, there could have been no deception upon creditors; who could only have looked to the property of Ballard. It is immaterial whether we consider the original act or the act amendatory, as bearing upon the case, for the proviso to the latter must take effect; and the articles must exonerate the property from the debts incurred previous to marriage, if the estate of the wife is a separate one.

In deciding upon this point of separate estate, there is much difficulty, if the whole deed is to be taken together; for the latter part cannot well be reconciled with the former. But in strict legal construction, I shall rely upon the first part of the deed; which shews "a decided intention that the husband shall have no interest whatever."—*Lamb v. Milmes*, 5 *Vezev*, jr. 521. The words are strong, "that the property belonging to each shall remain, as if no marriage had taken place; and that the husband shall not have it in his power to sell, convey or will away any part of the same, without consent of the wife, and that she alone shall be the disposer of the same," &c. With such words before me, there is no necessity to resort to implication; for there is a strong expression of a separate use.—2 *Vezev*, 270.

Therefore, it is decreed, that the property settled is not liable for the debts contracted previous to marriage. That as to them, the injunction be perpetual;—that the property be now settled agreeable to the articles; and

that it be referred to the commissioner to report precisely, what debts were contracted previous to marriage.

W. D. JAMES.

4 Desaus. \*552

\*Case LXXIX.

Laurens.—Heard by Chancellor Gaillard.

HUGH O'NEAL v. SAMUEL COTHRAN,  
SAMUEL SPEERS and DAVID  
WATERS.

(February, 1815.)

[*Execution* ⇨ 272.]

A purchaser at sheriff's sale under a judgment and execution, of property which really belonged to another, other than the debtor, (who had conveyed away his rights before the judgment,) shall not be protected as a purchaser for valuable consideration, when he had notice of the true state of the title. But the sale shall be declared void, and the title from the sheriff ordered to be given up to be cancelled.

[Ed. Note.—Cited in *Steele v. Mansell*, 6 *Rich.* 461.

For other cases, see *Execution*, Cent. Dig. § 771; Dec. Dig. ⇨ 272.]

[*Execution* ⇨ 254.]

The court will not direct an issue in such a case. Rents to be accounted for.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 722; Dec. Dig. ⇨ 254.]

The application to the court in this case is, to render of no effect the sale of a tract of land, purchased by the defendants on the eighth of December, 1810, as the property of Moses Lindsey, to satisfy a judgment obtained against him, at the suit of Evans & Co. entered up on the 7th of May, 1808.

The complainant alleges that the land was not Lindsey's, but his the complainants, and that the defendants were informed of this fact before the sale by the sheriff. The complainant states in his bill, that he purchased the land on or about the 1st of January 1808, from Lindsey, and the defendants in their answer admit that they were informed of it. They say, that they were informed that the complainant did purchase the land of Moses Lindsey, as stated in the bill, at the time therein mentioned."

Lindsey it appears, conveyed the land to the complainant O'Neal, for \$675, by deed, dated the 27th of April, 1808. There was a mortgage on the land from the Connors, the former proprietors of it, to Inman, to secure \$350 due to him. O'Neal was to pay this debt, and credit was to be given to him for so much out of the \$675. He settled with Barret Inman's agent by giving his note for the amount of the debt due to Inman, and Barret gave him up the mortgage, with a receipt on it in full, dated the 31st of December, 1808. To assert that the defendants

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were purchasers at sheriff's sale without notice, would be to contradict their own admis-

sion; and Jones, a witness, says, that notice of O'Neal's purchase of the land was communicated to them by him, before the land was levied on; and the mortgage to Inman was on record in the proper office. Lindsey's conveyance to O'Neal gave him a legal title to the land on the 27th of April, 1808, and the judgment against Lindsey was not entered up until the 7th of May following: Besides the mortgage given to Inman by the Connors in 1805, was a subsisting lien on the land: no satisfaction was entered on it in the office: the receipt on it does not appear to have been even known by the defendants:—The complainant states that he bought it up with a view to strengthen his title in this way. The mortgage must therefore be considered as a subsisting lien on the land, whether owned by Inman or the complainant.

It is strongly insisted that I should send this matter to a jury. The complainant had a right to apply to this court for a discovery, from the defendants, whether they knew of his purchase from Lindsey, before they made their purchase at sheriff's sale, and to set up his mortgage. I see no good purpose that can be answered by directing an issue at law. Both complainant and defendants derive their title from Lindsey. In a court of law the plaintiff labors under disadvantages: He must recover there by the strength of his own title, and not by the weakness of his adversary's. The defendants ought not to be allowed to take advantage of their own wrong.—They purchased the land as the property of one man, knowing it to be the property of another, and to induce the sheriff to sell it, Fernandis says, gave him a bond of indemnity. The complainant at the time of the sale was a lunatic, he could not protect his own rights. One of his committee was dissatisfied with what had been done, and Mr. Jones says, always declared he intended to endeavor to get the land back.

The prayer of the bill is, that the defendants be compelled to convey the land to the complainant, who by the finding of the jury has lately been declared sane. I shall not order this, lest by doing so, it might affect

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the \*rights of persons not parties to this suit; but declare the sale made by the sheriff to the defendants void.

And it is ordered and decreed, that they do deliver their title from the sheriff for this land to the commissioner to be cancelled, and that they do pay the costs of this suit. The defendants must account to the commissioner for the rents and profits of the land.

Theodore Gaillard.

April, 1815.

From this decree an appeal was made, and the following statement was made, and grounds of appeal stated:

The bill in this suit was filed for the purpose of avoiding the right of the defendants and confirming that of the complainant to a tract of land.

The complainant claimed under a deed from Moses Lindsey to himself, dated 27th of April, 1808, and which was registered 5th September 1809. He also claimed under a mortgage from Conner to Inman, dated 18th of Dec. 1805, and which was registered the same day. It appeared that on the 31st of December 1808, Barret, who was alledged to be an agent of Inman, delivered the mortgage to the complainant, and gave a receipt thereon for full satisfaction. It likewise appeared that the complainant gave no money or adequate consideration for the deed or mortgage, and that Lindsey was in bad circumstances, and not in the habit of paying his debts.

The defendants Cochran and Speers claimed the land under a sheriff's deed dated 8th December 1810, founded on the following facts, to wit: in March 1808, the defendant Waters, and the firm of Evans and Co. (of which the defendant Speers was a co-partner,) obtained separate judgments against the defendant Lindsey, which were signed and executions lodged the 7th of May following. On the 8th September 1809, under those executions levies were made on the land, which in November following was sold for its full value at that time. The defendants Waters and Speers became purchasers. Waters sold his

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interest in the purchase to \*Cochran, and the sheriff executed titles to Speers and Cochran.

His honor the presiding judge, decreed that the sheriff's deed to the defendants be cancelled, &c.

The defendants, therefore, move the Court of Appeals to reverse the decree of his honor, or to make such order and decree as to the Court of Appeals shall seem fit, on the grounds,

First,—That the alledged right of the complainant being a matter purely legal, was not a proper subject for the jurisdiction of a court of equity.

Second,—That the claims of the defendant should be preferred to those of the complainant.

Third,—It was incumbent on the complainant to prove an adequate consideration.

Fourth,—The conveyance by Lindsey to the complainant will authorize the conclusion of fraud against the right of creditors.

Fifth,—That the decree is not warranted by the bill, answer and evidence.

Crenshaw defendant's solicitor.

The appeal was argued before the Chancellors Desaussure, Gaillard and James, who afterwards unanimously affirmed the decree of the Circuit Court.



## 4 Desaus. 555

## Case LXXX.

Columbia.—Heard before Chancellor  
Desaussure.

J. and F. WALKER v. JOHN BYNUM and  
Others, Executors of Joseph Walker.

(June, 1815.)

[*Guardian and Ward* ⚡54.]

Executors [guardian] bound to pay interest for monies of the estate kept in their hands unnecessarily.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 244; Dec. Dig. ⚡54.]

[*Guardian and Ward* ⚡174.]

Money received by a guardian, on account of his wards, ranks as a bond debt, in the administration of his assets, being protected by his guardianship bond.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 590; Dec. Dig. ⚡174.]

This case came on upon the commissioner's report and exceptions thereto.

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\*The counsel for the defendant excepted on three points to the commissioner's report:

First,—That interest ought not to be charged to the estate of Joseph Walker, on monies received by him on behalf of the estate of Edward Walker, as guardian of the complainants.

Second,—That too much rent was charged to Joseph Walker's estate in the report, for the rent of land.

Third,—That the money received by Joseph Walker as guardian of the complainants, should not be considered as a debt of higher grade than simple contract debts.

On the first exception, there is no difficulty. The rule of this court is a plain one. Where an executor, administrator, or guardian receives money, he is bound to pay debts, or to put it out to interest, on proper securities. He is allowed to the end of the year to make up his accounts, and if at that time the balance appears to be very trivial, or if there be exigencies which require some money to be kept in the hands of the executor or guardian for a short time, interest will not be charged; but where he receives considerable sums of money, and neither applies them to pay debts, or to produce interest or revenue of any kind, he is bound to pay interest on the money so received from the end of the year.

On applying this rule to the circumstances of the case under consideration, it does appear to me, that the interest is properly chargeable.

The first exception is therefore overruled.

The second exception, that too much was charged to the defendant's testator, Joseph Walker, on the ground of rent, depends on the evidence.

It does not appear in proof, that more than two hundred and thirty dollars were actually received by Joseph Walker for rent; and three fifths of that sum belonged to others than the complainants. If more rent was due, it does not appear that the same was not recovered by default of Joseph Walker, or that the balance actually due may not yet be recovered from the debtors. Unless there should be more positive proof of gross neglect, and actual loss, I should not be dis-

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posed to make the estate \*of the guardian liable for more than he actually received. The exception is therefore sustained.

The third exception relates to the grade in which the debt due by the guardian to the complainants, for money received on their account, is to be placed. It seems there is some apprehension that the estate of Joseph Walker may not be able to pay all its debts; and it is of importance to the complainants, and still more to the securities of the guardian in his bond, that the balance due by the guardian for money received by him, in that character, should be placed in the grade of bond debts.

The act of our legislature prescribes, that debts due by a deceased person, shall be paid in a certain order, to wit: Funeral and other expenses of the last sickness; charges of probate of will, or administration; next, debts due the public; next judgments, mortgages and executions, the eldest first; next, rent; then bonds or other obligations; and lastly, debts due on open accounts. Now the bond given by the guardian, was given expressly to cover monies received by him in that character. The sums received by him in his lifetime, were due to his wards, not merely under the general principle of a liability for money had and received, but directly under the bond. It seems to me therefore that the money received by the guardian, must be considered as a debt due under his guardianship bond or obligation, and it is protected by the act of the legislature. The case of Cox and others, against Joseph, executrix of Joseph, 5 T. Rep. 307, seems to warrant this doctrine.

The exception is therefore overruled, and the balance reported to be due is to be placed on a footing with bond debts, as reported by the commissioner.

Henry W. Desaussure.

November, 1815.

From this decree there was an appeal, on the ground that the debt recovered, ought not to rank as a bond debt.

The appeal was argued before the Chancellors Desaussure, Waties, James and Thompson, who unanimously affirmed the decree, for the reasons given therein, and dismissed the appeal.

## 4 Desaus. \*558

## \*Case LXXXI.

Columbia.—Heard before Chancellor  
Desaussure.

The Heirs of D. MILLING v. BARBER,  
WOODWARD and BARKELEY.

(June, 1815.)

[Cancellation of Instruments ⇨4.]

The court decreed that the defendants who had purchased land from the heir at law, who had destroyed his father's will, should deliver up the original grant, and the title deeds they had received from the heir. The complainants had established their title at law. Each party to pay his own costs.

[Ed. Note.—Cited in *Pace v. Burton*, 1 McCord, Eq. 250.

For other cases, see Deeds, Cent. Dig. § 210; Cancellation of Instruments, Dec. Dig. ⇨4.]

John Fortune was seized and possessed of a tract of land in Fairfield District, and devised the same by his last will and testament, duly executed, to his wife, for the benefit of herself and his children, except his eldest son, Wm. Fortune, whom he excluded. He authorized the sale and division of the money it might bring as aforesaid, and died leaving his will in full force.

On the 28th Nov. 1777, Ann Fortune, the widow and devisee, agreed to sell the land to John Milling, and executed her bond in the penal sum of 2,000*l.* currency, with condition to make titles thereto to said J. Milling, in fee simple: But the said Ann Fortune died without having actually executed conveyances to the said John Milling. William Fortune, who was the eldest son and heir at law of his father, (as the law then stood,) clandestinely possessed himself of the will of his said father, and actually destroyed it; and then claiming as heir at law both to his father and mother, sold and conveyed the land to the defendants, and delivered them the original grant, and other title deeds and documents relating to the said land. John Milling died prior to the 1st of May, 1791, leaving David Milling his heir at law. The relief prayed was, that the defendants may be decreed to bring in the deed of Wm. Fortune, conveying the land to them, and to deliver up the same; and that they may be compelled to release to the complainants, their legal right or title to the land.

No answers were put in by the defendants, and the bill was taken pro confesso.

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\*At the hearing it was proved by the witnesses, that they had heard Wm. Fortune complain that his father had by his last will cut him off, and had devised his land to his mother, for the benefit of herself and the other children; and he declared if he could get at the will he would destroy it, and then claim as heir at law. He sometime after

said, he had been at his mother's, and fixed things as he wished; and he said, he would take possession of the land.

Woodward, one of the defendants, was cautioned against purchasing the land, by one of the witnesses, who informed him that Mrs. Fortune had made bonds to execute titles for the same to John Milling. But the defendants purchased and took Wm. Fortune's title.

Several trials at law were had between the defendants, claiming under William Fortune, and David Milling as heir at law of his father. The defendants failed in their claim.

It was contended for the complainants that every thing was to be presumed against the destroyer of the will or deed, in odium spoliatoris; and those claiming under him must suffer by his misconduct. That the will having been established by parol evidence, and the destruction of it proved, and the complainants having succeeded at law, were entitled to the aid of this court, to have their title established, and to obtain the original grant, and the title deeds delivered up to them, which might otherwise, at some future day, be set up to their disadvantage. And that they were entitled also to have costs, because the defendants by retaining the deeds and grant, had compelled the complainant to come to this court, to have his title, already established at law, forever quieted.

For the defendant little opposition was made to the claim of the complainant as to the title deeds; but on the ground of costs, it was insisted, that the defendants ought not to be obliged to pay them. They had been defeated at law, and could not support the legal title. The complainants then were under no necessity to bring them into this court. It would have been enough for them

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to have \*brought the Fortunes here, to have compelled a specific performance—and that even then it is not usual to make the heirs pay costs.

Chancellor Desaussure delivered the following decree:

It is ordered and decreed, that the defendants do bring into this court and deliver up to the complainants, the deed which William Fortune executed, conveying to them the land in dispute between the parties, and also such other grants and conveyances, as relate to the said estate, as the said William Fortune delivered to them.

It is further decreed that the defendants do execute such releases of all the title to the land in question, which they may have derived from the conveyance of William Fortune to them, as shall be prepared by the commissioner of this court for that purpose.

It is further ordered that each party do pay his own costs of suit.



## 4 Desaus. 560

## Case LXXXII.

Columbia.—Heard by Chancellor  
Desaussure.

CATHARINE THREEWITS, by Her Next  
Friend, v. LEWELLIN THREEWITS.

(July, 1815.)

[*Fraudulent Conveyances* ⚡172; *Husband and Wife* ⚡297.]

A wife being abused and ill treated by her husband fled to her relations, but was induced by his promises of amendment to return. She soon after again left him and returned to her relations. Although her return to him is a waiver of objection as to his prior ill treatment, yet the court will receive evidence of his prior ill conduct, to aid the presumption of harsh treatment after her return, of which there was no very positive proof. The voluntary settlement made by him after marriage, though certainly not good against prior creditors, was good as between the parties. One half the property included in the deed, vested in the hands of the trustee therein named, for the use and maintenance of the complainant and the younger children, remaining with her, and to pay half the debts. The other half of the property to remain in defendant's hands for his own use and support, and that of his eldest child, unalienable by him to any other purpose, and subject only to such debts as have a legal right to be satisfied out of it. Defendant or-

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\*dered to enter into a recognizance before the commissioners to keep the peace towards his wife, who is protected in living separate from him. Defendant to pay costs.

[Ed. Note.—Cited in Rutledge's *Adm'r v. Smith's Ex'rs*, 1 McCord, Eq. 133.]

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 523-529, 542; Dec. Dig. ⚡172; *Husband and Wife*, Cent. Dig. § 1090; Dec. Dig. ⚡297.]

[*Husband and Wife* ⚡283.]

[Cited in *Rhame v. Rhame*, 1 McCord, Eq. 206, 16 Am. Dec. 597; *Converse v. Converse*, 9 Rich. Eq. 571; *Wise v. Wise*, 60 S. C. 433, 38 S. E. 794; *Levin v. Levin*, 68 S. C. 131, 46 S. E. 945, to the point that a wife, having been forced to leave her husband by his drunkenness and gross treatment of her, returned to her husband upon his promising to abstain from drinking, and to treat her with kindness. *Held* that, upon the husband's being again drunk and threatening the wife, she was justified in leaving him, although the husband had not actually abused her, and that she was entitled to a separate maintenance, though the husband again promised to reform.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⚡283.]

[*Husband and Wife* ⚡283.]

[Cruel and violent treatment of his wife by a husband will support a bill by her for alimony, according to the circumstances of the parties.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⚡283.]

This case was argued before the Circuit Court at Columbia, which thereupon made the following decree:

This is one of those unhappy cases in which courts of justice are obliged unwillingly to enter into the privacy of domestic life, and to judge between persons whose re-

lations are so close, that they ought not to require any other guide for their conduct, than that pure and strong affection, which is the guarantee of domestic felicity.

The bill charges that the complainant being entitled to a personal estate of the value of \$3,000, intermarried with the defendant on the

February 1810; and that he possessed himself of her property. That during the courtship, the defendant proposed to settle certain property on the complainant, and the issue of the marriage, if the same should take effect; but the agreement was not perfected, till the month of October 1813, when the defendant executed a deed by which he conveyed ten negro slaves to certain trustees, for the use of complainant and the issue of the marriage: But he reserved a life estate in the property to himself. That soon after the marriage the defendant became much addicted to intoxication; and when in that situation, he beat, abused and ill-treated the complainant; so that her life was frequently in danger; and she was obliged to seek refuge with some of her neighbors: that his paroxysms became so frequent, and and his abuse so great, that finding no dutiful submission on her part made any difference in his conduct, she took shelter with her relations; but upon his repeated solicitations, and professions of better behaviour, she returned to his house, and conducted herself with all duty, affection and tenderness. That he soon forgot his promises, and acted more outrageously and brutally than ever; beating and abusing her more grossly than before, which drove her from him a second time. Again he solicited a reconciliation, and again she returned to him, and used every means

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in her power to sooth his angry \*passions. But in vain—he burst out again into new abuse and ill treatment, till at length, finding all hope of better conduct at an end, she finally left him, and sought protection with her mother and other near relations.—And he has pursued her with slanders on her reputation, to deprive her of her asylum. That the complainant with her children, is dependent on the bounty of her mother and brothers for subsistence, the defendant refusing to make her any allowance for a separate maintenance.

The bill prays that the complainant may be protected in living separate from the defendant, and that the defendant may be decreed to deliver up the ten negroes, mentioned in the deed above-mentioned, for the use of the complainant and her children, or to make some other just and adequate provision for them.

The answer of the defendant admits the marriage of the complainant with the defendant, and the execution of the deed of settlement stated in the bill; but insists that it was made to gratify the wishes of the com-

plainant's friends, and not upon any agreement either before or after marriage. That he never meant to place the negroes mentioned in the deed, out of his own control, and submits whether the language of the deed, will authorize such a construction as will deprive him of the use and possession of them. The answer further admits, that from intemperance, in which he indulged too much, he might and did treat the complainant with that roughness and want of tenderness which might superinduce complaint on her part, and shame and confusion on his; and that being incapable, from the fatal effects of spirits, of appreciating the value of the complainant's society, or of endeavoring to regain her affection and attachment, he admits that for this cause, the complainant did absent herself, and continued with her relations for some time;—and defendant insists that even during this period, when she received such treatment, (as he alleges she has never received since,) the complainant would have been averse, as he believes, to a total and final separation from this defendant, inasmuch as she solicited, in a tender letter, an interview, and a return to this defendant.

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That \*in consequence of these pacific overtures, a reconciliation took place, and he received the complainant affectionately, and they continued to live in peace and harmony, till some time in February last. She then applied to this defendant in terms of affection, for the means of visiting her mother and friends in Edgefield, to which the defendant acceded—And he accompanied her on the way, and parted from her in apparent harmony and good humor. And at separating she requested him to meet her at Major Bond's, on a certain day, to attend her home; which he accordingly complied with; but she did not come, and he has never since seen her. He believes she would have returned home in affection with him, but for the interference of her relations and friends; and the defendant offers in the sincerity of affectionate regard, to receive and treat her as a wife ought to be received and treated.

Defendant denies the statement that their children are dependent on the bounty of the complainant's connections. One of them is with the defendant's mother, and the other two, can at any time, claim the protection and care of a father, if they are returned to the defendant.

On the trial of this case, Mrs. Thomas, the mother of the defendant, was called by the complainant, who swore that the complainant has been married to her son about five years; and that they lived in harmony for about a year after the marriage. That when the husband was in a drinking way he used his wife ill, spoke roughly to her, and once he laid hold of her in a great passion and shoved her about; but the witness interfered and prevented his beating her. She never saw him

beat her; but she has seen her with marks of beating about her, which she said was done by her husband. He did not use her ill when sober; but he was drunk pretty often; and then he abused her violently. The last time she returned home to him, he drank less than before, and he treated her better; at least not so ill as before, and a woman might have put up with it:—They seemed to live in harmony, except once, when she heard them dis-

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puting.—\*This was sometime in January or February last:—He was intoxicated. They had high words and she came out of the chamber, and complained of his threatening to strike her; upon which the witness told her to remind him that she had bound him over to the peace. He appeared to be angry but did not strike her. The witness has never advised the complainant to separate from her son; nor does she remember ever to have said that they could not live together; or that she regretted that her daughter-in-law returned back to her husband the last time. When she went away the last time, her son and daughter-in-law went together in a chair in apparent harmony, and she appointed to return in about ten days. The witness told her daughter-in-law, that if she wished to remove and live apart, she would have a house prepared for her, near to witness. But she said, she had no inclination to remove, and wept at the idea of a separation. She always conducted herself with propriety as a dutiful and affectionate wife. When they lived apart, (before the last time of coming together,) the complainant told witness, she wished to return home to her husband. Her brother, Mr. Daniel, appeared to be averse to her going home; and told her, not to speak to her husband but in his presence. They consorted as man and wife, when he accompanied her to Major Bond's, on her way to visit her mother, whence she has not returned. The complainant has told witness lately, that she never had any contract before marriage with her husband for a settlement. Also, that her relations interfered to prevent her going home. Has heard her son tell his wife, since they came last together, that if she wished to part entirely, it might be done amicably, and he would consent and arrange it, and give her some of his property: but she then said, she had no desire to leave him. When the time arrived which had been fixed for him to go and meet her, she heard him say he would go; but does not know if he went. She thinks her son would willingly receive his wife again.

Capt. Thomas, testified on the part of the complainant, that the marriage took place in 1810. He witnessed the strife between Three-

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wits and his wife. It began \*a year or eighteen months after the marriage:—the defendant was in the habit of drinking hard; and when drunk he treated her severely. He



was very outrageous when he got into his drunken frolics—thinks he is somewhat reformed latterly, but not wholly. He was very drunk last Monday. Did not see him get drunk at home since the last time his wife returned home to him; but he got drunk when from home. They lived in more harmony the last time they were together than before. She always behaved unexceptionably as a wife. The witness was not on good terms with his step-son, Mr. Threewits. He was displeased with him for his ill conduct. On one occasion he found him near his house armed with a gun, and the family had left the house, greatly alarmed at his conduct. His wife and mother were part of the family. He was angry and took the gun from Threewits,—beat him a little, and broke the gun, and ordered him not to come near his house again. This was before the last coming together of the parties. The defendant's personal property was worth about \$4,000, when he married. He has disposed of it to about \$1,500 or \$2,000. He got about four grown, and two small negroes by his wife, and some money; and he has disposed of part of that.

Major Threewits, the uncle of the defendant, was called by the complainant, and he testified that the quarrels between his nephew and his wife, arose about a year or eighteen months after their marriage. He was subject to intoxication and used her ill; they were once on a visit to witness's house, and at the breakfast table, he was drunk, and suddenly rising from the table, he cursed himself and his wife in outrageous terms, and made a blow at her with a knife—she fended off the blow from her body, and received a cut on her hand. At another time, and some weeks after she was confined with her last child, Mrs. Threewits came running over to witness's house, which is not far from his residence, with her head naked and her child in her arms: a negro sheltered them from the rain with a blanket—she was greatly alarmed. Mrs. Thomas the mother

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of the defendant came running \*after her; she also appeared greatly alarmed. This was as he believes, the day on which Mr. Thomas took the gun from him, and broke it. Mrs. Threewits was an exemplary wife, and behaved perfectly well. The witness said he had endeavored to reclaim the defendant, his nephew, from hard drinking; and offered him a thousand dollars if he would leave off drink; but he refused it, and said, he would drink as long as he had a seven-pence. —Mrs. Threewits, several times, came running over to his house in great alarm and apprehension, in some instances with marks of beating. They live within a quarter of a mile of the witness. The witness does not think that Mrs. Threewits could live with her husband, unless he would leave off hard drinking, which he does not think will take place. He was drunk on the Monday pre-

ceding this trial. Witness has heard Mrs. Thomas say, she regretted that her daughter-in-law came home the last time, as she did not think her son would behave better than he had done. He saw Mr. Threewits and his wife several times since her last return; he behaved better in public:—But when he was gone, she said to the witness, it would not do, she could not live with him. He believes she would be willing to live with him, if he would leave off hard drinking, not otherwise. He has spoken with his nephew, who said, he did not wish the cause to come into court; and proposed an accommodation; but she said, she was ignorant, and left it to her counsel.—Mr. Threewits was in good circumstances when he married; but he has wasted his property a good deal.

Mr. Daniel, the brother of complainant, swore, that she had made a determination not to return home, for she did not believe he would quit hard drinking. He is persuaded she would have kept to this resolution, but for her husband's solemn promise, which he heard, that he would never drink to excess again. He told his wife that he had taken an oath that he would never drink to excess again. She was induced to go back the last time by these assurances. The oath which he took, was made before a magistrate, and reduced to writing, and recorded; a copy of it was produced in evidence. It contained

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a \*solemn oath that he never would knowingly or voluntarily drink any spirituous liquors, or intoxicating liquor, in this state, or in any state, to which he might remove. It was dated 16th August 1814. He got by his wife six negroes, and about \$700 in money.

The letter from Mrs. Threewits to her husband, mentioned in the defendant's answer, was produced in evidence. It was an affectionate letter, deploring their disagreement, and earnestly soliciting him to come and see her and not to leave the state, or she should be miserable.—It bore no date. His letter to her was in these words:

“Madam,—As you have left me and my house, at a time and in a manner, calculated by you to injure and expose me, and without my consent, I write this to desire you to keep away; you shall never return to my house in safety; do not attempt it.

(Signed) Threewits.

Mr. Caver was examined for the complainant.—This witness had kept himself out of the way for some days, and gave some trouble to procure his attendance. A suspicion was excited that he was kept out of the way designedly. On his examination, he attributed his removal from his usual place of residence, after he had been subpoenaed and the cause brought to trial, to sickness. In some degree the suspicion was removed, but not wholly. He testified that he was present when Mrs. Threewits, the complainant,

returned home to her husband the last time. They seemed to be reconciled, he heard no quarrels, and she was well treated by her husband. He saw them almost every day, and he did not see any ill behaviour. She appeared to be well pleased. He saw Mr. Threewits drunk twice during their last residence together, but he did not hear him abuse her, or ill use her. He was not violent when drunk, as far as witness saw, though he saw them together when he was drunk. He was a little groggy a third time, in the evening. Mrs. Threewits came out of the room where the company was sitting; she was not alarm-

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ed. Mr. Threewits followed \*her, and said she might as well have come to bed to him as to another bed; he heard nothing more. This was in January or February last. When she went away to visit her mother, he heard Mr. Threewits say, he would go with her—he does not know if he did.

This was all the testimony given in the case. It having been strongly stated by the counsel for the defendant, that the complainant, Mrs. Threewits, was not disposed to prosecute this suit, and would rather compromise the affair, and return home to her husband, but that she was over-ruled by her brother, and her other relations, the court felt it a duty to ascertain that fact, and requested Colonel Chappell a near relation of Mr. Threewits, the defendant, to visit Mrs. Threewits, and learn her real sentiments, as well as to endeavor to bring about an amicable arrangement of their differences if possible. Colonel Chappell accordingly visited that lady, and conversed freely with her. He communicated in writing to the court the result of his conference with her. She stated that she could not return to her husband, for she could not confide in any promises which he might make. He had repeatedly made solemn promises to her, and her friends, that he would reform his conduct to her, all which had been so often broken, that she could not now hope for a different result; and that she should now be afraid of her life, if she ventured to return home to him. Colonel Chappell also saw Mr. Threewits, the husband, and was satisfied from what passed between them, that her determination not to return to him was correct.

On the argument of this case, the counsel for the defendant admitted the charges in the bill, generally, as the answer had done; but insisted that the complainant having returned to live with her husband, after the most atrocious instances of ill conduct, was a waiver of all objections up to that time; and that the conduct of the husband to the wife, after that time, was not so harsh or severe, as to justify her in separating herself from her husband, or to warrant her claim to a separate maintenance. The coun-

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sel admitted the jurisdiction of the \*court,

but insisted that such a case of severity had not been made out, on their last living together, as would support the claim of the wife, to the protection and aid of the court. I had occasion some years ago to examine this subject, in the case of Prather and Prather, at Laurens, in which a demurrer was put in to the bill, and the question of jurisdiction was fully argued, and I decided that in the absence of ecclesiastical courts, and from the incompetency of the courts of law to give relief, it devolved of course on this court to give relief, or the citizen would be left remediless, in one of the most important particulars of human life. And I also noticed that in several instances, since the revolution, this court had given relief, on proper cases being made out.

The first case after the establishment of the court, was decided in April, 1785. The court stated that the conduct of the wife was free from all blame, and that the husband's conduct was blameable, and warranted the wife in separating herself from him; and that the custody of the children belongs to the father, but the mother is entitled to access to them. It then decreed, that the defendant enter in recognizance to the master, for 1000*l.* with two sureties for 500*l.* to keep the peace towards complainant. That the complainant be enjoined from proceeding at law, against any person for receiving or entertaining her. That the estate which devolved to the complainant on the death of her brother, be settled by the defendant, to the use of the complainant, and her children, subject to her disposition among them; and that the defendant should execute the deeds necessary to give effect to the decree before the master, to trustees, for the purposes aforesaid. That it be referred to the master to examine into the value of the estate which the defendant obtained in marriage with the complainant, and of defendant's estate, and to report thereon. That the complainant have free access to her children, and they be allowed to visit her, whenever she desires to see them. And in case of sickness, she shall have the care of them till recovery. That the parties may apply from time to time in a summary way by petition

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for further or other directions, and that all costs be paid by defendant. The next case which occurred, was that between Mrs. Winifred Wilson, by her next friend, against her husband John Wilson. This was an application to protect the wife, in living apart from her husband, propter sevitiā, and in compelling him to settle a large property which she brought him in marriage, but which he had agreed by bond to secure. The court in the first instance, in March 1789, granted an injunction to restrain defendant from selling the personal estate, till the ultimate hearing and decree, and to account for the rents and profits with the master, reserv-



ing sufficient for the support of the husband and wife and child. Afterwards, in August 1791, the court established the bond, and protected the wife in living separate. Again, in the case of Elizabeth Jellineau, suing by her next friend, against her husband, Francis Jellineau, the court upon full argument made a decree so full and clear to the points in question that I will, for the benefit of the profession, state it fully, as it is not in print. "This is a bill filed by a wife against her husband, for a separate maintenance, on the ground of cruelty and ill conduct. It has been contended by defendant's counsel that this court has not the power to decree a separate maintenance for a wife, however harshly treated by her husband, unless a divorce has been previously obtained, or unless there be an express or implied agreement, on their separation for that purpose. The cases cited from the English books to establish this doctrine, may be good law in England, where the ecclesiastical courts have competent jurisdiction to grant divorces a mensa and thoro. But in this state there is no such court, and hard would be the lot of females if they alone should be excluded from the protection and benefit of the laws, and be obliged to submit to any degree of cruelty from their husbands, without any redress." If there were no precedents of the interference of the Court of Equity in cases of this sort, we must make them, rather than so wanton an abuse of power by a husband over his wife should escape with impunity. But this court has all the powers incident to a Court of

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Chancery, and its jurisdiction is not in \*any manner restricted, except in cases where the party can have complete and adequate remedy at law. The cases of *Huger v. Huger* [3 Desaus. 18] and of *Wilson v. Wilson*, [1 Desaus. 219,] determined in this court, have established precedents. It is true that the separate maintenance in these cases, was a provision out of the wife's estate. But it cannot be inferred from thence, that if they had not such estate, they would not have been provided for out of the estate of the husband. The complainant has made out her case by testimony. She has been insulted, despised, degraded below a negro slave, who was preferred to her, and threatened, (though not beaten) with a horse whip. He has calumniated her, by alleging the child she bore him is not his, without his producing any testimony to support the charge against her. He has attempted to prove that they lived happily together, but he has not succeeded in his proofs. The complainant's letter to defendant, which was given in evidence, shews a sincere desire to be reconciled to him, and to return home. And he said her letter deserved no answer. In his answer filed in this court, he has lavished his abuse on her, and denies that he is obliged to take her back or maintain her; and asserts that he would be

happier without her than with her, yet he has the confidence to say, that if the court orders him to receive her, he is ready to do so. It would be absurd to suppose after what has passed, that they would be happy together. Complainant is entitled to some provision for her and her child's maintenance. He once offered to maintain her, and now offers some provision for the child.—Referred to the master to enquire, and report his circumstances. To make the history of the doctrine as established by this court complete, I will mention that in another case, decided on full argument in May 1803, the court refused to allow alimony to a lady, who had lived apart from her husband for many years, and who never made any legal claim till the death of her husband. The court said she came too late after his death.

We come now to consider the circumstances of the case under discussion.

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\*It was clearly proved that the complainant was blameless, and even meritorious in her conduct from the time of her marriage to the final separation. This testimony was borne her by the nearest relations of her husband, his mother and his uncle. It was also clearly proved, that Mr. Threewits, the defendant, has been habitually in a state of intoxication, and when in that state, has generally abused and ill used his wife, and sometimes beat her, and put her life in jeopardy; in two instances most barbarously. This makes a strong and clear case for relief; else forlorn would be the condition of the female sex, and disgraceful the inefficiency of the laws.

But it is said, that all the instances of brutal conduct which might have warranted the wife separating herself from her husband, and obtaining the protection of this court, occurred before their last re-union; and that she went away the last time without any real ill usage, or any just provocation; and that her husband is willing to receive her back, and treat her tenderly as a wife ought to be treated.

If this was the real state of the case, and there was good reason to believe that this ouer was the genuine effusion of a mind repenting its past errors, and seeking occasion to remedy them, it would make a material alteration in the case. But let us look at the facts. It is manifest from this lady's whole conduct, and particularly by her repeatedly returning to her husband, on his promises of reformation and better treatment, that she was sincerely attached to him. It is equally manifest that he has violated those promises. He obtained her return the last time by a promise made upon oath, of reformation, on the article of excessive drinking, and with respect to his treatment of her. It is in full proof that he violated that oath, and was repeatedly drunk during the short period they stayed together the last time they

were united: at least three times at home, in the course of a month, and oftener when from home. He had always used her ill before when drunk; the presumption is, he would do so again; for he who could violate an oath for reformation and sobriety, could

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not hesitate to repeat the ill \*usage, to guard against which that reformation was promised. The uncle of the defendant who has acted a very friendly part to him, and advised him well, and offered him a large sum if he would leave off drinking to excess, swears that he does not think Mrs. Threewits could live in safety or comfort with him, unless he would leave off hard drinking; and of this he swears he has no hope, as he has repeatedly violated his oath; and has been drunk even pending the trial of this cause. The mother of the defendant too, expressed in the presence of Major Threewits, that she, (whose maternal partiality made her view every thing most favorably for her son,) regretted that her daughter-in-law had returned home the last time, she did not think it would be better than before. Appearances were, to be sure, kept up better than they had been. He was more cautious of offending in public by gross ill usage; but it is discernible, that he did not behave well; for we find through the reluctant narrative of the fond and perhaps excusable mother, that when they came out of the chamber, where she heard high words, that Mrs. Threewits complained, he had threatened to beat her; and he did not contradict her assertion; he was then intoxicated. The *evidentia rei*, too, is against him. The wife had earnestly sought a reconciliation.—He had written a stern letter, forbidding her to return, as it would be unsafe for her to do so. Yet she afterwards ventures, such is her attachment for him, to return and live with him, on his renewed promises to avoid excessive drinking, and to reform his conduct to her. He broke the first promise, though made under the sanction of an oath; and I must believe he broke the other promise of better treatment. There is some direct evidence that he did, and this is supported by vehement presumptions. Else why should a wife so attached, and behaving so correctly in all respects, abandon him, if he had reformed. But it is said her friends interposed and obliged her. There is no evidence of this after her last return. Her repeated returns when she had hopes of reform, shew that she acted independently of them, or that they were not inimical to her attempting to live

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with him, as long as \*there was any hope of her doing so in harmony; and the result of the enquiry lately made at the instance of the court, shews that she is acting from her own judgment and feelings, and refuses to return to her husband on a deep conviction that her life would not be safe with him.

Under these circumstances, I cannot do as I am desired to do; I cannot separate the evidence of his conduct at different times; I cannot shut my eyes to the light of the truth disclosed by the whole evidence. To be sure, if a woman forgives ill usage and returns to her husband, on promises of good usage, she shall not afterwards obtain the protection and assistance of this court, if those promises had been faithfully kept, and she again leaves her husband from caprice; but if there are clear indications of a breach of those promises, and some actual ill usage, she is not bound to wait for extremities as in the first instance, but may depart as soon as she finds the promises violated, and her husband returning to his old bad habits. She has a right to judge of the future by the past; and the court will connect the whole of his conduct, in order to form a correct judgment.

But it is insisted that the defendant has offered to take back his wife, and treat her kindly and affectionately as a husband ought to do. If this offer were made bona fide, in good earnest, with a view to keep his promises, and not merely to elude the effects of the breach of former promises, the court would most willingly listen to it, and endeavor to obtain its reception by the wife. But there is little reason to believe that this offer is made with that fixed intent to reform and behave better to his unfortunate wife, on which reliance can be placed. I speak the language of his nearest kinsman, the respectable old witness Major Threewits, when I say that I have no hope of this reform, and no confidence in these promises. His violation of all former ones forbids it; and it would be a miserable elusion of justice, to permit the defendant to disarm the court, and to send back his wife to his cruelty, on the faith of promises so often broken. Upon the whole, I am too well convinced that there is no resource for this lady, but in being

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protected by the \*court in living separate from her husband, and in having a provision made for her out of his property. The voluntary settlement made by him after marriage, though certainly not good against prior creditors, was good as between the parties. But as he reserved the possession and use of the negroes to himself, for life, that would not furnish any immediate supply. It is in evidence that he has diminished his own property, as well as that which he got by his wife, by extravagance and bad habits.—This renders it necessary that an immediate provision be made.

It is therefore ordered and decreed, that the defendant enter into bond or recognizance to the commissioner in the sum of \$1000, with two sureties, each in the sum of \$500, to keep the peace towards the complainant; and that the defendant be enjoined from proceeding at law, against any person for re-



ceiving or entertaining the complainant. That the complainant have free access to her children, and in case of sickness, she shall have the care of them till their recovery. The defendant having repeatedly declared his willingness to make a reasonable provision for his wife and children, the court would prefer that the terms should be proposed by himself.

It is therefore ordered and decreed, that the defendant do immediately lay before the commissioner, proposals for the establishment of a fixed fund for the support of his wife and children. And in the mean time he is enjoined from selling or otherwise disposing of any part of his personal estate, till the ultimate decree as to such provision. And farther, that the parties may apply from time to time in a summary way by petition for further or other dispositions; and that all costs be paid by the defendant.

Henry W. Desaussure.

The commissioner having made a report, the following additional order was made:

This case having been referred to the commissioner to examine and report upon the

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circumstances of the defendant, the commissioner reported there were debts due by the defendant, contracted before the 20th October, 1813, (the date of the deed of trust) to the amount of \$931, and that his estate now consists of eleven negroes, which are included in the deed of trust, and one other negro man slave, and some inconsiderable personal estate. The report also states that several negroes of defendant have been sold to pay debts. To this it must be added, from the evidence on the trial, that the defendant has expended a considerable part of his property since his marriage; so that his present possessions are not worth as much as his own property, or his wife's, were severally worth at the time of the marriage. Nor has he contributed in any degree to support or maintain his family since his separation from his wife.

On this report being taken up, it was proposed by the counsel for the complainant, that the court should order the delivery to the trustee of all property comprehended in the deed, to be managed by him, and applied to the maintenance and support of Mrs. Threewits and the children, as well as Mr. Threewits; and an offer was made, that the trustee would then pay off the debts contracted before the date of the deed, and which threatened destruction to the property. On the other hand, the counsel for the defendant proposed that a certain portion of the property should be put into the hands of the trustee, for the purpose of maintaining her, and that the remainder should be left in his hands to maintain himself and the children.

I have considerable difficulty in this case. I am reluctant to intermeddle with the rights of the husband and the father, beyond what

is forced on me by the circumstances. But the past conduct of the defendant leaves little doubt that his property would be wasted, and his family left in beggary, if every thing remained at his disposal. This raises a strong inclination to do something for the security of this unhappy family. I cannot however, on reflection, feel myself justified to take all the property of the trust deed out of his hands, for that property is for his bene-

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fit, as well as that of his family; \*and however improper his conduct has been, there is no evidence of such derangement as would justify the taking it wholly out of his hands. I must therefore restrain myself, and act upon the defendant's proposition rather than upon the complainant's.

It is therefore ordered and decreed, that the defendant do forthwith deliver up to Mr. Jesse Daniel, a trustee named in the deed of the 20th October, 1813, one half of the negro slaves comprehended in the deed, regarding number and value, (and separating families as little as possible) for the use and maintenance of Mrs. Threewits, the complainant, and of those children, who, by reason of their tender age, have been properly left in her care and custody; and that the said trustee shall thereupon pay off one half the debts stated in the report of the commissioner.

It is further ordered and decreed, that the other half of the said negro slaves shall remain in the hands of Mr. Lewellin Threewits, the defendant, for the use and support of himself and the eldest child which is with his mother; unalienable by him to any other purpose, and subject only to such debts as really have a legal right to be satisfied out of it; and he is directed to pay the other half of the debt reported by the commissioner.

Henry W. Desaussure.

By the consent of the parties, James Rogers, Benjamin Busby and Randolph Geiger, are appointed commissioners to divide the property, as above directed, with directions to include in the wife's moiety the negroes which belonged to her before the marriage.

From this decree and order, an appeal was made by the defendant on the following grounds, to wit:

First,—Because by her reconciliation and subsequent cohabitation with defendant, the complainant had waved all antecedent grounds for relief.

Second,—Because the decree in this case makes a provision for two children of defendant, out of a specific trust fund, contrary to the provisions of the deed creating such trust.

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\*Egan defendant's solicitor.

The case came on in the Appeal Court, and the following decree was made:

Court of Appeals, November, 1815.—Upon hearing counsel in this case, it is ordered

and adjudged, that the decree of the Circuit Court be affirmed, for the reasons given therein. and the appeal dismissed.

HENRY W. DESAUSSURE,  
(Signed) THOMAS WATIES,  
W. D. JAMES.

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#### Case LXXXIII.

Beaufort District.—Heard by Chancellor  
Desaussure.

The VESTRY OF ST. LUKE'S CHURCH v.  
The Reverend PHILIP MATHEWS.

(June, 1815.)

[Corporations ⇨289; Religious Societies ⇨9, 27.]

A clergyman entered into a contract with a vestry, who were not legally elected, but who were yet the vestry de facto, for a year's service in the church. He was ignorant of the illegality of the election, and there was no collusion. He performed the duties, and is entitled to the benefit of his contract. But in the ensuing year he entered into another contract with the same vestry, when apprized of the illegality of their election. This furnishes sufficient proof of collusion, and the court decreed a perpetual injunction against any suit for the services rendered the second year.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1242; Dec. Dig. ⇨289; Religious Societies, Cent. Dig. §§ 62, 191; Dec. Dig. ⇨9, 27.]

[Corporations ⇨54.]

[All by-laws of a corporation must be conformable and subordinate to the regulations of its charter.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 154; Dec. Dig. ⇨54.]

[Religious Societies ⇨7.]

[Where a statute incorporating a parish directed elections to be made in the customary manner, and the ancient law, which fixed that manner, allowed all persons residing in the parish, or paying taxes therein, etc., to vote at elections, a by-law of the parish that every person should pay \$50 in order to be entitled to the privileges of membership is a violation of the charter, and a mere nullity.]

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 18; Dec. Dig. ⇨7.]

[Religious Societies ⇨8.]

[A statute having pointed out the manner in which the election of church officers shall be made, a by-law made by the vestry of a church, varying the manner of election by requiring from electors a property qualification, is invalid.]

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 40; Dec. Dig. ⇨8.]

This case was argued, and the following decree was made thereon by the presiding judge:

This is a bill filed to restrain the defendant from availing himself of a judgment at law, obtained for a year's salary, alleged to be due to him on a contract made with the vestry and wardens of the Episcopal Church of St. Luke's Parish, to serve as rector of that church, from Easter 1811 to 1812.

The bill states "that the defendant was

rector of St. Luke's church, by the appointment of certain persons, who had usurped the office of vestry and wardens; and that the defendant was knowing to the usurpation, and therefore came in by collusion with them." That such was the intimate under-

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standing between the defendant \*and these usurpers, that the terms of agreement were that the defendant was to be paid as long as he chose to continue with them. That when the title of these usurpers came to be examined in court, on a motion for a mandamus, the application was dismissed, because the mandamus was not the proper remedy; of which cause of dismissal the presiding judge informed the parties, and apprized them, that the tenure by which those persons held their offices was illegal; yet after this the defendant renewed his engagements with the usurpers in question. That the complainants were not satisfied that the defendant is recognized as an Episcopal minister, by the church of this state. That the complainants, and the body of the parishioners never concurred in defendant's appointment, but regarded him as an unfit person, on account of the reports which had reached them, concerning his general character. That the defendant Mathews has obtained judgment at law, for the amount of one year's salary; and issued his execution, and threatens to levy upon, and sell the church.

The bill prays for an injunction against the judgment at law, and that the complainants may not be further troubled at law. The answer of Philip Mathews denies that he had any knowledge of any conspiracy between the vestry and wardens elected in April 1811, to retain their appointments, in despite of the wishes of the congregation. That defendant for five years before he came to St. Luke's Parish, had been rector of the Episcopal church of St. James. Santee. That receiving pressing letters from Capt. J. W. Alston, an officer of the church of St. Luke, encouraging him to expect the appointment to that church, with a salary of \$1,400, to be the minister for St. Luke's and Hilton Head, he was induced to leave his residence. That at that time the defendant was entirely ignorant of any contention existing in St. Luke's. That on his arrival, he found in office J. W. Alston and others, who appeared from the books of the said church to have been members and officers of the same for several years; by whom the defendant was engaged to preach every Sunday in said

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church, for a salary of \$800. \*That although the defendant was present on the day of election, in April, 1811, having come into the parish only the evening before, he was entirely unacquainted with the nature of the controversy between the conflicting parties of the said church. But he understood it at



that time to be a contention who should have the disposition of the funds of the said church. The defendant further states, that the charge of complainants, that the defendant is not a legally ordained minister of the Episcopal church is false and unfounded; he having been ordained by bishop Madison, who conferred on him the grade of deacon and priest's orders, on the same day, as would appear by exhibits filed with the answer. That the defendant is recognized by the parish of St. Helena, as its rector, and has been returned by the vestry to bishop Dehon, who promised to enrol his name; having been previously enrolled, to wit, in 1805, by the standing committee.

This defendant further states, that he agreed with the vestry and wardens of St. Luke's, to serve as rector for the year 1812, (which was his second year,) before the Court of Common Pleas had pronounced any decision on the question then in litigation; as the said vestry and wardens were then recognized by a large portion of the congregation. That J. W. Alston was either a warden or a vestry-man, for several years, before any dispute originated; and that this defendant did not abandon the said congregation, till he found that he could not reconcile them. That the charge of collusion with usurpers is untrue, for at the time of passing the bye-law, so much complained of, the defendant was in the enjoyment of the rectory of St. James.

Defendant defies his enemies to substantiate a single charge of criminality on him. That during the first year of defendant's services in the church of St. Luke's, the church was well attended on Sundays, and would have continued so, had it not been for party animosities.—That the defendant did not know the papers belonging to the church had been detained, till informed thereof by G. W. Morrall, who had detained them, be-

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cause, what \*was due to defendant, was withheld by men illegally elected. That the defendant having received no compensation for his two years' services, (so that his board and physician's bills remained unpaid,) commenced an action at law to recover his salary of the year 1811, and obtained judgment therefor; and his attorney proceeded to levy on any property he could find; that defendant was unwilling to levy on the church, but the present vestry refused to pay him in any other way. The answer denies combination.

On the trial of this cause, the following evidence was produced:

The act of the legislature of the 29th February 1788, incorporating the Protestant Episcopal Church of St. Luke's, and sundry others therein named, by which it is enacted, "that the vestry shall be elected in manner accustomed." To shew what "the manner accustomed" is, the act of the 30th November, 1706, (see Trott's Collection of the Laws, No.

260,) was produced. By the 30th sect. p. 138, it is enacted, "that on Easter Monday in each year, the inhabitants of each parish, that are of the religion of the church of England, and that do conform to the same, and that are either freeholders within the same parish, or that contribute to the public taxes, and charges thereof, or so many of them as shall think fit to attend, shall meet at their parish church, (or for want of one, at some appointed public place,) and there elect seven sober and discreet persons, that are of the religion of the church of England, and do conform to the same, and that are either freeholders, within the same parish, or that do contribute to the public taxes and charges thereof; to be vestry-men, for the said parish, for the space of one year." And church wardens are to be annually elected at the same time, and by the same persons.

To shew that the election of vestry men and wardens of St. Luke's, which took place on Easter Monday in the year 1811, was not made in the manner accustomed, the journals of the proceedings of the vestry of St. Luke's were produced, by which it appeared, (see page 59,) that on the 8th of April 1811, the

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then vestry \*entered into a resolution, which they called a bye-law, by which it was enacted, that every person desirous to join the church of St. Luke's, should pay the sum of \$50, or he should not be admitted a member, nor be entitled to its privileges. By the same journal, page — it appeared, that an election of vestry men and church wardens took place on the 15th April, when Mr. Josias W. Alston, and sundry other persons, were entered as elected. It also appeared, by the same journal, that on the 16th of April 1811, a resolution was entered into, by the vestry so chosen, to employ attorneys to defend the rights of the vestry. And that on the 27th April, 1811, the vestry resolved to authorize the church wardens, to employ the Reverend Philip Mathews, as the rector of the church, for a year, at \$800 per annum. And that on the 2d Nov. 1811, several persons were admitted to be members of the church, who were approved by the vestry. So also, on the 7th of March 1812. On the 30th March 1812, there appears to have been an assemblage of the vestry, to try the Rev. P. Matthews, on a charge of infidelity, said to have been made by St. R. Proctor; but Mr. Proctor refusing to give evidence, as he denied the power of the vestry, Mr. Mathews was acquitted.

By the same journal it appeared, that on the 28th of Nov. 1812, the vestry entered into a resolution to employ Mr. Mathews as the minister of St. Luke's, till he chose to resign by letter, at \$600 per annum; which was done on Mr. Mathews' own motion. There was also a letter by the vestry to the bank in Charleston, dated 12th July, 1811, which related to the money of the church, of which they claimed the disposal, though

its payment to them was forbidden by those who thought them illegally elected. The minutes from the court of sessions were produced in evidence, by which it appeared, that a rule was taken out on the — day of April 1811, for the vestry and wardens of St. Luke's, to shew cause why the election should not be set aside as irregular.

Several witnesses were called. Those on the part of the complainants testified, that they were present at the election of vestry-

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men and church wardens, for St. \*Luke's church, in April 1811. That the new rule, requiring the payment of fifty dollars as a qualification to vote was enforced. That they never heard of the rule till the day of election; and that a much greater number of persons were rejected from voting, by the operation of that rule, than the number who voted. That the great bulk of those who were rejected, were Episcopalians; and that they would have voted against those who were elected vestrymen, as they expressed their sentiments openly; but were prevented from voting by the operation of that bye-law. Their votes would have changed the election. The witnesses did not see any of those who had been actually subscribing, and recognized members of that church, prior to the bye-law, refused permission to vote; but all who were entitled, and then came for the first time to subscribe and to vote, (and these were many,) were refused unless they paid the fifty dollars, required by the new bye-law; and many of the old members refused to vote on account of that law. Almost all who were rejected on that day, became regularly members of the church, as soon as they could.

Mr. Mathews was present on the day of election, and saw and heard the contention among the people.—The bye-law was produced and discussed, and all present knew of it; and one of the witnesses thought he, Mr. Mathews, must have known that the bye-law was deemed illegal. Another of the witnesses heard Mr. Mathews answer Mr. J. W. Alston, that he had got one of his letters of invitation to come to the parish:—Also heard him lament the differences existing, and say, that he would leave the parish speedily.

Mr. Mathews said, about the close of his stay in the parish, that there were great abuses in the books of the Church, which ought to be put to rights.

Two witnesses were produced on the part of the defendant, one of them testified, that he did not see any of the old members of the church, (former members,) repelled from voting. That several persons present were strangers, to wit, Dr. Proctor, and Mr. Patterson.—Some came from curiosity, and some

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from other churches. \*That Mr. Mathews was present, but he was a mere stranger. The witness heard him say, that he regretted

the dissensions he saw among the people, and it would be his duty to heal them.

Another witness said, that he attended once at the church, soon after Mr. Mathews was pastor, and he had a full congregation. On his examination he said, that he had learned from Captain Josias W. Alston, that the object of the bye-law was to keep others out, who might incline to put out the then vestry, and put in others.

I have been thus full in stating this case, from the importance of the principles involved in it, as well as from the great interest taken in the cause, by a respectable church and community.

The questions made in the cause were as follows:

First,—Whether the defendant Philip Mathews, was a regularly ordained episcopal minister of the gospel, entitled to perform the functions of a clergyman of that denomination.

Second,—Whether he was regularly appointed rector of St. Luke's, by a vestry regularly elected, and duly qualified to act in that behalf.

Third,—Whether the persons acting as vestry-men, if not duly elected, were such a vestry de facto, as would authorize their acts, and bind the church to pay for services actually performed.

Fourth,—Whether the defendant, P. Mathews, colluded with a vestry, illegally elected, and thereby deprived himself of the benefits of the contract made with them, as a vestry, and performed by him.

The first question was not discussed, for notwithstanding the doubt stated in the complainant's bill, the defendant gave a distinct and positive answer, affirming that he was a regularly ordained clergyman of the episcopal church, which he supported by documents, and which were not contradicted by any testimony. The counsel for the complainants, candidly gave up this point, for defect of proof; and we must consider Mr. Mathews as a regularly ordained minister of the gospel, capable of performing all the functions of that holy office, in the protestant episcopal church.

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\*July, 1815.

The second question, involves two points: First, Whether Mr. Mathews was regularly appointed by the vestry, to be the rector of St. Luke's parish, in the year 1811? Second, whether that vestry were regularly elected, and duly qualified to act in that behalf?

There does not seem to be any difficulty on the first point. The entry in the journals of the church shews that Mr. Mathews was duly appointed by the vestry, on the 27th of April 1811, to be the rector of the church of St. Luke's, for one year, at the salary of



\$800, and the evidence shews that he accepted the office, and performed the duty.

The second point requires more discussion. The right of a corporation to make bye-laws is not questioned, but they must be conformable and subordinate to the regulations of the charter; and they must be reasonable. If we test by these rules the bye-law made a few days before the election, and kept secret from all but a few, until the day of election, requiring that each inhabitant of the parish, otherwise entitled to vote, should be obliged to pay \$50, before he should be allowed to vote, we shall find that it will not stand an examination. The act of incorporation of 1788, directed elections to be made in the customary manner, and the ancient law which fixed that manner, allowed all persons residing in the parish, or paying taxes therein, and conforming to the Protestant Episcopal Church of England, to vote at the elections for the vestry and wardens. The new bye-law, requiring a new qualification to entitle persons, otherwise qualified, to vote, was therefore an attempt to transcend the powers given, and to alter the qualification of voters, and was a violation of the charter. The bye-law was therefore a mere nullity. The manner too of the enactment, a few days before the election, and kept secret till the people were assembled, when few could be prepared to comply with the new bye-law, and the object avowed to one of the witnesses of defendant, to exclude persons, who might interfere with the then vestry, rendered this an unreasonable bye-law. And it was unreasonably exercised; for we perceive, that an attempt was

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made \*by the vestry, to make the right of the voters depend upon their approbation, even when they complied with the bye-law, by paying the fifty dollars required. See two entries to that effect. It is true, it is said in 3 Burr 1833, that when the electors are described in the charter, their number may be restrained by a bye-law, in order to avoid riot and confusion. But it is added, that a bye-law cannot strike off an integral part.

This power, if it be really lawful to a corporation, must be exercised with great caution, with no sinister designs, and without counteracting the charter, or substituting a new rule, to entitle it to support. It deserves no support, under the circumstances of this case.

Upon every ground therefore, I am satisfied, that the bye-law was unwarranted and illegal, and void; and that those, who by virtue of its sudden and unexpected application, (as was pretty strongly proved by the witnesses,) were elected vestry men under it, were illegally elected; and though they might not perhaps, be said to be usurpers, as they held under colour of an election, however irregular, yet they were unlawfully

in, and held their office de facto, and not de jure. And this brings us to the consideration of the 3d question, whether the persons acting as vestrymen, were such a vestry de facto, though not de jure, as would authorize their acts, and bind the church to the contract made with Mr. Mathews? And it does appear to me, after the best consideration I can give the case, that they were a vestry de facto, and that their contract with Mr. Mathews (unless we suppose, he acted by collusion with them,) bound the church, and entitled him to the payment stipulated, when he had performed the service. In the case of the People v. Collins, reported 7th Johnson's New-York Reports, 549 to 554, it is laid down by the court, in conformity to the old cases, that the acts of commissioners, though coming in, or acting irregularly, and liable to a penalty, or to be turned out, were the acts of commissioners de facto, since they came to their office by colour of title; and that it is a well settled principle of law, that the acts of such persons are

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valid, when they concern the \*public, or the rights of third persons, who have an interest in the act done; and this rule is adopted, to prevent a failure of justice. "The limitation to this rule, is as to such acts as are arbitrary and voluntary, and do not affect the public utility." So also the King v. Lisle, Andrews, 263, 5. T. Rep. 56. Cowp. 413. Salk. 43. Lord Raym. 1244.

During the year for which these men were so irregularly elected, they could be removed, only by a quo warranto. 2 Term Rep. 239. 1 East, 78. 1 W. Blackstone, 445. 3 Burr. 1454. 4 Burr. 2008.

In the People v. Runkel, 9 Johnson's Rep. 147 to 159, the court again laid it down, that trustees, even if not regularly elected, were at least trustees by colour of office, and their acts would be good.

In 1 Woodeson's Lectures, 491, it is laid down from 2 Lev. 242, that if an officer de facto, perform a corporate or judicial act, as if a mayor seal a bond, or a sheriff pronounce a sentence, their proceedings are valid, though they are not de jure qualified for their respective stations. There must however have been an election, (however irregular,) otherwise he is a mere usurper. Being sworn in, and acting, do not, without an election, constitute an officer de facto. 2 Stra. 1000. Now the act done by the vestry de facto, who came in by colour of title, in the case under consideration, was precisely the act, which, if they had been duly elected, they ought to have done. They appointed a clergyman to fill the vacant church. It was not an arbitrary act, and can scarcely be called a voluntary one, for it was a duty to fill the vacancy. The contract made by the vestry, in this case, with Mr. Mathews, to serve the congregation as their minister, for a year, seems to be analogous to the presen-

tation and induction in England, which put the clergyman in complete possession of the benefice, though admitted on a wrongful and illegal presentation; or though insufficient and illiterate, for he is a parson de facto, and the acts creating him so, are not mere nullities. 1 Woodeson, 315. A clergyman presented by a stranger, that hath no right,

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is not liable to be dispossessed, \*even by the patron, but he lost his turn of presentation by it; because the intent of the law in creating this species of property, being to have a fit person to celebrate divine service, it preferreth the peace of the church, (provided the clerk were once admitted and instituted,) to the right of any person whatever. See 3 Black. Com. 342, 3. Unless therefore, there was collusion, between the vestry de facto, and Mr. Mathews, I consider his appointment valid, and that he is entitled to the stipulated reward for the first year of his services.

This brings us to the consideration of the 4th question, which is, whether Mr. Mathews did collude with the vestry de facto, knowing the illegality of their election? And is he thereby subject to be deprived of the stipulated salary, after performance of the service? The defendant Mr. Mathews, in his answer positively denies the collusion charged, and states, that being in possession of a benefice, in St. James' Santee, he was invited by an officer of St. Luke's Church, whose legality, at that time, has never been questioned, to come to St. Luke's Parish, to be employed in that church. That he arrived the evening before the election of the vestry and church wardens, and was present at the election on the 15th April, 1811. That he saw much discord, but he was not acquainted with their regulations, nor could he judge of the points in controversy among the parties. That he verily believed the point in dispute related to the disposition of the funds of the church. He was appointed rector of the church by the vestry elected in April, on the 27th of that month, for one year, at 800 dollars. And he remained in the parish and performed the duties of his station. To the peremptory denial of collusion, made by the answer, there is nothing opposed, but the proof, that Mr. Mathews was present at the election, and saw the strife, which prevailed; and one witness thought he must have heard the discussion about the bye-law, and have known of its illegality, and yet consented to be employed by a vestry so elected. Whence the collusion is inferred. It is indeed very probable, as the witness supposed

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that Mr. Mathews heard the discussion on the day of election. But it would be too much to infer, contrary to his express denial on oath, that he understood the subject so well, as to be able to determine on the legality of the bye-law, and the regularity

and validity of the election. It required particular attention to the facts, and some legal discrimination to decide upon the validity of the proceedings. I cannot therefore say, that I am prepared to pronounce, that such a case of culpable collusion has been made out, as would justify the court in setting aside the contract, where the party has performed his part of it.

It is said that a rule of court was taken out in April 1811, for the vestry to shew cause, why a mandamus should not go out against them. But Mr. Mathews, who was appointed about the same time, is not proved to have known of this rule; and if he had, it is not certain that he was bound to act upon it, until the determination of the court was known. It would be too great a hardship on a clergyman to make the payment of the sum due him for services performed, to depend on the regularity of the election of the vestry, and upon the correctness of his legal judgment upon the points in controversy, between the parishioners. A very flagrant case of misconduct on his part, and of plain and culpable collusion with the party, palpably in the wrong, would alone warrant the interference of this court, to deprive him of the benefit of his labours. And it is of great importance throughout this case, to remember that the act done, and complained of, was not in itself incorrect, but was precisely the act which duty required the vestry, whether de jure or de facto, to perform, to wit, the filling the church with a clergyman of the Protestant Episcopal church, to perform the duties of that holy function.

Upon the whole, therefore, I am of opinion, that Mr. Mathews was entitled to the salary stipulated to be paid him for one year's service from April 1811, to April 1812. I do not know whether the proceedings in this case are so made up, as to require the judgment of the court upon the claim of Mr. Mathews, for compensation, from April 1812 to the time he left the parish. But the

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prayer of \*the bill, for relief, seems to reach the whole case, and the parties went into evidence, on the contract made in Nov. 1812. So that I presume the judgment of the court is desired. And as it may prevent further litigation, I have no objection to give it.

Upon that point, I have no doubt Mr. Mathews had been long enough in the parish, to know the whole controversy; the books and proceedings were under his eyes, and he must have known, that the judgment of the court of law was against the legality of the election of the vestry, his patrons. With a full knowledge of all these circumstances, and that the vestry was an illegal body, acting without authority, and against the will of the congregation, he renews his engagement with them, nay it is on record, that he himself is the mover in the vestry that he should be employed, indefinitely, until he



chose to resign by letter. This was a plain and wilful collusion, of a culpable nature, and he became an usurper. The congregation in disgust withdrew from him, and he frequently had no auditors, and was obliged to abandon the church. If, therefore, Mr. Mathews has wasted his time uselessly to others, and without benefit to himself, it is his own fault. He is not entitled to compensation.

It is therefore ordered and decreed, that so far as the complainant's bill seeks relief against the judgment at law, for the year's salary claimed by the Rev. Philip Mathews, under his first contract with the vestry de facto, of St. Luke's Church, the same be dismissed, and the injunction dissolved. And that so far as regards any demand which he may have against the Protestant Episcopal church of St. Luke's parish, under, or by virtue of any subsequent contract, with the persons claiming to be the vestry of said church, or for services alleged to have been rendered by him, that he be forever enjoined from prosecuting the same.

It is further ordered and decreed, that the costs of suit be paid by the complainants out of the funds of the church.

(Signed) HENRY W. DESAUSSURE.

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\*General Huger and Mr. Pettigru for complainants. Mr. Morrall for defendant.

From this decree there was no appeal.

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#### Case LXXXIV.

Camden.—Tried before Chancellor James.

HALLOWAY JAMES v. J. MAYRANT.

(June, 1815.)

[*Husband and Wife* ⚭31; *Judgment* ⚭533.]

The estate of the wife being directed by a decretal order of 1795, to be settled to the use of herself and husband, and the formal deeds being not as yet executed; the court, on application of the parties, and new acquisitions of property, in 1808, decreed the whole to be conveyed in trust for the separate use of the wife; the formal deeds are executed, and by order of the court, bear date as of the time of the original decree. This settlement shall not operate to bar a creditor of the husband, whose demand arose subsequently to 1795, and prior to the order of 1808; but such creditor shall be paid out of the husband's interest in the annual proceeds of the property, as the decree of 1795 imported. And the debt in this case having also arisen from supplies advanced for the benefit of the trust estate, though charged personally to the husband, is, according to former decisions in this court, a distinct and valid ground of relief, and the creditor is relieved on both grounds.

[Ed. Note.—Cited in *Boggs v. Reid*, 3 Rich. 451, 464; *Montgomery v. Eveleigh*, 1 McCord, Eq. 269; *Frazier's Trustees v. Center*, Id., 276; *Douglas v. Fraser*, 2 McCord, Eq. 112; *Henshaw v. Robertson*, Bailey, Eq. 316, 318; *Mag-*

*wood & Patterson v. Johnston*, 1 Hill, Eq. 233; *Reid v. Lamar*, 1 Strob. Eq. 37.

For other cases, see *Husband and Wife*, Cent. Dig. § 188; Dec. Dig. ⚭31; *Judgment*, Cent. Dig. § 983; Dec. Dig. ⚭533.]

[This case is also cited in *Shumate v. Harbin*, 35 S. C. 530, 15 S. E. 270, without specific application.]

The complainant in his bill states, that some time previous to the year 1808, he was a factor and commission merchant in Charleston, and was employed by John Mayrant to sell the crops of a trust estate, which he sent him for that purpose; that he did sell them; and furthermore, purchased for and supplied the trust estate with sundry articles, such as were proper and necessary for its support. That he did these things by the direction and request of John Mayrant, who acted as agent for William Mayrant the trustee, and Mrs. Isabella Mayrant, the cestui que trust, under authority by them to him delegated for that purpose. That in this manner an account was raised to the amount of \$483, for which, with interest from the 5th November 1808, John Mayrant by note promised to pay, "it being for goods for the use of the plantation."

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\*The complainant further states, that John Mayrant is an insolvent debtor, and that he never had any personal credit with him, the articles being furnished through his authority, but on the exclusive credit of the trust property; and that he conceives the trust property, having received the benefit, bound to make compensation.

The prayer of the bill is, that out of the profits and proceeds of the trust property, the trustee may be directed by the court to discharge the complainant's demands.

The defendants answer separately.

John Mayrant admits he employed complainant as his factor, but denies that he acted therein as agent, for either the trustee or cestui que trust. He submits that in 1808, he surrendered for the benefit of his creditors all his estate, consisting of upwards of thirty negroes; and says, that during the time complainant was his factor, he had hired negroes, and planted lands not at all connected with the trust property; and that complainant's demand arose previous to the surrender of his estate.

He further says, that there was no understanding at the time the debt was contracted that the trust property was to be charged with it;—that he first gave his note for the balance due complainant, and afterwards, at the earnest importunity of complainant renewed it, inserting the words "for the use of plantation." He admits some of the articles may have gone to the use of the trust estate, but says, the trust deed was not executed until some time after the account was raised. He filed a bill against the executors

of Jared Nelson, praying an account of a legacy, which upon hearing was ordered to be settled upon Mrs. Isabella Mayrant, and not to be subject to his debts. This was about 1795, the execution of this settlement was not perfected till 1808, when it was ordered to be executed in strict settlement, and to take effect from the date of the original decree.

He further says, no power was ever delegated to him by either William Mayrant, the trustee, or Mrs. Isabella Mayrant, the cestui que trust, to charge the trust estate in any

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manner whatever. He says the original entries of complainant shew him to be the sole debtor, and that the attempt to fix the debt upon the trust property, was an afterthought of complainant. He says, when he failed in his estate it was very considerable, and more than sufficient to procure credit to a greater extent than he obtained with complainant. He admits he is justly indebted in the sum contained in the note, and prays to be dismissed with his reasonable cost and charges.

Mrs. Isabella Mayrant answers and says, she is ignorant of the terms upon which the supplies were furnished her husband John Mayrant, other than she has understood from him. Does not know that any goods were furnished upon the credit of the estate settled upon her, that were not paid for out of the proceeds of that estate. She never authorized her husband to take up any goods upon its credit, nor delegated to him any agency by which he could charge or encumber it. She cannot admit the justness of complainant's demand, nor consent with her separate property to pay the debts of her husband. She does not know whether the goods furnished for her separate estate, were not paid for, if any ever were so furnished. She further says, that the account appears to be in the name of her husband, and being a feme covert with only an adequate separate maintenance secured to her, prays the interposition of the court in her behalf—and prays the benefit of the statute of limitations against so stale a demand as the complainant's and to be dismissed, &c.

William Mayrant says he is a stranger to the things contained in the complainant's bill, except to the execution of the deed of trust in favor of Mrs. Isabella Mayrant, in which he is trustee; knows nothing of the contract between complainant and John Mayrant for the supplies furnished—never delegated to John Mayrant any agency by which he was authorized to sell or encumber the trust property. He further says, that previous to the surrender of John Mayrant's property for the benefit of his creditors, he had considerable of his own, which although

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afterwards settled in pursuance of an original decree of the court of equity, might have been considered as the property of John May-

rant. After the debt was contracted this property was ordered to be settled in strict settlement, and submits this decretal order as a bar to the debts contracted anterior thereto. Submits that no acts of John Mayrant, whether authorized or not by the cestui que trust, can affect the trust property. Admits that the complainant applied to him for payment, but was told he had not the power to settle the demand. Pleads the statute of limitations against it, and prays to be dismissed with his costs and charges, &c.

Gilbert Dinkins, was sworn as a witness. He lived on the plantation said to be John Mayrant's, as an overseer, from 1805 till 1809, inclusive. During this time John Mayrant was the only person who directed the witness in the management of the place; he contracted with witness; took charge of and sent the crops from the plantation, and had the entire control of every thing thereon. John Mayrant also planted for part of this time, a little land near his dwelling house—the negroes worked there occasionally, sometimes one set of them and sometimes another. The little cotton there raised was sent down to be ginned, without any account being taken of it. It in fact was, with that raised upon the plantation, all one crop. He never knew any thing of the property being Mrs. Mayrant's until some time after John Mayrant took the benefit of the insolvent debtor's act, in 1808, about the first of September of that year. William Mayrant on Sunday told witness to send certain negroes, naming them, to Sumterville, and have them there at an early hour the next day. He sent off the negroes early, and himself followed them. After arriving at Sumterville they were set up and sold. He was crier—four or five persons only were present, until the sale was nearly concluded. Except the two last, William Mayrant was the only bidder for them;—and says, some one observed near the conclusion of the sale, that it was not yet 11 o'clock.

William G. Richardson was sworn. He received from Dr. Pringle the mortgage un-

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der which these negroes were sold. He was present and took an account of the sale;—few persons were present;—the sale commenced at 10 o'clock. Some others came up just as the sale was concluded. The two negroes sold the last, were bid up to nearly double the amount of any other two. The whole twenty eight brought upwards of five and forty hundred dollars. They were purchased by William Mayrant as trustee for Mrs. Isabella Mayrant, who mortgaged them for the payment of the money;—it was after 11 when the sale concluded. He would not have credited John Mayrant to any extent;—and thought 10 o'clock the legal hour of sale.

Several other persons being sworn, said the sale was before 11 o'clock.



The complainant produced several letters of John Mayrant, dated in 1805, 1806 and 1807, which shewed him to have the entire control and disposal of the crops, and the sole management of every thing relating to the planting interest. The complainant also produced certified copies of the decretal order, made 28th of March, 1795, settling a legacy recovered by a suit in court, upon Mrs. Isabella Mayrant, Capt. John Mayrant, and their issue, under the direction of the master; and also of the decretal order made 28th of April 1808, directing John Mayrant to execute a deed of settlement, to be dated as of the 26th March, 1794, to and for the separate use and benefit of Mrs. Isabella Mayrant, during her life, and from and after her death, to and for the joint and equal use and benefit of the children of the said Isabella and captain John Mayrant, equally to be divided among them, and to comprehend all the negroes, (except those which had been sold for land,) that were the subject of the legacy, with their issue and proceeds.

After argument, Chancellor James delivered the following decree:

The complainant alleges in his bill, that he was employed by the defendant, John Mayrant, as a factor and commission merchant, in the business of a trust estate, of which the other two defendants are respectively, Wm. Mayrant the trustee, and Isa-

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bella Mayrant, wife of John \*Mayrant, a cestui que trust. That as a commission merchant he supplied the trust estate, upon its own credit exclusively, with articles to the amount of \$483, with interest. That the said John Mayrant is insolvent, and acted in the said business only as agent for the said estate.

The above contains a statement of all that is relevant in the bill of complainant; but a ground taken in the argument, renders it necessary to state a few matters extracted from the exhibits.

The property settled was recovered by John Mayrant, in right of his wife, in the Court of Equity, and as is usual in that court, when property can only be recovered by its aid, it was ordered to be settled upon her. The decretal order was made on the 28th March 1795, and among other matters directs as follows: "That the legacy recovered from Mathew Neilson's estate, be settled on Mrs. Isabella Mayrant, and Capt. John Mayrant, and their issue, under the direction of the master. Also, that the sum of \$32*l*. old currency, being the balance due on the statement of the accounts from Jared Neilson's estate, be paid Capt. John Mayrant, out of such funds as the court may direct." Upon this order, no settlement was made, until in April, 1808, when an ex parte application was made in behalf of Mrs. Mayrant, by her next friend; and a separate estate was ordered to be settled upon her by the Court of Equity. That

the present debt was originally contracted between the time of the first and second order above mentioned.

The defendants, John Mayrant, his wife Isabella Mayrant, and the trustee William Mayrant, have all answered separately; the two last plead the act of limitations, all of them deny that the articles mentioned by complainant were furnished on the credits of the trust estate, and they aver that J. Mayrant was not employed as agent in the business of that estate.

Thus the parties are at issue upon the point, whether the goods were furnished upon the credit of the trust estate? To prove his allegations, which are all denied, the complainant has produced certain titles of John Mayrant, directed to him; but these make

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no mention of any \*trust estate or agency; and only shew that John Mayrant in his own name, requested that certain articles should be sent to him, which were sent agreeably to his request. The letters shew that the credit was given to John Mayrant, and not to the trust estate, and therefore operate against the claim of complainant. But he also relies upon the wording of the note of J. Mayrant, given for this debt, which expresses that it was "for value received in goods for the use of the plantation." This reasoning has but little weight, for since he has shewn no authority from the trustees to furnish the goods, and has failed to prove that they were purchased on the credit of the trust estate, no form of words which John Mayrant could use would be binding.

The only claim made in the bill was upon the property settled; but at the hearing, the ingenuity of counsel has suggested other points, so as to make a serious charge by argument, if not by bill. The whole of the attempt to make out the sale of the negroes fraudulent is of this cast; for there is not a word said about it in the bill. However there was one ground taken, which I think it incumbent upon me to notice, namely that by the decretal order of the court of 1795, Mrs. Mayrant cannot claim a separate estate, and that there is a life estate in the husband subject to the claims of this creditor, whose demand arose prior to the second order of 1808. I confess there is much difficulty upon this question, and it has engaged much of my attention. The power exercised by the court in directing settlements, appears to be unsettled by any acts of the legislature upon this subject, because the orders made are of such a public nature, that all men about to give credit are bound to take notice of them. The Court of Equity has certainly the power to make a construction of its first order, so as to bind creditors subsequent to the second one, but as to creditors prior to the last one, it seems that the construction must be left open to other courts, unless the case in equity was in the first instance retained for further

decision. Then the questions are, what was the intention of the first order of 1795, and was the case then concluded? First,—it was

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\*intended to provide for Mrs. Mayrant and her children. But if such provision was made independent of her husband; the intention of the court would be frustrated. The legacy was vested in negroes, and from the nature of that property, if he was left to dispose of it during life, at pleasure, little might ever come to the wife and children. Secondly,—The intention was to provide for the children of the marriage. The legacy recovered was decreed to be settled upon Mrs. Mayrant, Capt. John Mayrant, and their issue. Now the word issue is a word of purchase, and strongly implies that the court intended a strict settlement. But again, in the third place, the legacy was to be settled "under the direction of the master." And further, "the balance due from Jared Neilson's estate was to be paid to John Mayrant out of such funds as the court might direct." Then from the wording of this part of the order, it is plain that the case was left sub judice, and the court meant to exercise a further control over it. They have explained and enlarged the meaning of the former by the latter order, as they would have done articles by a settlement. It has been fashioned according to the original intent, by directing a separate estate; which in this short hand way, and without filing a bill of review, cannot be subjected to the claim of complainant. It was strongly urged at the hearing, that the trust estate received the benefit of the supplies, and therefore, ought to make compensation. Had they been furnished through the proper authority, the conclusion would be true; admit it without adding this fact to the premises, and most marriage settlements will become nullities. Although the doctrine be well settled, let us briefly examine their merits, and ascertain what would be their loss. When a husband cannot obtain possession of his wife's property but by the aid of this court, it is an exclusive branch of its jurisdiction to direct a provision for her and her children. The maintenance of the wife may be of importance in many instances, but to provide a certain fund for the education of the children, is in every view a most seri-

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ous concern. When the property moves from the wife, it is but reasonable, that she should be placed as much as possible beyond the reach of the misfortunes of the husband; the children too may often be innocent sufferers. When such a provision is made in a public manner, and according to authorized forms, no injustice can be done the creditor, because he may deal only for cash if he chooses; or before he parts from his goods, he should be vigilant and see that he is secure. Settlements before marriage are also founded upon the same good reasons; and

besides have the sanction of immemorial usage. They have had the approbation not only of the enlightened, but also of the savage nations. We have derived them from the British laws; they borrowed them from the Roman; and it is said, with great appearance of truth, that Justinian received and adopted the principle of them into the civil code, from the ancient Gauls and Germans. At present, accompanied by the civil law, this principle obtains in a great part of modern Europe. Thus, such settlements appear to be at once reasonable, and to have the sanction of the most enlightened part of the human race. Then to permit them to be infringed or evaded, would be contrary to the duty of this court. But to leave this one at the discretion of the husband, and to suffer him at pleasure to make his wife's fortune liable for debts, would be to defeat the very end for which it was created. It can be made liable only through proper channels, and by prescribed forms. The complainant has not approached it through these, and therefore he is remediless. This case may be a hard one, but a general good is not to give way to private convenience.

Therefore, it is decreed, that the bill of the complainant be dismissed with costs.

W. D. James.

The complainant appealed on the following grounds:

First,—That in point of fact it was established by proof at the trial, that when complainant's debt was raised, John Mayrant was either agent for trustee or owner of the

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property, which was afterwards decreed \*in strict settlement, and could at any rate by a contract for its benefit, bind that property.

Second,—That the property which had received, previous to the strict settlement of 1808, the benefit of supplies furnished by the complainant, and through John Mayrant, the only authority at that time recognized as the proper one, ought now to make compensation

Third,—That the bill claimed only against the property settled in trust, in 1808, yet when the claim arises on a contract for the support of that property before the settlement, the court will notice the means by which that settlement was procured when given in evidence, and leave the parties to the contract in the same relation to each other after the settlement, they were in before it.

Fourth,—That after the decree of 1795, executing the estates therein ordered, those estates were no longer under judicial control; the intent of the court being declared in the words of the judicial order of 1795, could not in 1808, become the subject of implication.

Fifth,—That the meaning of the decree of 1795, might be explained and enlarged in



1808, in an *ex parte* case, yet such explanation and enlargement of the latent intention in the first decree, are not to defeat the rights of creditors, by taking away a particular estate given by that decree, on which those rights have in the interim attached.

A. Silliman, Complainant's Solicitor.

The appeal was heard by the chancellors Desaussure, Waties, James and Thompson. But the judges being divided in opinion, the court reserved the decision of the case, in order to have the benefit of the judgment of chancellor Gaillard, who was detained by illness.

July, 1815.

Afterwards the judgment of the court was delivered as follows:

The complainant seeks to subject to the payment of his debt the profits of a trust estate. The trusts of which were created and declared by decretal orders of the Court of Equity in 1794 and 1795.

The first was made on the 28th of March, 1794, Mayrant and wife against Davis, exec-

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utor of Jared Nel'son. In this case the court confirmed the report of the master in some matters, not necessary to be noticed here, and ordered that on a final report of the master, whatever balance might be found due to Mr. Mayrant in right of his wife, should be considered as settled on his wife in manner as should be directed by the court. On the 28th of March, 1795, the balance due being ascertained, the court ordered that the same should be settled on Mrs. Isabella Mayrant, Capt. John Mayrant and their issue, under the direction of the master.

On the *ex parte* application of Mrs. Mayrant, by her next friend William Mayrant, on the 28th of April, 1808, the court ordered the property which had been purchased with the above balance to be settled. The order runs thus: "It is ordered and decreed that the said John Mayrant do forthwith execute a settlement, to be dated as of the 26th day of March, 1794, pursuant to the intent of the court in the said decretal order, that is to say, to and for the separate use and benefit of the said Isabella Mayrant, during her life; and from and after her death, to and for the joint and equal use and benefit of the children of the said Isabella and John Mayrant, equally to be divided among them; that the said settlement do comprehend all the negroes that were purchased under the said decree, with their issue and proceeds, save only those particular negroes that have, with the assent of the said Isabella Mayrant, been applied to the purchase of the tract of land aforesaid, from John Greening; and as to that land, it is further ordered and decreed, that William Mayrant, who petitions as the trustee and next friend of the said Isabella Mayrant, do also execute a declaration of trust, to bear date the 1st of

January, 1795, the time when the negroes were appropriated and the land purchased, to the same uses, intents and purposes before prescribed; and that the master do cause the necessary deeds to be prepared; and that William Mayrant be named a trustee in the settlement." The necessary deeds were prepared and executed. The settlement of the negroes on the 14th of June, 1808, but bearing date on the 26th of March,

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1794; and the declaration of trust \*of the plantation, on the 14th of June, 1808, but bearing date on the 1st of January, 1795. The debt to Mr. James was contracted after the date of the decretal order in March, 1795, and before the order of the 14th of June, 1808. He was a factor in Charleston, to whom the crops of the estate were sent, and who used to supply the estate with such articles as Mr. John Mayrant gave orders for from time to time. On a settlement of accounts a balance of \$483 was found to be due to Mr. James, which Mr. John Mayrant, one of the *cestui que trusts*, gave his note for, on the 24th of April, 1813, acknowledging in it, that it was for goods for the plantation.

It is contended that the trust is not liable for this debt:—

First,—Because the trust estate is settled to the separate use of Mrs. Mayrant.

Second,—Because Mr. John Mayrant had no authority to bind the trust estate. The decretal order of the 28th of March, 1795, directing the settlement to be made on Mrs. and Mr. Mayrant and their issue, vested in Mr. Mayrant the profits of the estate, during the joint lives of Mrs. Mayrant and himself. In the case of Barrett and Barrett, it was decided that the husband supporting the expenses of the household was entitled to the whole of the profits of the trust estate, settled jointly on himself and his wife. This was a case between husband and wife, and not between them and creditors. Under such a settlement the creditors of the husband would not be allowed to deprive the wife of her maintenance; and the court would apportion the profits to prevent the object of the settlement from being defeated. The court would do so in this case, but that the note was given for things necessary for the trust estate, and of which it had the benefit. This case falls then within the principle of the case of Cater and Eveleigh. Some of the articles for which the note was given, it is said, were not furnished for the trust estate; but upon looking into Mr. James' account, a considerable part of it appears to have been furnished for it, which renders a discrimina-

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tion unnecessary; because Mayrant \*is himself liable to the extent of his interest in the profits, to subject which to this debt, it was necessary to institute a suit in this court, the estate being a trust one, and the

profits accruing yearly. The order of 1808, does not shew that Mayrant is not entitled to any part of the profits of the trust estate. It directs a settlement to be made according to the intention of the court in their order of March, 1794, and that the deeds should bear that date. But what did the court intend in the order of March, 1794? That the property should be settled on Mrs. Mayrant, in manner as should be directed by the court, and the manner was directed by the court, on the 28th of March, in the year after, viz. on Mrs. Isabella Mayrant, and Capt. John Mayrant, and their issue, under the direction of the master. The intention of courts is to be collected from their acts. Now the order of March, 1795, clearly fixes the interests of the cestui que trust; and if reference had been had to the proceedings of the court by any person desirous of knowing whether any part of the estate was settled on Mr. Mayrant, he would have seen that he had a life estate in the profits; and that the settlement which was to be made under the direction of the master, did not certainly prevent the act of the court from being complete. It was no longer sub judice. The order of 1808, could not impair the rights of those who became creditors of Mr. Mayrant, between that time and the date of the order in March, 1795; for nothing is said in the order of 1808, about the rights of creditors, who were not even before the court, and the court does not decide on the rights of parties not before them. Unless we give to the order of 1808 a construction not affecting the rights of creditors, the order of March, 1795, was calculated to deceive persons the most cautious and wary, and more likely to deceive in proportion to the caution used. As between Mr. Mayrant and his wife, the court could mould and fashion the trusts as they pleased; but those with whom Mr. Mayrant entered into contracts subsequent to the order of March, 1795, and prior to the order of 1808, acquired a general lien on his estate; their rights

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are of a more stubborn nature than trusts. They are legal rights and remain unimpaired.

THEODORE GAILLARD.

We concur in this opinion.

HENRY W. DESAUSSURE.  
W. THOMPSON.

A majority of the court being of opinion that the trust estate of Mr. and Mrs. John Mayrant ought to be subjected to the debt of the complainant, Halloway James,

It is ordered and adjudged that the trustee do account with the complainant, before the commissioner, for the annual income of the trust estate until the debt be paid. Costs to be paid by the defendants.

HENRY W. DESAUSSURE.  
THEODORE GAILLARD.  
W. THOMPSON.

Judges Waties and James differing in opinion from their brethren, delivered the following opinions:

I think the decree of the Circuit Court ought to be affirmed, but on different grounds from those on which the decree is founded.

This court cannot, it appears to me, make the trust estate of Mrs. Mayrant liable for the debts of her husband, without setting aside the decretal order of the Court of Equity in 1808. But that court was then supreme, and its decrees are not now under the control of this court, or subject even to a review. If, however, it is held that the decretal order of 1795 is now operative, so as to give a life estate to Mr. Mayrant in the property directed to be settled, then the order of 1808 will not have the effect which I think it was intended to have.—There were then two orders on the subject on record, which were inconsistent with each other; one entered on the 26th March, 1794, declaring that the property should be considered as settled on the wife alone; the other on the 28th March, 1795, ordering the settlement to be made on the husband and wife

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and their issue. The court being called upon in 1808 to give the true construction to these contradictory orders, made the following order: "Upon reading the petition in the case, &c. and the decretal orders made therein, it is ordered that the said John Mayrant do forthwith execute a settlement to be dated as of the 26th March, 1794, pursuant to the intent of the court in the said decretal order, that is to say, to the separate use and benefit of the said Isabella Mayrant, during her life, and from and after her death to the joint use and benefit of the children of the said Isabella and John, equally to be divided among them." I think it evident from this order that it was intended to supercede the order of 1795, which gave a life estate to Mr. Mayrant, to annul that order as an erroneous entry in this respect, and to carry into execution the one of 1794, which gave a separate estate to Mrs. Mayrant. This intention appears to me so obvious, that I have no doubt that if the present demand had been then before the court, the trust estate would not have been made liable to it; for if the order of 1795, was considered a nullity as to the settlement, it could vest no interest in Mr. Mayrant, nor could any rights accrue under it to his creditors; and the court by directing the settlement to bear date on the 26th of March, 1794, has expressly given to it a retrospective operation from that date. This view is much strengthened by the fact, that in the original suit for the recovery of the property of which the trust estate consists, the executor prayed that the same might be settled to the separate use of Mrs. Mayrant. The first order made, (that of 1794,) was in conformity thereto; and the order of 1808 was a confirmation of that order, for this is distinctly expressed. And it



was the duty of the court to do this; for although some creditor of the husband might have trusted to the entry of 1795, (which however is not pretended in this case,) yet the court was bound to protect the interest of the wife against an erroneous entry, and to give her the benefit of its original order in her favor. But whether it was proper to do this or not, is a question not open to the examination of this Court. It was the act of a court of supreme and final jurisdiction; and as such ought to be conclusive.

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\*As it does not appear to me that Mr. Mayrant contracted with the complainant as the agent of the trustee, or that the articles went to the use of the trust estate, I am therefore of opinion that the trust estate ought not to be made liable to the complainant's demand. THOMAS WATIES.

Certain facts have been developed since the hearing below, which in my mind add considerable weight to the opinion given there. These were brought to view first at the discussion here, and are as follows:

In the case in which John Mayrant recovered his wife's portion, namely, that of the executor of Jared Nelson, ads. J. Mayrant and wife filed the 25th of March 1791, the answer concludes by praying, that if any property should be decreed to the complainants, it should be secured for the complainant Isabella and her issue, free from the control and intermeddling of the complainant John, and not subject to his debts and incumbrances. That at the time this answer was put in, the executor of Jared Nelson stood in loco parentis to the said Isabella, who was an orphan. That afterwards on the 26th of March, 1794, the court decreed to the said Isabella the legacy due her from Matthew Nelson's estate, of whom Jared was an executor, and concluded by ordering whatever balance may be found due Mr. Mayrant in right of his wife, shall be considered as settled upon said wife, in manner as shall be directed by the court. These were the new facts.

Again by the order of the 28th of March, 1795, mentioned in my decree in the circuit court, the legacy or portion was fixed at 1318*l.* 0*s.* 2*d.* "to be satisfied out of the proceeds and sales of Matthew Nelson's estate, and that the same be settled on Mrs. Isabella Mayrant and Captain John Mayrant and their issue, under the direction of the master."

Upon these orders no settlement was made, there being no trustee appointed to carry it into effect, until April 1808, when an application was made in behalf of Mrs. Mayrant by her next friend, and it was decreed by

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the \*court, that the said John Mayrant do forthwith execute a settlement to be dated as of the 24th of March, 1794, pursuant to

the intent of the court, in the said decretal order: that is to say, to and for the separate use and benefit of the said Isabella Mayrant, during her life, and from and after her death to and for the joint and equal use and benefit of the children of the said Isabella and John Mayrant, equally to be divided between them, and so forth: by which last decree the court passed entirely over the decretal order of 1795, as forming no part of their original intent, and as entered by mistake of the register. Thus what ought to have been done in 1794, was done in 1808, in conformity with a common maxim and the common practice of the court.

But the claim of complainant arose between the date of the second and third decretal orders, and they now contend,

First,—That there is a life estate in John Mayrant, subject to this demand of the creditor, by virtue of the order of 1795.

Second,—That the court under the former establishment, had no power to decree a separate estate to the wife, after the order of 1795, which was final.

Upon the first ground let us enquire, what was the intention of the court, by the first order of 1794? Mrs. Mayrant was an orphan, and the only person who stood in the place of a parent to her, had prayed that the portion she was about to receive, should be secured to her and her issue in strict settlement. This was a reasonable prayer; for even without such a one, and where, as was the case here, a husband cannot come at his wife's portion but through the aid of this court, a settlement is always ordered. The settlement prayed for, was a separate estate in the wife, and the court no doubt, intended to make it conformable to the prayer; for it said in the first order of 1794, whatever balance may be found due, shall be considered as settled upon the said wife. Here the wife alone is mentioned; her rights alone are recognized; the husband is not even named; and the case was directed to remain sub judice.

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\*The intention is plain on the first order; and I do not see that it is departed from even in the second one of 1795; although it was made no part of the case by the final decree of 1808.

That a separate estate in the wife was originally intended, is sufficiently evident: Now what reason could have induced the court in 1795 to alter this intention? John Mayrant was largely indebted at the time the answer was filed, and the order of 1794 was made:—In 1795, he was still greatly in debt; and he remains so at the present time. The prayer was made, and the order of 1794, was enacted, because he was so indebted; and to secure a portion to the ward of the court. Then where was the reason in 1795, for the court to depart from their original intention? There was none: and before

a reason for such departure can be shewn, it must be presumed that the court acted without any at all.

But it is said, that agreeably to the construction of the order in 1795, and the case of Barret and Barret, [4 Desaus. 447,] there was no separate estate.

I grant that since the case mentioned has been decided, the construction of this order would warrant the decision, that a life estate in J. Mayrant was intended by the same; but that is not conclusive as to the intention in this case, which arose before the doctrine was settled. The word issue is used both in the prayer and order of 1795; and certainly was intended to confine the settlement.

But it has been said, that although the doctrine as to separate estates had not been settled before the decision in Barret and Barret, yet the cases existed in the books upon which that doctrine is founded.

Nothing can be more fallacious than such reasoning, to shew the general intent. Those cases, although to be found in the books, had never been expounded and submitted to the solemn adjudication of this court; and even when that took place, the principle was not readily settled, for it was at last established by the Court of Appeals, contrary to the opinion of the Circuit Court.—Then as the case

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passed sub silentio in the former court, \*and might have been left very much to the wording of the register, such a mistake of such an abstruse doctrine, and contrary to the real intent, might very well have crept into the minutes of the proceedings. For these reasons, I think that the former court intended a strict settlement originally, and never departed virtually therefrom.

I come now to the second ground: Had the court the power after the order of 1795, and by their order of 1808, when the rights of creditors had intervened, to decree a separate estate in Mrs. Mayrant?

No one can deny to that court the power to rehear, review, and to correct their proceedings. And they often exercised these powers, not only while suits were pending, but also after decrees, purporting to be final, were delivered. But in the present case, there was not even a final decree, under the order of 1795; for it remained for the master to report a settlement, which the court might have altered or modified.

But the meritorious rights of creditors are objected?

I answer that the rights of the wife, who brought a portion to her husband, were more meritorious, and are under certain forms preferred by law. The general doctrine is, that marriage is a valuable consideration, when the wife brings with her a portion.—Roberts on Fraud. Cont. 105. And according to the authorities cited by defendant's counsel, settlements after marriage have been decided to be good against general creditors; although

founded only upon a parol promise before marriage. Even a promise of this kind, made by an infant before marriage, to settle the estate when of age, was held a sufficient consideration to support the settlement after marriage, made in pursuance of such promise, although the infant was not compellable by law to fulfil the same. The reasons upon which these decisions are founded, is that the wife's portion was the subject of the settlement, which is deemed a valuable consideration—Roberts on Fraud. Cont. 241, 2, 3, and 4.

Upon this subject the court looks much to the purity of intention of the donor, and that

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the thing agreed to be \*done, and the thing performed, should exhibit so plain a correspondence, as to unite them in a derivation from the same original motive. Now there was marriage and a portion here, which when united appear to form a double consideration, of a higher nature than that of creditors: besides, the court in this case, stood in the place of donor, and I suppose the purity of its motive will hardly be called in question.

But further, it has been said, that this creditor upon a search made, ought to have found sufficient notice upon the decretal order of 1795, to shew him that there was a separate estate.

It is evident that when he gave the credit he never had sought for the order, and never thought of a trust estate, or a life estate in John Mayrant, until he filed his bill; for the whole of the charges in his account are made against John Mayrant. But supposing him to have looked into the order, and even to have employed counsel, still for the reasons I have before stated, the point would remain very doubtful: he would see that by giving the credit he might risk a law suit, and perhaps eventually lose his money. Then, by giving the credit he did a very imprudent act, and ought not to be favored here.

It has also been said, that the articles furnished were of such a nature, that they must have been for the trust estate. This was not made certain, or at least not more so, than in the case of Ewing and Smith [3 Desaus. 417, 5 Am. Dec. 557]. At the time John Mayrant had hired negroes, and worked a certain number of his own slaves, upon a separate plantation; about \$4,000 of the account had been paid, and a small balance of \$483 only remained unpaid; but a small part of the articles comparatively, were for plantation use; and the payment made would more than cover them all.

But it has been further urged, that John Mayrant was the agent for the trust estate. Now, this ought to have been proved;—there was no testimony but that of Gilbert Dinkins to prove it; and the answers of both the trustee and cestui que trust deny the charge. Yet after all it is evident that the Court of



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Equity, under the for\*mer establishment, which settled this whole matter by the decretal order of 1808, was vested with as ample powers as the present court. According to law, its records ought to be conclusive evidence. The determination of a court of competent jurisdiction, whether of record or not of record, is also conclusive. In New York the supreme court will not open a judgment, so as to allow money to be recovered, which was paid under a decision of a competent court, although the plaintiff had paid the money before, and could not find the receipt at the time before, but afterwards discovered it.—2 Espin. 436, New-York edition. Now this was in fact to determine, that they could not look into the merits of the judgment; and neither ought this court, except to review, or upon a charge of its being obtained by fraud. But further, this court has determined that they would not even entertain a bill to review the decisions of the former court—See the case of Lindsey v. Hampton. They said the decisions of the former court stood upon sacred ground. Then if the ground which the decree of 1808 has covered, be indeed sacred, it may be assimilated to a field well enclosed on all sides, into which this court cannot penetrate unless by a forcible entry.

W. D. JAMES.

Silliman and Blanding for Complainant.—Miller for defendants.

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Case LXXXV.

Laurens, Washington District.—Heard by Chancellor Thompson.

JOHN ELLIS v. STEPHEN SHELL et al.

(June, 1815.)

[*Life Estates* ¶15.]

A bequest of a woman slave, to testator's wife for life, and after her death to his daughter Jane, gives a vested interest in the slave to Jane. And the issue of the slave born before the determination of the life estate, goes to remainderman, at the expiration of the life estate.

[Ed. Note.—Cited in *Haynesworth v. Cox*, Harp. Eq. 118.

For other cases, see *Life Estates*, Cent. Dig. § 34; Dec. Dig. ¶15.]

John Ellis, the elder, by his last will and testament, bearing date the 21st day of Jan-

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uary, 1772, made \*the following bequest: "I leave to Mary, my dearly beloved wife, the land and plantation I now live on, and the mill; one negro woman slave, named Peg, during her life; and I also leave her all my stock of horses, cattle, hogs and household goods, debts, and a still, during her life, then to be equally divided among my children."

A subsequent clause in the will is in the

following words: "I bequeath to my daughter, Jane Ellis, one negro woman slave, named Peg, after her mother's decease."

John Ellis, the testator, died shortly after the execution of his will, intervening which occurrence, and the death of Mary Ellis, Peg had considerable increase. The complainant is one of the children of the testator, and claims his distributive share of the said increase. Stephen Shell intermarried with Jane Ellis, who are the defendants in this action.

There are two points involved in this case. The first is, at what time the legacy vested in Jane Ellis, and secondly, whether having an absolute and vested right to Peg, it follows as a matter of course, that she is entitled to her increase. With regard to the first point, I am of opinion, that Jane Ellis' right vested absolutely, the moment of the testator's death, and that the life estate in Mary Ellis was nothing more than a postponement of the possession of the chattel in the person in remainder.

With regard to the second point, I am of opinion that the increase of a female negro, belongs to the person to whom the ancestor belonged. That Peg belonged to Jane Ellis, and of course her children did.

It is therefore ordered and decreed, that the bill be dismissed with costs.

W. Thompson.

From this decree there was an appeal on the following grounds:

First,—Because Jane Ellis' estate in Peg, instead of an estate vested in possession or interest, was only a contingency.

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\*Second,—The doctrine partus sequitur ventrem cannot be so applied to this case, as to convey the increase of Peg to Jane Ellis, because the mother was not vested in her until after the birth of all the children of whom complainant claims distribution.

Third,—From the will of John Ellis, it does not appear to have been his intention to convey the increase of Peg to his daughter, Jane Ellis.

Fourth,—That the increase of Peg must be considered as intermediate profits accruing during the existence of the life estate of Mary Ellis, and before the vesting of the remainder, and therefore liable to be distributed among the heirs of John Ellis.

Fifth,—That the increase of Peg should be divided, if not as the property of John Ellis, as the personal estate of his wife.

Gray and O'Neal complainant's solicitors.

Mr. O'Neal, to reverse the decree—No absolute vested right in the daughter and devisee.—The words of the will are a mere direction to executors, not a positive bequest. See other clauses of the will.

Mr. Crenshaw—This is a vested remainder, but unimportant whether vested or contin-

gent; for whether vested or contingent the contingency has happened. *Fearne on Rem.* 4th Ed. 148. 2 Fomb. 371. 3 Atk.

If the tenant for life had a right to the increase, she gave the increase expressly, and delivered it to the person in remainder.

The sale was made by the remainderman with the consent of the tenant for life.

November, 1815.

The appeal was heard by the Chancellors Desaussure, Waties, James and Thompson, who unanimously affirmed the decree of the Circuit Court.

#### 4 Desaus. \*614

\*Case LXXXVI.

Columbia.—Heard before Chancellor Thompson.

JAMES S. GUIGNARD v. WILLIAM MAYRANT.

(February, 1816.)

[Wills ⇐764.]

A. being about to marry, settled on his wife 500*l.* in lieu of the fortune he expected to get by her. He afterwards died, leaving her a considerable legacy, expressly in lieu and bar of dower.

The court decreed that the legacy was not a satisfaction of the debt.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1978; Dec. Dig. ⇐764.]

This case was argued before Chancellor Thompson, who delivered the following decree therein:

In consequence of a marriage intended to be solemnized between Peter Horry and Margaret Guignard, the said Peter Horry, on the 9th February, 1793, executed a marriage settlement, wherein it was stipulated, that he should settle on the said Margaret, the sum of five hundred pounds sterling, in lieu of the fortune and property of the said Margaret, which amounted to that sum and upwards, and further covenanted and agreed, that the said sum should be paid into the hands of Wm. Mayrant and George Joor, for such uses, and upon such trusts, as were therein after mentioned. And it was further covenanted and agreed, that the said trustees, and the survivor of them, &c. should permit the said Peter and Margaret during their joint lives, to have, receive and take to their own proper use and behoof, the same and the issues thereof; with a further power to the said Margaret, that in the event of a failure of issue, lawfully to be begotten between them, that she should have full authority to dispose thereof by her will.

On the 5th day of June, 1793, the said Peter Horry, for the better securing the payment of the sum of five hundred pounds aforesaid, executed a mortgage of seventeen negroes to the said trustees. On the 7th day of February, 1815, the said Peter Horry executed his last will and testament, wherein he devised to the said Margaret, lands and

negroes to a much larger amount than the debt created by marriage settlement.

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\*The question therefore which arises in this case, is, whether the legacy is to be considered as an ademption of the bond.

The general rule laid down in the English authorities, is, that where the legacy is equal to, or exceeds the debt, the court considers it as given in satisfaction thereof, but this general rule is so exceptionable, that although the courts are bound by it, they will lay hold of the most trivial circumstances to take a case out of it; as if the legacy and debt are not payable eodem tempore, or are not ejusdem generis, &c.

It is contended by the counsel for defendant, that the debt and legacy are not payable at the same time, inasmuch as where no time is mentioned in a will for the payment of a legacy, it cannot be demanded under twelve months.

I do not consider this argument to have much weight, for if the executors should refuse to pay both debt and legacy, one could be recovered by law as soon as the other; and it cannot be presumed that the testator, who was a very weak and ignorant man, could have known the legal operation of omitting to mention the time of payment.

Every case of this sort depends upon its own intrinsic circumstances, and where it cannot be plainly inferred from the will itself, that the testator intended that the legacy should go in satisfaction of the debt, I shall consider myself warranted in departing from the general rule.

This case does appear to me to be very different from any referred to in the argument. By the marriage deed, the five hundred pounds is given for property to that amount or upwards. This, therefore, cannot be considered in the light of a gift, but an absolute purchase, making Peter Horry debtor, and the trustees creditors to that amount; and the will leaves no room for construction, as it emphatically says, that the legacy is in lieu and bar of dower, which if accepted, forms another, and distinct contract.

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\*If I thought it necessary, I could also rely on the circumstance of the debt and legacy being different in their nature, as one is for the payment of money and the other for lands and negroes.

I am of opinion, that the legacy and debt must both be satisfied, with interest on the debt from the death of the testator, and that the costs be paid out of the estate of Peter Horry.

W. Thompson.

From this decree there was an appeal.

Mr. Starke for appellants, quoted 3 P. Wms. 354, *Fowler v. Fowler*. 3 Atk. 98, *Clark v. Sewall*.



Mr. W. F. Desaussure argued for respondents, that when a particular object is expressed for a legacy, it cannot be taken as a satisfaction of a debt. 10 Ves. 327, where the lord Chancellor (Eldon) said, "though where a father has advanced to a child a portion upon marriage, it may be supposed, he intended to pay a debt, or satisfy a portion, I always understood that presumption was not warranted, where the father has said, what he means to do; and in one case, the name of which I do not recollect, lord Thurlow decided upon that ground alone, that he meant to satisfy something else."

Here the legacy was given expressly in lieu and bar of dower.

The case of *Haynes v. Mico*, 1 Bro. 130, was also strongly relied on.

After hearing the argument, the Court of Appeals made the following decree in April, 1806:

It is ordered and decreed, that the decree of the Circuit Court be affirmed.

HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES,  
WADDY THOMPSON.

Stark for Appellants.

Blanding and Desaussure for respondents.

#### 4 Desaus. \*617

\*Case LXXXVII.

Edgefield district.—Heard by Chancellor Waties.

J. MILLEDGE and Others v. LAMAR and Others.

(February, 1816.)

[*Dower* ⇨12; *Perpetuities* ⇨4.]

A. conveyed all his property real and personal to his natural son B. by deed, to take effect after his, the donor's death; but if his son should die without any heir of his body, then the whole of the then remaining property to be equally divided between the children of his three brothers.

A. kept possession of the property until his death, leaving a will, by which he confirmed the deed. B. died without leaving heirs of his body, but leaving a wife alive. The limitation over is not too remote. The deed is good as a covenant to stand seized to uses, and the remaindermen take.

[Ed. Note.—Cited in *Powell v. Brown*, 1 Bailey, 102; *Brummet v. Barber*, 2 Hill, 551; *Hill v. Hill*, Dud. Eq. 82; *McCorkle v. Black*, 7 Rich. Eq. 420.

For other cases, see *Dower*, Cent. Dig. §§ 37, 38; Dec. Dig. ⇨12; *Perpetuities*, Cent. Dig. § 28; Dec. Dig. ⇨4.]

[*Dower* ⇨13; *Wills* ⇨728.]

The widow of B. is entitled to dower. The issue of the slaves born before the death of B. go to the remaindermen.

[Ed. Note.—Cited in *Gayle v. Cunningham*, Harp. Eq. 125; *McCorkle v. Black*, 7 Rich. Eq. 420.

For other cases, see *Dower*, Cent. Dig. § 44; Dec. Dig. ⇨13; *Wills*, Cent. Dig. § 1760; Dec. Dig. ⇨728.]

[*Wills* ⇨87.]

[Where an instrument could be supported either as a covenant to stand seized, or as a will, the latter construction was adopted in order to entitle the widow of the donee to dower.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 206; Dec. Dig. ⇨87.]

[*Wills* ⇨98.]

[Cited in *Lyles v. Lyles*, 2 Nott & McC. 533; *McGee v. McCants*, 1 McCord, 522; *Dawson v. Dawson*, Rice. Eq. 260, to the point that where a deed of gift was executed, to take effect after the death of the donor, and the donor afterwards confirmed the deed by will, the deed became part of the will and operated as such.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 234; Dec. Dig. ⇨98.]

The bill was filed in this case by persons claiming the estate of the late Robert Lamar, under a deed executed by him on the first day of April, A. D. 1806, by the provisions of which he conveyed his real and personal estate to his natural son Thomas Lamar Winfrey, to take effect after his (the donor's) death; but if he should die "without any heir of his body, then and in that case, the whole of the then remaining property should be equally divided between the children of his three brothers, Thomas Lamar, Philip Lamar and James Lamar, in equal proportions among them all." Robert Lamar kept possession of the estate till his death. By his last will and testament he confirmed the provisions of the said deed. He afterwards died, leaving the said deed and will in full force. Thomas Lamar Winfrey possessed himself of the estate of his late father, and held and enjoyed the same till his death, which occurred in the year 1810. He died without leaving any issue; but he left alive his wife, Elizabeth Lamar the defendant. By his last will he left the property which he could dispose of to his wife. But he declared in his said will, "that as to the property and estate he inherited and enjoyed from the will of his father, he could make

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no disposition thereof, as from the tenor of that will, it reverted to the uses and purposes therein expressed."

The complainants claimed the property under the deed of the said Robert Lamar, being the children of the three brothers of the said Robert. The defendant claimed the estates in question under the will of her husband Thomas Lamar Winfrey, insisting that the whole estate of Robert Lamar vested in the said Thomas L. Winfrey, under the operation of the said deed, and of the will of the testator, Robert Lamar.

The cause came to a hearing before Chancellor Waties, who after argument delivered the following decree:

Robert Lamar, by a deed dated the 1st of April 1806, gave to his natural son, Thomas Lamar Winfrey, all his lands, negroes, stock, &c. under the following restrictions, to wit, "to have and to hold the same, (at my death

and not before,) without any manner of condition except the following, that is to say, that should T. L. Winfrey die without any heir of his body, then and in that case, the whole of the then remaining property above mentioned, shall be equally divided between the children of my three brothers, Thomas Lamar, Philip Lamar and James Lamar, in equal proportions among them all."—Afterwards the said Robert Lamar by his will made the following devise:—"I will and bequeath to my son T. L. Winfrey, all my lands, negroes, stock, &c. as mentioned in a deed of gift bearing date the 1st April, 1806, which deed being agreeable to my will, I now absolutely confirm unto the said T. L. Winfrey, his heirs, executors and administrators, as mentioned in the said deed." T. L. Winfrey became possessed after the death of his father, of all the property given by the said deed and will, and died in the year 1810, without issue, having made his will in which is the following clause:—"As to the property and estate I now inherit and enjoy from the will of my deceased father, I can make no disposition, as from the tenor of that will it reverts to uses and purposes therein expressed."

The complainants are the children of Thomas Lamar, Philip Lamar and James

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Lamar, the three brothers \*of Robert Lamar, and claim their respective shares of the property limited to them by the said deed.

The defendant Eliza A. Lamar, is the widow of the late Thomas Lamar Winfrey, and contends that her said husband took an absolute estate under the said deed, and she claims the whole property under the residuary clause of his will.

The question then is, what interest Thomas L. Winfrey, took under the deed? I consider this a question altogether of intention, and not of technical construction. The numerous cases, therefore, cited in the argument, appear to me of little weight in such a question. Where technical words only are used, uncontrolled and unexplained by any other words, it is proper to refer to cases which have settled the sense in which such words are to be understood, and their technical sense must prevail; but where the question depends on the intention of a party in any instrument, whether deed or will, this alone ought to be consulted, and to govern the construction, unless the party intends to do an act incompatible with some positive law or general rule of policy. What is the present case? Robert Lamar gives to his son Thomas L. Winfrey, his whole estate at his death, on the following condition: "If the said T. L. Winfrey should die without any heir of his body, then and in that case, the whole of the remaining property shall be equally divided between the children of my three brothers." I think the intention here is plainly expressed, and perfectly consistent with the rules of law. The donor has

no other than an illegitimate child, and he gives him his whole estate; but he does not lose sight of his other relations, and he provides that if his son should leave no heir of his body, the children of his three brothers shall next take. This was a natural and reasonable disposition of his property.

But it was argued, that the words heir of his body, "gave an estate in tail to his son, and the remainder over is void."

If the donor really intended to create such an estate, I should be bound to give it this

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construction; but there \*are no other than technical words to intimate such an intention: and it appears to me an incredible thing that he should intend to perpetuate in his family, a property of no great magnitude, when the first taker was an illegitimate son, who did not even bear his name. I do not indeed believe, that these words are ever used in their technical sense in this country. In England, where the pride of aristocracy often supercedes the strongest claims of nature, it may be fairly presumed in many cases, that a provision for issue is intended to be indefinite; but I have no doubt, that in all the cases that come before our courts, in which the words "dying without issue, or without heirs of the body," are used, the parties have only in view the first descendants; and if other judges would concur with me, I would give this construction to those words, without requiring any other words to explain them; for it is surely a great servility to continue to permit precedents, the reasons for which do not exist here, to overrule our own convictions, and the common sense of the whole community. While, however, a majority of the judges adhere to these precedents, I am bound to do so likewise. But in the present case, I think that even these are in favor of the complainants. In cases indeed of real estate, where the interest of the heir at law is concerned, the English courts have leaned to a technical construction; but in cases of personal estate, they generally incline to any circumstance or expression, that seems to afford a ground for construing a limitation, after dying without issue, or without heirs of the body, to be a dying without issue living at the death of the party, in order to support the limitation over. As the rights of primogeniture have been abolished here, and real and personal property are placed on the same footing, the more liberal rule may be applied indiscriminately to this case. There are then plain and strong expressions in the deed, which confine the dying without heirs of the body, to the time of the death of T. L. Winfrey. The donor says, that in that event, "the whole property shall be equally divided between the children of my three brothers." These latter words evidently con-

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template \*persons then living, or who should be alive at the death of T. L. Winfrey, and



who should take at his death, if he should leave no heir of his body. They therefore restrain the technical sense of the words, "heir of his body," so as to satisfy, I think, all the cases that have been cited to the contrary. It is a circumstance of some weight, that T. L. Winfrey has himself confirmed this construction, by declaring in his will that he can make no disposition of the property, as it must revert to the uses and purposes expressed in his father's will. He may indeed, as has been said, have been ignorant of his rights, but it is more reasonable to presume that this declaration proceeded from a conviction on his mind that this was the intention of his father. It may be also added, that this construction is in favor of the nearest relations of Robert Lamar, and that the opposite claim is that of a stranger.

But the defendant's counsel have insisted, that notwithstanding this may be the intention of the deed, yet as the previous estate given to T. L. Winfrey is an estate in tail, the limitation afterwards of a contingent remainder, being by deed and without trustees, is void.

This technical objection is however easily obviated, by considering the deed either as a covenant to stand seized to uses, or as being testamentary in its nature, because it was not to take effect until after the death of the donor; either of which views will give to the deed the character of a trust, and disencumber it from this and every other technical objection that has been made to it. I prefer viewing it in the first light, and considering it in the nature of a covenant to stand seized to uses. It has not indeed all the legal forms of such a deed; but it is a general rule in equity, that no precise words are necessary to raise an use, and that any words which shew the intent with a good consideration, will be sufficient.—Here are both those requisites; for although affection for an illegitimate child, will not, it is said, raise an use. 2 Atk. 310; 2 Fonbl. 47, 48. Yet the relation in which the complainants stand to the donor is fully sufficient to support the covenant. 2 Fonbl. 26.

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\*I am of opinion, therefore, that the complainants are entitled to their respective shares of the property, limited to them by the deed of R. Lamar; and that the defendant Eliza A. Lamar must account to them for the rents and profits since the death of her husband, Thomas L. Winfrey.

It is therefore ordered and decreed, that a writ of partition do issue to divide the property described in the deed of Robert Lamar, among the complainants according to their respective rights, and that the defendants do account before the commissioner for the rents and profits of the said property, since the death of T. L. Winfrey. The costs are to be paid out of the estate.

THOMAS WATIES.

From this decree an appeal was made on the ground, that the limitation over to the complainants in the deed of Robert Lamar, was too remote and void; and that they had no rights under the same.

The appeal was heard and fully argued before the Chancellors Desaussure, Gaillard, Waties, James and Thompson.

The Chancellors took time to consider, and afterwards delivered the following opinions:

I have re-examined the grounds on which I founded the opinion delivered by me in this case in the Circuit Court, and I still adhere to that opinion.

(Signed) THOMAS WATIES.

The deed in this case is void as such at common law, for three reasons: Because the consideration is not good; it is made to take effect in futuro, and by it a fee is limited upon a fee. But as an instrument in writing, solemnly executed, this court appears bound to give it some operation. Now the doctrine is, that when a man has expressed clearly his intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet if the instruments can be construed in another manner, so as to effectuate his purpose, the ceremony is matter of form, and the substance shall be carried into ex-

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ecution, if it may by law. And although this paper has the form of a deed, yet as it was intended to take effect at the death of the testator, and is ratified by his will, it may be considered as testamentary; and thus be connected with the will, and both may make one testamentary disposition of the estate. If a testator in his will, refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses; that paper makes a part of the will, whether executed or not. 2 Vez. jr. 226, 7, 8. Now the will in this case is duly executed, and refers so expressly to the deed, that the identity cannot be doubted. Then by the above authority, the deed forms a part of the will, and the whole is testamentary. But further, the testator devises his whole estate in fee, but limits a remainder thereon, to commence on the future contingency of the devisee's dying without heir of his body begotten. According to this form then it answers to the definition of an executory devise. 2 Black. 173. Fearn, 299. But it has been objected to it, that it cannot take effect by law, as being too remote. This does not appear so, for the devisee and the three brothers of testator mentioned in the deed, were in esse at the time of the devise, and the contingency having now taken place, the property will vest in the children. This limitation does not embrace so much as a life, or lives in being, and twenty-one years afterwards, which is the reasonable time allowed by law.

To effectuate the intent, the court will add words; for instance, the word issue, is more general in its signification, than the words heir of the body; yet, to give effect to the executory devise, it will lay hold of any words in the will to confine the expression of dying without issue, to dying without issue living at the time of the testator's death. 3 Atk. 282. 1 P. Wms. 198. Fearne, 357. Then if to the words of the deed, "should the said T. L. Winfrey die or decease without any heir of his body begotten," should be added the words "at the time of his death," which are obviously to be inferred, the contingency

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must take effect in about nine months after the death of the devisee, which does not go even to the extent admitted by the law.

In short, upon every view of the subject which presents itself to my mind, this deed may be connected with the will so as to form one testament; and the limitation over has nothing in it to denominate it a perpetuity.

Therefore, I am of opinion, but for different reasons, that the decree should be affirmed.

W. D. JAMES.

I have considered this case with great attention, having repeatedly gone over the papers, examined the arguments of counsel, and consulted the authorities cited, as well as others. This was due to the deep interest taken in this important cause by the parties interested, as well as to its intrinsic difficulties, and the ability with which it was argued. And I feel it to be proper to state the grounds on which I have formed my opinion.

It is manifest that Robert Lamar, the father, intended that if his son should die without issue, his property should go over to his brother's children. And I apprehend it to be the duty of the court to give effect to that intention, if not contrary to some positive rule of law.—But it was argued that this supposed intention, could not be carried into effect in the case under consideration, from the nature and wording of the deed or instrument employed by the donor; and because the limitation over was upon an indefinite failure of issue, and was therefore too remote and void. In which case the first taker, Thomas Lamar Winfrey, would be entitled to the whole estate of his father; which his widow the respondent would take under his will.

On the first ground, it was stated that the deed or instrument of the 1st April, 1806, executed by Robert Lamar, could not legally convey any estate to the remaindermen, the children of Robert Lamar, because it was really a feoffment, and not a deed to stand seized to uses, or as a testamentary paper, as had been contended on the other side. That as a feoffment it was void as to the real estate, because it attempted to transfer

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an interest in a \*freehold, to take effect at a future time, to wit, on the death of the grantor, which a feoffment cannot do.

This objection is a technical one, set up in opposition to a plain intention. And it certainly is true, that a feoffment cannot in that character, convey an interest in a freehold to take effect in future. But it appears to me that the objection is as fatal to the appellant as to the respondent's claiming under the deed: For the deed cannot, as a feoffment, convey any estate of freehold to take effect in futuro, to the son Thomas Lamar Winfrey, under whom the appellant claims, any more than it can to the remainder-men. And if the deed be ineffectual as to both, then the property would, on the death of Robert Lamar, without wife or legitimate child, descend to his brothers and their children, the present complainants, unless it was disposed of by his will. It was argued that the grant to the son Thomas was direct, and the enjoyment only postponed to the death of the grantor; but what is this but a deed to take effect in futuro, which we have seen cannot be done as to freehold estate by a feoffment; and if the arguments were well founded, then the limitation over could be grafted on the estate of Thomas.

It was further contended, admitting this deed to be good and operative, that according to the rules for the construction of deeds, the limitation over to the children of Robert Lamar's brothers, was void, because they are not mentioned in the premises of the deed, and that the habendum in which the limitation is contained, cannot pass any thing to persons not named in the premises. It would be very strict to apply a severe rule to a deed very unskilfully drawn. But the rule, though correctly stated, does not go so far as is supposed; for though a man not named in the premises of a deed, cannot take a direct estate under the habendum, yet he may take an estate in remainder by limitation in the habendum; and that is precisely the case in the deed which we are considering. See 3 Bac. Abr. New Am. Ed. 395; Cro. Jac. 564; 3 Leon. 60; Willes, 686; 1 Bos and Puller, 534.

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\*Again it was contended, that if the deed should be considered void and ineffectual as a feoffment, both as to Thomas Lamar Winfrey, and the remainder-men, then Thomas could take the estate under his father's will, of the 6th May 1806, which devised the estate to him absolutely, clear of all restrictions or limitations. But I think this is an erroneous view of the will; for Robert Lamar, the father, says in his will, I bequeath to my son Thomas all my lands, negroes, &c. as mentioned in a deed of gift executed by me on the 1st April 1806, which said deed being agreeable to my will and wishes, I now absolutely and bona fide con-



firm the said deed of gift unto my said son, his heirs, &c. as mentioned in the said deed of gift, and he desires that no alteration should be made in the said deed. It strikes me that this is a complete recognition of the deed, not partially, but wholly and in all its provisions; and it is as if he had repeated the words of the deed and made them a part of his will. His will does not then alter the case, but leaves it where it found it; and the limitations over to his brother's children, (if not too remote,) are as good and effectual under the will as under the deed.

If upon consideration we should be of opinion that the instrument executed by Robert Lamar on the 1st of April 1806, cannot operate as a feoffment, then the question arises whether it can be construed to be a deed to stand seized to uses, or be deemed a testamentary paper.

After a great deal of examination and reflection I am of opinion with the judge who tried and decided this case in the circuit, that the instrument under consideration may be so construed, if it be necessary to do so, in order to give effect to the intention of the maker. It is a leading object with courts of justice to give effect to the intention of parties, both in their deeds and wills.—3 Bac. Abr. 393 New Am. Edition. That great and virtuous magistrate, Lord Hale, said in the case of Pybus and Mitford, (cited in 1 Vez. sen. 153,) "that we ought to serve the intent if we can, as the best expositor we can go by."

Lord Hardwicke had exactly the same difficulty in the case of Rigdon v. Hallier, 2

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Vez. sen. 252, 5; (3 \*Atk. 731,) which we have now; that is, what he should call and how he should construe a paper in order to give it effect. He said, that though executed as a deed, he was not sure it was intended to take effect as a deed. It began as a deed poll, but it was a disposition of his whole real and personal estate, and to take effect after his decease, in consideration of, &c. If this is not a will or a covenant to stand seized to uses, it would be void, because a freehold cannot pass in futuro; but being in consideration of love and affection, it may be good by way of covenant to stand seized.

It was insisted, however, that there was no consideration here, upon which an use could be raised, for that it had been settled that the love and affection which a father bore his natural child, was not a sufficient consideration to support a deed to stand seized, and it is certainly true that the old cases have so decided the point.—7 Bac. Abridged New American Edition p. 98. But I am not sure that on a review of the subject, these cases would prevail at this day. Even the old cases admit that if a man covenants in consideration of natural love and affection, to levy a fine, and that the conusee shall stand seized to the use of his bastard daughter on her marriage, this is so expressive of the in-

tent of the party that it shall prevail. 7 Bacon, 93; Gilb. on Uses, 207. And if the paper under consideration be construed a deed to stand seized to uses, we ask, what uses? The answer is, to the uses expressed on the face of the instrument. First, for the son and his issue; Secondly to the children of the brothers: For fraternal love is a good consideration to support a deed to stand seized. See the Cases cited in 7 Bacon's Abr. 98; Roll's Abr. 783; Cro. Car. 529.

But if the objection should prevail that the instrument could not be supported as a deed to stand seized to uses, then let us enquire if it could not be taken to be a testamentary paper.

In the case before cited from 2 Vezey sen. 258, 9, Lord Hardwicke says, that though the paper then under his consideration, had been

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sealed and delivered as a \*deed, and used the words give and grant, yet as it was declared on its face, by the maker, not to be intended to take effect till his death, it might well be construed a testamentary paper. See also the old cases, 1 Mod. 117; 1 P. Wms. 529. So too in the case of Ward and Turner, 2 Vez. Sen. 431, 440, 441, Lord Hardwicke cites and approves several cases which he states. One was the case of Ousley v. Carrol, decided in 1722, by the Ecclesiastical Court. There was left a writing in presence of three witnesses, not in the form of a will but a deed, viz. "I have given and granted and give and grant, to my five sisters, and children of the sixth, their heirs, &c. in case they survive me, all my goods and chattels and real and personal estate." And this was established, not sub silentio, but upon a litigation, to be a testamentary paper. And in another case cited under the title of Shargold's case, there was a deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered by way of symbol to the first grantee in possession, as was done and relied upon in the case under our consideration. This was pronounced a testamentary paper.

It was remarked by Mr. Yancey, one of the learned counsel for the appellant, that the case of Shargold was not to be found in the books, except as there cited. This is true, but the reason is that few of the decisions of the Ecclesiastical Courts in those times were published. But that case was cited and allowed in the Ecclesiastical Court by a learned Judge, and Lord Hardwicke also recognized the case. See 2 Vezey sen. 442, 3.

In another case as late as 1793, Habergam v. Vincent, reported in 2 Vezey jun. 204-208, &c. it was very solemnly decided that an instrument calling itself a deed, and executed as such, and stamped as deeds are required to be, should be construed to be a codicil to the maker's will, in order to give effect to his intentions. This case was greatly discussed, and the lord chancellor called two of the judges, Buller and Wilson, to his assistance,

and they agreed with him, that it is not the circumstance of the instrument being stated to be or that it is treated by the party as a deed or will, but the intention upon the

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\*whole that it should operate before or after the death of the maker, that decides whether it is to be considered testamentary or not, as indeed was decided in the house of lords, in *Lusher v. Hogg*. Judge Buller particularly stated, that the cases cited, (which had escaped his recollection till quoted to him,) "had established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose was not to take place till after the death of the person making it, shall operate as a will. The cases for that are both in law and equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant: But as upon the whole the intention was, that it should have a future operation, after death, it was considered as a will." Therefore he considered the instrument then under deliberation as a codicil, though executed by the party as a deed and called a deed.

These decisions are founded in perfect good sense, and are calculated to give effect to men's deeds and wills by preventing them from being defeated by technical objections. And these decisions apply directly to the case under our consideration. For Mr. Lamar, the maker, expressly declares and makes it a part of the instrument, that it should not take effect till his death; the words are, "at my death, and not sooner." Then we are perfectly at liberty, and indeed bound to construe this paper a will, in order to give it effect; and it having been executed in the presence of three witnesses, it will pass the lands as well as the personal estate. Nor would it be a benefit to the appellant to refuse to take this view of the case. For as the instrument cannot take effect as a feoffment, it would be wholly void if we refused to construe it either a deed to stand seized to uses, or as a testamentary paper: and then the complainants would take the estate as next of kin; unless the will of Robert Lamar subsequently made carried the estate to the son. But we have seen that the will recognizes, adopts, and redispenses of the property exactly as the former paper did.

We come now to the consideration of the last question in this case. It is whether the

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limitation over to the \*children of Robert Lamar's brothers in this instrument, considered in any character, is not too remote and void, after a gift to the son Thomas, his heirs, &c. The habendum is in the following words: "To have and to hold all the said lands and tenements, negroes, &c. (at my death and not before,) to him the said Thomas Lamar Winfrey, his heirs, executors or administrators, from thenceforth as his prop-

er lands, goods and chattels, absolutely, without any manner of condition, forever, except the following, that is to say, that should the said Thomas Lamar Winfrey die or decease without any heir of his body begotten, then and in that case or event, the whole of the then remaining property above mentioned, shall in that case be equally divided between the children of my three brothers, viz. Thomas Lamar, Philip Lamar, and James Lamar, in equal proportions amongst them all."

It has been so generally understood that the intentions of donors and testators are frequently defeated by the application of the technical rule on this subject, that the constant leaning of the court is to narrow its application, in order to give effect to the intention. Still however the rule cannot be set aside: It must prevail in all cases where a fair interpretation of the instrument shews that the limitation over is not to take effect, till an indefinite failure of the issue of the first taker. And generally speaking, deeds to uses are not construed in greater latitude than the common law conveyances, as to words of limitation. But where there are words of regulation or modification of the estate, (as the words equally to be divided are,) and not words of limitation, Lord Hardwicke said he did not think there was any harm in giving them greater latitude in deeds on the statute of uses, which are trusts at common law, than on feoffments, which are strict conveyances at common law.—2 Vez. sen. 257.

If we look carefully at the provisions of the instrument under consideration, it does not strike me that there is any thing which indicates an intention, that there should be an indefinite failure of the issue of the son, upon which the limitation should take effect. Mr. Robert Lamar seems to me to look only to

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the actual time of \*the death of his son, without leaving issue then alive.—The words are, "should the said Thomas Lamar Winfrey die or decease without any heir of his body begotten," then and in that case he makes the limitation to his brothers' children. I think it is manifest from these words that he meant to provide no further than for the state of things at his son's death: and if so then it is clear the limitation is not too remote. So too the limitation is to his brothers' children, equally to be divided among them. This furnishes a very strong presumption that Robert Lamar was not looking to an indefinite failure of the issue of his son, but to the state of things at his death.—The limitation is to persons who were in esse, or who might be so during the life of the son, the first taker.

I do not think it is necessary now to go into a full examination of the doctrine of limitations, as illustrated by the decided cases. It was very elaborately examined in the case of Clifton administrator of Campbell v.



the executors of Haig, executor of Wise [1 Desaus. 330] decided in the circuit court of Columbia, in June 1812, and the decree was affirmed by the court of appeals. I think the doctrine then recognized by the court, applies to this case, and will support the limitation; even if the limitation should be construed strictly, as in common law conveyances.

Upon the whole, after the best consideration which I have been able to give this cause, I am of opinion that the decree of the judge of the circuit court was correct and ought to be affirmed.

HENRY W. DESAUSSURE.

It is therefore ordered and adjudged, that the decree of the circuit court be affirmed.

HENRY W. DESAUSSURE.

THOMAS WATIES.

W. D. JAMES.

As this is a case of construction, it is necessary to determine whether the instrument under which it arises should be considered as testamentary, wills being more liberally construed than deeds.

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\*A paper signed, sealed and delivered as a deed, may be taken as a testamentary paper, but then it must be intended not to have effect until the death of the maker, and this construction of the deed is resorted to, to carry the intention into execution. In this case the instrument is a deed to which Robert Lamar intended to give effect, and which took effect on its delivery. This intention is evident from the delivery of the deed itself, and of the saddle as possession of the property. The deed conveyed an immediate interest with a present fixed right of future enjoyment, and did not stand in need of any further act on the part of Robert Lamar for its completion. His death was merely the period appointed for the exercise of the right previously transferred by the deed, and had Robert Lamar after the delivery of it been disposed to revoke it it was not in his power to do it.—The deed is said to be void as a feoffment, as far as it relates to the real estate, as an estate in freehold cannot be created to commence in futuro, but it ought to take effect presently, either in possession or remainder, because at common law no freehold in lands could pass without livery of seisin which must operate either immediately or not at all.—2d Blackstone.

As a covenant it is said not to be good, love and affection for a bastard child not being a sufficient consideration upon which a use can be raised.—Fonblanque.

The deed was confirmed by the will of Robert Lamar, at whose death Winfrey either took or was already in possession of the property, and the widow of Winfrey who now holds it, does not apply to this court for its aid, or to supply any defects in the deed. It is clear that Robert Lamar intended to give

the property to Winfrey, and if the mode he has taken to do it, be ineffectual, the court will find some other to give effect to his intention: for it is well settled that deeds shall operate according to the intention of the parties, if by law they can. Lamar might make the provision he did for Winfrey; by his conduct to him he had raised expectations in him, and he was besides his son. In making the deed he discharged a moral obligation,

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and the widow of Winfrey being in \*possession of the property under the deed, may set it up as an agreement of Lamar's which has been executed. And her case is stronger than if she came into this court seeking its aid, for the court will sometimes not set aside agreements of which it would not have decreed a specific performance. The question is, whether the limitation to the children of the brothers of Lamar be good?

There are many cases in which a limitation over, after a dying without issue or without heirs, has been held bad but this court believing that where there are limitations over, testators generally intend by their words issue or heirs living at the death of the first taker, has anxiously laid hold of any circumstance or expression in the will, to give this construction to them, and latterly has gone so far as to leave it doubtful, whether without any circumstance or expression in the will, *ex vi termini*, it would not construe a dying without issue or without heirs, when there is a limitation over, in the restricted sense.

The intention of a testator is highly regarded, and in favor of it a very liberal construction is allowed, as may be seen by the cases of Whalley against the executors of Whalley, and of Campbell and wife. But the same liberality of construction extended to deeds would unsettle the foundations upon which the title to property rests, and instead of the security of private rights, which an adherence to old pre-established rules of adjudication affords, would introduce an uncertainty, destructive of uniformity of decisions and pregnant with mischief. We know what the law is now, but we shall not know what it is, if we discard technical rules in the construction of legal instruments.

A conveyance of an estate to a man forever, is as indicative of an intention to give him a fee simple, as a conveyance to him and his heirs; yet the construction is different and it is right it should be so for it is wise and better that a particular hardship should sometimes be sustained, and that the intention of men not properly expressed in deeds should fail, than that the settled landmarks of property should be disturbed.

It was argued that the habendum in the

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deed is re\*puignant to the premises, and void. I say nothing on this point, because if the limitations to the complainant be too remote, there is an end of their claim.

The whole of the personal property will vest in the first taker, and it is immaterial to the complainants what estate in the lands passed. The case of *Tilbury v. Banbut*, 3 Atkins, is much like this. Dr. Tilbury devised all his real and personal estate to his wife for life, after her death to his son John, a younger brother of the plaintiff's by another venter, and his heirs forever. And in case of the death of John Tilbury without any heir, then his real and personal estate devised to his son John, shall go and be enjoyed by his son Cornelius the plaintiff.—This was held to be a void devise.

I am of opinion that the limitations to the children of Robert Lamar are too remote.

THEODORE GAILLARD.

Robert Lamar being seized and possessed of a large real and personal estate, and having no legitimate lineal descendant, by deed bearing date the first day of April, 1806 gave the same to his illegitimate son, Thomas Lamar Winfrey, and his heirs, executors, and administrators, with a proviso, that if Thomas Lamar Winfrey should die without issue, then, and in that case, he gave it to the present complainants, who were the nephews and nieces of the said Robert. The deed was delivered in due form to the donee, as was also a part of the personal property, as symbolical of a delivery of the whole; but the absolute and uncontrollable power over it was postponed, until the death of the said Robert. The parties to the deed lived together for several years, and enjoyed indiscriminately a community of the profits of the estate. Some time after the death of Robert Lamar, Thomas L. Winfrey died, leaving a widow and no issue, and the present controversy is between her and the complainants in the court below.

In the discussion of this case, three distinct and unconnected grounds were relied on, on the part of the appellees:—First, that the instrument was a testamentary paper; secondly, that it was a covenant to stand seized

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to \*uses; thirdly, that if it was neither, it was a nullity, and the property would revert to the heirs of the donor.

The circuit judge seemed to discard the idea of its being a testamentary paper, and I fully accord with him in that opinion. I cannot consider an instrument testamentary which possesses not a solitary ingredient of a will, or which is not made in contemplation of death, or has some propinquity of execution with a will. A will never conveys an immediate interest, which this instrument does: for although it is not necessary to a deed that the interest should be taken possession of at the time of the execution, it must be considered as passing it at that time; in a will it is otherwise. And further, a will is essentially revocable, which this instrument was not after its execution and delivery.

But admit that under any possible circumstances this could be considered in the light of a testamentary paper, still the complainants could not recover under it. It is the creation of an estate in fee tail, and the statute *de donis conditionalibus*, not being of force in this state, the particular estate, upon which the limitation over is supported, failing, the limitation also must fail, and the donee hold in absolute fee simple.

The second ground is, that it is a covenant to stand seized, &c. A covenant to stand seized is bipartite. It is where a man, seized of lands, covenants that he will stand seized of the same in consideration of blood or marriage, to the use of his child, wife, or kinsman for life, in tail or in fee. This species of conveying real estates originated in fraud. It deprived the lord of all his feudal rights, tenants of their leases, and creditors of their just debts. It was in general use during the time that England was engaged in her long wars with France, and subsequently, while the controversy between the Houses of York and Lancaster convulsed the nation: but after the salutary act of the 27th Henry VIII, C. 10 was passed, which obviated almost all the fraudulent purposes for which it had been invented, it sunk into disuse, and I doubt whether it ever found its passage to this country. The mode of transferring

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property by the ancient form \*of bargain and sale, and testamentary devise, has been found to be fully competent to all honest purposes; and I should be reluctant to innovate on good institutions for speculation and visionary schemes, invented by subtilty, and predicated on fraud.

I cannot, for my part, see the least resemblance in form, substance, or legal operation, between the deed in question, and a covenant to stand seized. But suppose it could be viewed in this light; it is still the creation of an estate in fee tail, and liable to the same objections as have been mentioned under the former head.—With regard to the third point it requires no comment.

The paper in question possesses all the requisites of a deed at common law. It is in writing. It is between parties able and willing to contract, in contemplation of law. It is for a good and meritorious consideration. The donor had no legitimate descendant; and, independent of the ties of affection, (which the stern laws of morality would deny a father to bear towards his illegitimate offspring,) it was more incumbent on him to provide for one whom he had been the cause of ushering into the world, with the legal inconveniences and reproach inseparable from a person of that description, than to bestow his fortune on co-relatives, who may have been in affluence, and regarded him with a view only to the ultimate enjoyment of his property.

It possessed another essential agreement of



a common law instrument. It was signed, sealed, and delivered in presence of witnesses, which was a complete consummation of all the law required. It is further to be observed, that Robert Lamar himself calls it a deed of gift upon the face of it; and frequently in his will, which was executed several years afterwards, denominated it "a deed of gift." I cannot therefore see the necessity of the courts endeavoring to find out another name for it than the one which was used by the maker, for the purpose of subjecting it to a different legal construction.

I am therefore of opinion, that the deed is a complete common law instrument, liable to legal construction as such; that the limita-

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tion over is too remote; that the de\*cree should be reversed, and that the bill should be dismissed with costs. W. THOMPSON.

June, 1817.

Afterwards two other questions were made in the cause for the consideration of the circuit court. It was contended, on the part of Mrs. E. Lamar, the widow of Thomas Lamar Winfrey, that she was entitled to dower in the real estate in question, and also to the issue of the female slaves born before the death of her husband.

These questions were argued before Chancellor Desaussure, who delivered the following decree:

Robert Lamar executed an instrument, by which, in consideration of the natural affection he bore his son, Thomas Lamar Winfrey, (son of Judith Winfrey, deceased, to whom he was not married,) he gave and granted to the said Thomas, his heirs, &c. all his real estate; and also his negro slaves, whom he names, but says nothing of the issue of the female slaves; also his stock, &c. of all which Robert Lamar says, I have delivered the said Thomas one saddle, as possession of the whole;—to have and to hold the said property (at the death of the said Robert, and not before) to the said Thomas, his heirs, &c. without any condition, except that should the said Thomas die without any heir of his body begotten, then, and in that case, the whole of the then remaining property should be equally divided among the children of his brothers, Thomas, Philip, and James Lamar, in equal proportions. Robert Lamar died without leaving a wife or any legitimate issue, but leaving alive his said natural son Thomas; and the said Thomas Lamar left a last will and testament duly executed, by which he confirmed the said instrument. Thomas, the son, took possession of the estate, and enjoyed the same till his death. He left a widow, but no lawful issue. In a former stage of this case it had been decided, that the instrument executed by Robert Lamar, took effect as a deed to stand seized to uses, or as a testamentary disposition, and that upon the death of the said Thomas Lamar Winfrey, "without any

heir of his body begotten," the children of the three brothers of Robert Lamar became

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entitled to the estate. It \*is now contended that the complainant, the widow of Thomas Lamar Winfrey, is entitled to dower in the lands, and to the issue of the female slaves, comprehended in said instrument, who were born after the execution thereof, and before the death of said Thomas.

To the claim of dower it was objected, that Thomas had not such an inheritable interest in the lands as entitled his widow to dower. But I am of opinion he had. The limitation is to him and to his heirs; but if he died without an heir of his body begotten, then over to the brothers' children.

If he had had an heir of his body, he would have inherited. Now the text of Littleton is express, that where a woman taketh a husband seized of such an estate, in tenements, &c. so that any issue she might have by him may by possibility inherit the said tenements, of such estate as the husband hath, she shall have her dower; otherwise not. See Litt. § 53. As then the issue Mrs. Lamar might have had by the said Thomas might have inherited, she is entitled to dower. The widow of a tenant in tail, it was conceded, would be entitled to dower. And so, in my judgment, is the widow of a tenant in fee conditional at common law.

But a more serious objection to the claim of dower exists. It is that a widow is not dowable of a trust estate: and that this was construed a deed to stand seized to uses by the court. There is no doubt that the decided cases have settled the point too long and too firmly to be shaken, that a widow is not dowable of a trust estate.—See 3 P. Wms. 229, Chaplin v. Chaplin; Cases Temp. Talbot, 138; Attorney General v. Scott; 1 Bla. Rep. 138, 161; Burgess v. Wheat, 2 Atk. 525; Godwin v. Winsmore, and Dixon v. Saville, 1 Bro. C. C. 326.

But it does not necessarily follow, because the court construed this instrument to be a deed to stand seized to uses, in order to give effect to the intentions of the maker of it, that it must be so construed to all intents and purposes. It is really a gift direct to the son, without the intervention of trustees, or the formal creation of a trust estate. But

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as it was not to take effect till the do\*nor's death, and therefore could not take effect as a common law instrument, the court in the anxiety it always feels to fulfill the intention of the parties, construed the instrument a deed to stand seized to uses for that purpose. And it would be very unwilling to attach to an instrument so construed for such a purpose, the quality of a trust estate so completely as to fasten upon it the application of an artificial rule, which would go to defeat the widow of dower. But if the privation of dower must necessarily follow the

construction of the deed to be a deed to stand seized to uses, then I shall resort without hesitation to the other ground on which the court proceeded, which was to consider this paper as testamentary.

The cases cited in the former decree of the court fully warranted that opinion, and I think the widow is entitled to the benefit of it. And I am the more satisfied with this determination, because the will of Mr. Robert Lamar confirmed the instrument, and its authenticity may be made to rest upon that confirmation, as itself an effective disposition. The result of this reasoning is, that I feel bound to allow the claim of dower.

The other claim made on behalf of the widow is, that she is entitled, (as the legatee of her husband,) to the issue of the female slaves, named in the instrument, who were born before her husband's death. This point was fully and ably argued, and I have considered the question very maturely. Slavery in a modified form existed in England, under the denomination of villeinage; but it was nearly fallen into disuse at the time of the settlement of the colonies, and completely so, before the settlement of South Carolina. The last case of villeinage reported in the books, is that of Crouch, in the 10th of Elizabeth. See Dyer 266. And villeinage was abolished by the stat. of 12 Car. 2d. We are not, therefore, to look to the common law for rules for the regulation of that species of property. By our colonial statute of the 10th May 1740, it was enacted that the issue should follow the condition of the mother. This was a plain departure from the common law in relation to the villeins; for by that law the issue followed the condition of the father,

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whether bond or free. The text of Littleton, § 187, is precise to that point.—See too 2 Bla. Com. 93, 4. This provision of the common law is noticed by Lord Coke to be the reverse of the civil law, the rule of which was, that *partus sequitur ventrem*. Our statute hath then adopted the civil law rule: and Mr. Cooper in his Notes on the Institutes, remarked that it was the same in Pennsylvania. See Cooper's Justinian, p. 479. Enquiring then into the rights acquired in that species of property, it seems to be proper to resort to the civil law, which according to Sir William Jones, is the true source of nearly all the English laws that are not of feudal origin.

The question to be examined is, who is entitled to the issue of female slaves, where there is no positive disposition made; the tenant for life, or any other particular estate, (the usufructuarius,) or the remainder man or reversioner, (the proprietarius)?

Blackstone says, the *usus fructus* of the civil law was, the temporary right of using a thing, without having the ultimate property or full dominion of the substance, and Domat

agrees with him. See book 1, tit. 11, § 1, 1 vol. 183, 4, &c.

Cicero says that the question whether the offspring of female slaves belonged to the usufructuary was formerly much discussed among the jurisprudents, among whom there was then some difference of opinion: Scævola and Manilius differing therein from Brutus.

To this passage there is supposed to be an allusion in the Pandects, where it is said, it was formerly a question whether the issue of female slaves belonged to the usufructuary; but Brutus' opinion has prevailed, that the usufructuary has no property therein. For man cannot be considered as the profits of man; for which reason the usufructuary shall have no usufruct therein; unless indeed such usufruct be specially bequeathed; for in that case, as the testator might have given the issue or offspring itself, he certainly might give the use and profits of it.—Digest, lib. 7, title 1. And in another passage it is more distinctly stated. The profits of cattle will comprehend not only milk, hair and wool,

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but also the young thereof. Therefore lambs, kids and calves become immediately the property of the usufructuary. But the issue of a female slave makes no part of the profits, (in fructu non est,) but belongs to the ultimate proprietor, (ad dominum proprietatis pertinet.) Digest. lib. 22, tit. 1.

The text of the Institutes lays down the rule almost in the same words: "Among the produce of animals we not only reckon milk, skins and wool, but also their young; and therefore lambs, kids, calves, colts and pigs, appertain by natural right to the usufructuary; but the offspring of a female slave cannot be thus considered, but belongs to the proprietor of such slave." See Cooper's edition of Justinian's Institutes, lib. 2, tit. 1, § 37; Voet. ad Pand. lib. 7, tit. 1, notices and remarks on this rule of the civil law. And Vinnius in his commentaries on the Institutes, states it as the settled doctrine, that the offspring of female slaves is not to be considered as part of the profits, nor as belonging to the usufructuary, but such offspring belongs to the proprietor, (ad dominum proprietatis.)—lib. 1, tit. 1.

In making up a definitive judgment on a question which is to affect not only the rights of property to a great extent, (for cases of this kind must be perpetually recurring,) but which must also have an influence on the comfort of the unhappy beings who are the subject of discussion, one cannot prevent the considerations of humanity from mingling in the judgment. It is alleged on the one hand, that if the right of property in the issue be not given to the usufructuary, he would not be led by the strong temptation of interest, to take care of the helpless infants, who would rather be burthensome and expensive to him for many years, besides the



loss of service of the mother during her pregnancy, and some time after:—whence it is inferred that humanity would be promoted by bestowing the right of property on the usufructuary.

On the other hand it is alleged, that if the absolute right of property be decided to be in the usufructuary, and that the issue of the females shall not go over to the remainder man, or ultimate proprietor, there will be a

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cruel and painful separation of the children, even those at the breast, from their parents.

There is weight in both views of the case; but there is more I think in the latter. The separation would be a great and certain evil. The want of care in the usufructuary, if deprived of the absolute right of property in the issue, might occur in a few cases; but we may trust in general to the humanity of the possessors, and more to the attention of the mothers themselves. On this ground then, I think the consideration of humanity is in favor of the adoption of the civil law rule. To this it may be added, that the remainderman, who is ultimately to be the absolute owner of the estate, and is usually the main object of the bounty of the testator or donor, would, if the intermediate estate should be protracted considerably, as is frequently the case, receive only an infirm and broken set of laborers, if the usufructuary were to keep the issue.

This subject has been before the courts of America, but the decisions have been different in the different states. In Maryland it has been adjudged that the legatee of slaves for life, is entitled to the issue born during the life estate.—*Scott v. Dobson*, 1 Harris and M'Henry's Reports, 160. In North Carolina the contrary doctrine has prevailed, and the issue is adjudged to go over with the parents to the remainderman. See the case of *Glasgow v. Flowers*, 1 Haywood's Reports, p. 233, in which the case of *Tims v. Potter* is cited, and stated to have established the law.

The question has scarcely ever been brought directly before our own state courts, though the case must have occurred frequently. The late chancellor Rutledge stated, that he had never been called upon to give a judicial opinion on the question in twenty years that he had been on the bench, which he attributed to its being generally understood, and acted upon in the country, that the issue were to go over with the parents to the remainderman: and he considered this understanding and usage to be correct.

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\*I concur in that opinion on principle, and on the doctrine of the civil law, which furnishes more apposite examples for the determination of questions respecting slaves, than the common law principles respecting villeins. And where there is no statute law on the subject, I consider the silent uncon-

troverted usage of the country, as going far to establish the rule; which therefore ought not to be shaken without the clearest conviction that it is radically erroneous. I feel no such conviction, but quite the contrary: and I am satisfied upon mature consideration, that it is most consistent with justice, policy, and humanity, that the issue should not belong to the tenant of the intermediate estate, (the usufructuary of the civil law,) but should go over with their parents to the remainderman or reversioner, the proprietarius of the civil law.

An attempt was ingeniously made to shew a distinction between cases where the right to the slaves was vested in the remainderman, and where not so vested. And it was argued, that as the provisions of the instrument under consideration, gave an inheritable estate to Thomas Lamar Winfrey, with merely a contingent estate in the remainderman, dependant on the happening of an uncertain event, the death of the said Thomas, without an heir of his body begotten, this was a case in which the issue of the female slaves born during the continuance of Tho. Lamar's estate, ought to be adjudged to belong to him, and to his legatees and representatives.

This argument struck my mind at first with some force, and it certainly makes as strong a case as can be made for the intermediate tenant, or fructuarius. But upon the best consideration I have been able to give it, it does not appear to me to vary the question so materially as to alter my opinion. For after all, Thomas had not the absolute estate, the dominion over the property:—If he died without issue, it was to go over to others. This has happened—his estate is defeated and terminated, and the property goes over to the remaindermen. I think they are entitled to the issue, and that the bill must be dismissed as to that property. But I shall be quite satisfied that the com-

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plainant should carry up this ques\*tion to the court of Appeals. It is of sufficient importance and difficulty to induce the most scrupulous counsel to pursue that course.

With respect to the dower, it is ordered and decreed, that a writ for the admeasurement of dower do issue in this case, and that ————— be commissioners to assign to Eliza A. Lamar her dower in the lands in contest between the parties, or to assess her the value thereof. Such allotment or assessment to be subject to the future order of the court, as a security for the restoration of certain parts of the estate alledged to have been carried out of the jurisdiction of the court by the said E. A. Lamar.

Henry W. Desaussure.

From this decree an appeal was made on the following grounds:

Robert Lamar executed an instrument by

which, in consideration of natural love and affection, he gave to his natural son, Thomas L. Winfrey, his real and personal estate. To have and to hold the said lands, &c. at his death, and not before, to the said Thomas L. Winfrey, his heirs, &c. without any condition, except the following, that is to say, that should the said Thomas L. Winfrey die or decease without any heir of his body, lawfully begotten, then and in that case or event, the whole of the then remaining property should be equally divided between the children of his brothers, Thomas Lamar, Philip Lamar and James Lamar, in equal proportions among them all. Robert Lamar died without leaving any lawful issue or wife to inherit. Thomas L. Winfrey likewise died without any lawful issue. Some time after the death of Thomas L. Winfrey, a bill was filed by those in remainder for partition, and a decree given in their favor by the circuit court, and confirmed by the court of appeals. At the court of equity at Edgefield in June term last, a motion was made by the solicitor for E. A. Lamar, the defendant in partition, by the consent of the complainant's solicitor, for leave to enter an order that a writ of admeasurement of dower

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er should issue, in \*favor of E. A. Lamar, widow of Thomas L. Winfrey, and the question of right argued before the court. The court granted the order, and decided in favor of her claim of dower. This is an appeal from that decision, and the defendants in dower contend that she is not entitled to dower.

First,—Because the estate in the lands held by the husband, was a fee simple conditional of which they contend a wife is not dowerable.

Second,—That the statutory provisions in favor of the wife, and alterations in the policy of this country, and the rules of descent, have materially altered the reasons of the English law, on the subject of dower.

Third,—That Thomas L. Winfrey was considered by the court as holding under a covenant, to stand seized to uses, and a wife is not dowerable of a use or a trust.

Ellison, solicitor for defendants in dower.

Robert Lamar by a deed, subsequently confirmed by his will, gave to Thomas Lamar, the husband of Eliza A. Lamar, amongst other things certain negroes, "to him and his heirs forever," in the premises. In the habendum he gives it to him and his heirs forever, without any manner of condition, except the following; that if Thomas Lamar should die without an heir of his body begotten, then they are limited to other persons. The point submitted to the court was, whether the issue of the negroes, born during the life of Thomas Lamar, who died without issue, go to his representatives or the persons in limitation. The presiding

judge decided in favor of the persons in limitation, from which decision the defendant appeals, and moves to reverse it.

Because Thomas Lamar had such an estate as entitled him to the issue and they of course go to his representatives.

Simkins and M'Duffie for appellant.

December, 1817.

This appeal was argued at Columbia, and the Chancellors Desaussure, Gaillard, Waties and James, unanimously affirmed the decree of the circuit court.

Ellison and Blanding for complainants.—M'Duffie, Yancey and Goodwin for defendants.

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\*Case LXXXVIII.

Columbia—Heard before Chancellor Desaussure.

DUNLAP and Others, v. JOHN BYNUM, administrator of W. C. Tyson, and PRESLEY GARNER.

(February, 1817.)

[*Executors and Administrators* ⇐261.]

A. being indebted by judgment, was elected sheriff, and, together with his surety, entered into a bond to the state for the faithful discharge of the duties of his office. While sheriff, he collected money on certain executions, and had not paid over the amount before his death. His estate was so far insolvent as to be unable to pay both his private judgment debts, and these monies so collected. The court decreed that the plaintiffs, whose monies he had collected, and who claimed the benefit of his bond to the state, were not entitled to a priority of payment over the private judgment creditors, whose debts were decreed to be first paid. But the surety was ordered to pay the amount collected by the sheriff, and which he had not accounted for.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 970; Dec. Dig. ⇐261.]

The bill stated that the complainants were judgment creditors of Thomas H. Wade, and had sued out executions on their judgments, which were lodged in the office of Wright C. Tyson, then sheriff of Richland district, and continuing to be so till his death.—That the said Tyson collected the amount due on their judgments some time in the beginning of the year 1816, and died soon after, without paying the same over to the complainants.—That since his death John Bynum hath administered on the estate of the said Tyson, and complainants have applied to him for payment of the monies collected on their judgments and executions; but he has refused to do so, on the grounds that there were before, and at the time when the said Tyson became sheriff of Richland district, judgments against him in favor of his individual creditors to a larger amount than all the assets of the said Tyson: and that these judgment creditors are entitled to a priority, in the distribution of the said assets, to the



complainants.—That before his entering on the duties of his said office as sheriff, the said Tyson gave his bond to the state, with security, according to law, on the 24th January, 1816, in the penal sum of        dollars, conditioned for the faithful performance of his duties as sheriff as aforesaid, and Presley Garner joined in said bond as one

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of his securities.—That complainants \*applied to the said surety to pay the said sums of money so collected by said sheriff; but he has declined to do so, on the ground that the administrator of the said Tyson is bound to apply the assets of the said Tyson, in discharge of the complainants' demands, in preference to his judgment creditors; and that in case he was to pay the complainants' demands, he would then file his bill in this court, and compel the said John Bynum to refund the same from the assets of the said Tyson. The bill prays the court to decide between the conflicting pretensions, and to give complainants relief, either out of the assets of Tyson, or by compelling the security to pay the amount due to the complainants by the said Tyson.

The answer of John Bynum, the administrator of Wright Tyson, the late sheriff of Richland district, admits that the complainants' exhibit contains a true statement of the monies collected by said Tyson, in his character of sheriff, on the executions of the complainants; but that at the time the said monies were collected, the said Tyson was indebted on several judgments, on which executions had been lodged, to an amount greater than the value of the assets of the said intestate, which have come to the hands of the said defendant, a statement of which judgments is filed. The defendant admits that the said W. Tyson, before entering on the duties of his office, gave bond and security according to law, as stated in complainants' bill. The defendant submits, and prays the direction of the court, whether the complainants are entitled to avail themselves of the security given to the public, so as to give their claims a preference to those of the private creditors, or whether the said P. Garner would have a right to do so if he had discharged the complainants' demands? Whether any debt to the public was contracted at all by the said W. Tyson, as there had been no forfeiture of the condition of his bond before his death, and, a bond given as a contingent security is not considered a debt, in the administration of assets, until forfeiture of the condition; and at any rate it is not a debt of record, and cannot take precedence of private judgments? And also, whether the court can now divest

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the judgments and \*executions of their lien on the assets, especially as they had this lien before the existence of the plaintiffs' demands? Defendant denies combination, &c. The bill was taken pro confesso as to Garner.

This question has been well argued, and is of much importance as to the principle involved in it, though the amount in question be not very large.

The claim of the complainants to a priority of payment out of the assets of Tyson, the intestate, is founded on several acts of the legislature. The first is the act of 29th July, 1769, the eighth section of which provides that the sheriffs shall give bond to the public Treasurer, in behalf of the public, for the faithful performance of the duties of their offices; which bonds should remain in the treasury, and may be sued for by order of the court for satisfaction of the public, and all private persons aggrieved by the misconduct of the said sheriffs. The 9th section provides, that the sheriffs shall have the same powers, and be subject to the same suits, fines, penalties, and disabilities, which the sheriffs in Great Britain are liable to by the laws and statutes of Great Britain.

The act of the 12th December, 1795, re-enacts the obligation of the sheriffs to give security in a fixed sum, payable to the treasurer of the state, conditioned for the faithful performance of their duties; which bonds are to be deposited in the treasury, and may be sued for by the public, or any private person who may be aggrieved by the said sheriff; for which purpose the treasurer shall, upon application at the treasury office, deliver to any person applying, a certified copy of any sheriff's bond there deposited, which copy shall be evidence in any suits to be instituted.

The act of 1789 was also cited and relied on for complainants. It is enacted by the 26th section, that executors and administrators shall, in the administration of assets, pay the debts of the testator in the following order:—funeral and other expenses of the last sickness; next, charges of probate of the will, or letters of administration; next, debts due to the public; next, judgments, mortgages and executions, &c.

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\*These acts were commented upon by the counsel, and much stress laid upon them. After a careful examination of the acts, it does not appear to me that the two first intended to introduce any new law. They have merely prescribed the mode by which the sheriffs are to give bond with sureties, to which the public and individuals can have recourse to be indemnified for misconduct by those officers. But they do not speak of these bonds as a debt established; on the contrary, suits are directed to be brought on the bonds, by the public or persons aggrieved, to establish any debt or demand on the sheriff. The bond to the public was contingent till a forfeiture had taken place, and been established by suit on the bond; so that if we even admit that the state and its assignees are entitled to all the advantages of priority of payment, on the ground of prerogative,

and of the acts of parliament giving the king's debts a priority, (though few of these acts are of force) this does not appear to be one of the cases to which the right of priority applies, or can be made effective. The rule is, that where the rights or titles of the subject and of the king concur, the king shall have the preference. But the concurrence must be in the beginning. It is so laid down in 9 Co. Rep. 55, 129. So in Co. Lytt. 306, and 4 Bac. 198. Now the state, or its assignee, had brought no suit, and established no rights, on Tyson's bond, at the time of the existence of the judgments and executions of Tyson's private creditors against him, nor even to the time of his death. I recognize then nothing till the death of Tyson which could establish any right or title in opposition to the legal liens of the judgments and executions of the creditors of Tyson, which bound his lands from the signing the judgment, and his goods from the delivery of the writ of execution; so that the sheriff might levy on the goods even in the hands of the executors or administrators. See 2 Bac. Abr. 352, Cro. Eliz. 181. Raym. 695. Salk. 322. The great case of Rourke v. Dayrell, 4 Term Rep. 402, has however settled this question conclusively.

The other act to be examined is that of the year 1789, which prescribes the order for

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the payment of the \*debts of a deceased person by his executors or administrators. This act is directory to executors and administrators. It meant not to change any law; it only re-enacts the common law. It must be taken with reference to other established doctrines—that is to say, that when it directs debts to the public to be paid before judgments, and executions, and mortgages, it must mean where those debts are established and concurrent, not contingent and doubtful. It would be monstrous to say, that a mortgagee, or judgment and execution creditor, should be postponed to a bond to the state officer; not for a liquidated debt, and an ascertained sum of co-equal existence, but on a penalty given to cover defaults in office, which are known or ascertained at the death of the officer. The act directs payment according to the rights of parties at the time of the death of the deceased. But no debt had been established on the bond to the treasurer at Tyson's death. I do not think therefore the statute of 1789 will oblige the administrator of Tyson to pay the complainants, to the prejudice of his private judgment creditors.

If however I had any doubts, they would be overruled by the judgment of this court in the case of the Commissioners of Public Accounts v. Greenwood and others, creditors of P. Bocquet, decided in Charleston, in August, 1795. See Reports of Cases in Equity, 1 vol. p. 450, and Appendix.

Nor is the case of security, Presley Garner, better than the persons on whose judgments and executions Tyson had received the money in question. If he pays the money, he stands in their shoes, with all their rights and advantages, but no higher or better.

I am therefore of opinion that the complainants are not entitled to the priority they claim, to be paid out of the assets of Wright Tyson, the late sheriff of Richland district: but must come in on his assets at all events subsequent to the judgment and execution creditors.

The complainants are entitled to a decree against the defendant Presley Garner.

It is therefore ordered and decreed, that Presley Garner do pay to the complainants

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the amount received \*by the late Wright C. Tyson, as sheriff, on the executions in his hands; and that it be referred to the commissioner to examine and report what was so received by Tyson, and not paid over to complainants. Costs to be paid by Presley Garner.

From this decree there was an appeal on the ground, that the complainants are secured by a bond due to the public, which takes priority of the judgment creditors of the sheriff.

December, 1817.

The court of appeals made the following decree:—

This case having been submitted to the court, it is ordered and adjudged, that the decree of the circuit court be affirmed.

(Signed) HENRY W. DESAUSSURE,  
THEODORE GAILLARD,  
THOMAS WATIES,  
W. D. JAMES.

Blanding for appellants.—Harper for respondents.

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Case LXXXIX.

Orangeburgh.—Heard by Chancellor Thompson.  
THOMAS BUTLER, WILLIAM BUTLER,  
JAMES BUTLER and the Heirs of  
CHARLES BUTLER, Deceased, v. E. HASKELL.

(February, 1816.)

[Principal and Agent ⇄ 69.]

The heirs apparent of an idiot, whose estate was in the hands of a committee, being weak, illiterate and necessitous, and finding a difficulty in procuring and perpetuating the evidence of their relationship, employ an agent to transact the business for them, at a commission of ten per cent on the amount to be recovered; the agent afterwards purchases their interest in the estate, at about one fourth its ultimate value; when the estate is recovered, he takes from them in pursuance of the said purchase, a conveyance of their interest, and a power of attorney to prosecute the decree, and to receive to his own use their shares of the estate yet to be accounted for. The contract of purchase set aside on



the ground of gross inadequacy of price, connected with the weakness and necessities of the sellers; and on the further ground that the agent was legally incapacitated to purchase from his principal the estate which was the subject of the agency, so long as this relation of confidence continued.

[Ed. Note.—Cited in *Drake & Mitchell v. Boyce & Henry, Riley*, 234; *McCants v. Bee*, 1 McCord, Eq. 390, 16 Am. Dec. 610; *Miles v. Ervin*, 1 McCord, Eq. 535, 16 Am. Dec. 623; *Way v. Union Cent. Life Ins. Co.*, 61 S. C. 506, 39 S. E. 742; *Ex parte Gadsden*, 89 S. C. 364, 71 S. E. 952.

For other cases, see *Principal and Agent*, Cent. Dig. § 135; Dec. Dig. ☞69.]

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[*Principal and Agent* ☞75.]

\*The after conveyances held no confirmation, having been made under the original impression, and a belief that they were bound by the first contract, and during the continuance of the necessities of the sellers.

[Ed. Note.—Cited in *Gregg v. Harllee, Dud. Eq.* 53; *Manes v. Durant*, 2 Rich. Eq. 406, 46 Am. Dec. 65.

For other cases, see *Principal and Agent*, Cent. Dig. § 155; Dec. Dig. ☞75.]

[*Principal and Agent* ☞69.]

[An agent, if he can in any case become a purchaser from his principal of the subject of the agency, during such agency, is bound to show demonstratively that he has not abused the trust reposed in him.]

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 135; Dec. Dig. ☞69.]

[*Principal and Agent* ☞79.]

[Where an agent purchased from his principal the subject-matter of the agency, a lapse of 12 years was held to be no answer to a suit, by the vendor, to rescind the sale.]

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 179; Dec. Dig. ☞79.]

[*Sales* ☞19, 20.]

[Cited in *Banker v. Hendricks*, 24 S. C. 13; *Coley v. Coley*, 94 S. C. 387, 77 S. E. 49, to the point that a contract of sale will not be set aside merely for inadequacy of price, unless the inadequacy is so great as to furnish proof of fraud or undue advantage.]

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 32; Dec. Dig. ☞19, 20.]

[This case is also cited in *Young v. Burton, McMul. Eq.* 266, without specific application.]

The object of the bill of complaint was to set aside certain sales made by the complainants to the defendant, of their interests and expectations in a great estate, real and personal, then owned by an idiot, named Margaret Butler, and held and managed for her by a committee; on the ground of enormous inadequacy of price; extreme indigence and ignorance in the vendors; great skill and judgment in the defendant, and advantage taken of the incapacity and necessities of the complainants; and also on the ground that the defendant was, at the time of the sales, employed as the agent of the complainants, to pursue and establish their claims to the said property, and was consequently incapacitated to become a purchaser from them.

The bill set forth that Margaret Butler, an idiot from her birth, was seized and possessed of a considerable real and personal estate in the district of Georgetown; and the complainants discovered some time in 1801, that they, together with their brothers and sisters, were related to the said idiot, and were informed that they were as nearly related as any other persons, and would be entitled on her death to a proportionate part of her estate. But by reason of their residing at a distance, and being ignorant persons, they knew not the nature or extent of their claims, nor the evidence necessary to establish the same. That their brother George Butler made some enquiries concerning the said evidence, and advised with counsel on the nature of their claims, without being able to procure any satisfactory information. That while he was pursuing these enquiries, he was counselled by the defendant, (who apparently acted as his friend and adviser,) to employ some person of influence and authority, and who was accustomed to business, to discover the necessary evidence, and prosecute the claim.

In consequence of this advice, the complainants and their brothers and sisters, ap-

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plied to the defendant and \*employed him to enquire and discover the evidence of their relationship to the idiot, and establish their claim to her estate, and agreed to allow him for his services one tenth of what should be ultimately recovered—and gave him a power of attorney, authorizing him to institute a suit in equity, to perpetuate the testimony of their relationship, and to establish their claim. By this agreement it was stipulated that the expense of prosecuting the claim should be borne equally by all parties interested.—That the defendant set on foot an investigation of the said claim—instituted a suit and obtained a decree for the perpetuation of the testimony relating to the said claim; by means whereof the defendant became fully acquainted with the nature and extent of their rights and expectancies, with the value of the estate, and the probable and estimated duration of the life of the idiot.

That during the pendency of the said suit, the complainants and their brothers and sisters, (nine in number,) with the knowledge and at the instance of the defendant, entered into a covenant, by which it was agreed, that if they or either of them should survive the idiot, and should be the survivors of each other, and should recover any part of the said estate, they should divide the said estate, after deducting all expenses, into ten equal parts, and allot one of those parts to the defendant, and one to each of the other parties, or in case of the death of any of them, to his heirs, executors, administrators and assigns. That the complainants were extremely ignorant and illiterate, and total-

ly unacquainted with the nature of legal transactions, and but imperfectly acquainted with the nature of their claim, and their relationship to the idiot, and entirely ignorant of the value of the estate, or the probability of their speedily succeeding thereto. That the complainants were and still are in the most indigent and necessitous circumstances. That the defendant appearing as their friend and adviser, and acting as their agent and trustee throughout the whole of these transactions, the complainants reposed the most implicit faith and confidence in his representations and uprightness. But that being de-

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sirous to take an undue and \*fraudulent advantage of his knowledge of the nature, evidence and value of their claims, and to avail himself of their ignorance, and necessities, and of the confidence reposed in him, the defendant applied to them to sell and assign to him, their right, interest and expectancies in and to the estate of the idiot, representing that their claims were of uncertain value, and that it would be a long time before the claim could be reduced into possession, and that perhaps they might never obtain any thing; that as they were in indigent circumstances it was better to take something certain and present, than to wait for a distant and uncertain expectancy. That influenced by these representations and the circumstances aforesaid, the complainants Thomas Butler, James Butler and William Butler, and Charles Butler, the father of the other complainants, respectively entered into written engagements with the defendant, by which they sold, assigned and conveyed to the defendant all their right, title, interest, expectancy and inheritance in the estate of the idiot; and the defendant on his part agreed to deliver them each, three negroes of the value of one thousand dollars, and to pay them the sum of two hundred dollars: and that when he reduced the said claim into possession he would pay them the further sum of two thousand dollars each. That the defendant paid them the \$200 each, and the three negroes, but that the said negroes were of little value and different from the description given, which their necessities alone induced them to accept. That at the time of making this agreement, each of the shares in the said estate was worth \$20,000, which value was rapidly increasing.—That the idiot then lived in a sickly part of the country, and from her state of health and age, (being 45 or 50 years old) she could not live many years. All this was known to the defendant, and unknown to the complainants.

That in 1810 Charles Butler died. That the idiot died in 1811:—and shortly after a suit was instituted in Georgetown court of equity, by the administrators of the idiot, for the purpose of ascertaining who were her next of kin. In this suit the claims of the

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complainants, \*and their brothers and sisters, were conducted by the defendant. That the decree of the court established the right of fifteen claimants to the said estate, among whom were the complainants, Thomas Butler, James Butler, William Butler, and four of their brothers and sisters, excluding the said Charles Butler's children, as too remote. The decree ordered a distribution of the real and personal estate, and an account by the administrators. That a short time after the decree aforesaid, the defendant applied to the parties to sign a further instrument, which he then and there produced, and which he represented to be a further power for him to receive the shares of the complainants, Thomas Butler, William Butler, and James Butler; and that share to which Charles Butler's heirs were entitled under the agreement above stated; and the one tenth to which the defendant was entitled in the shares not sold to him. That the complainants were entirely ignorant of the tenor and contents of the said instrument, except from his representations. That they were induced to sign it from their ignorance of their rights, and from supposing they were bound by the sale before made. That the defendant, by virtue of the said powers, has received the whole estate to which the complainants are entitled, to the amount of 80,000 dollars. That coming to a knowledge of these rights, they have applied to the defendant, to deliver up the said estate, to which they are entitled, which he has refused. The prayer of the bill is for a discovery and relief.

The answer states, that a day or two previous to the 4th of February, in the year of our Lord 1804, this defendant was met on his plantation by George Butler and George Barsh, two of the person's named in the complainants' bill, who appeared then, and who this defendant still thinks were in search of him. That the said George Butler commenced a conversation with this defendant, in which he informed him that he had been for some time in search of evidence to show how they (meaning the complainants,) stood in relationship with Margaret Butler, the idiot of Waccamaw, and to have the said evidence perpetuated, but had not as yet

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effected their object; and \*named to the defendant, as witnesses in their favor, the names of Mrs. Cordes, Mrs. Repult, (by the name of Depult,) and Mr. and Mrs. Graham, of Georgetown. That the said George Butler and George Barsh then asked this defendant, if he would undertake to perpetuate their evidence for them, and to procure from Mr. Nicholson and others all papers in their possession relating to that business: to which this defendant replied, that they had better get some person of influence, and who understood the law and business better than



he did. That the said George Butler and George Barsh then rejoined to this defendant, that they were very desirous of getting him to be concerned for them, and would give him as a compensation for his trouble and services one tenth part of whatever might be recovered by them on the idiot's death; and if nothing should be recovered nothing should be received. That this defendant, considering their inability to prosecute their claim of themselves, did then agree with them in their said proposal; but as some document was necessary for him, to show in what right he acted, the said George Butler and George Barsh sent to this defendant a letter, dated the 4th of February, 1804, by which they authorised him to act on their behalf; and that on or about the ninth day of April following, the said complainants gave to this defendant, as an evidence of their agreement to allow him one tenth part of all which should be received by them on the death of the said Margaret Butler, a certain paper, dated the 9th of April, 1804, signed by them. That some time after, to wit, on or about the 21st day of Nov. 1809, this defendant received from Benjamin Hart, Esq. a letter, enclosing a copy of a certain agreement between the said complainants, dated the 29th day of March, 1804; which agreement stated, that "certain evidence was soon to be examined by the Court of Equity in Charleston, which would prove that the said complainants were next of kin, and heirs apparent of the said Margaret Butler.

The answer admits, that in consequence of the aforesaid agreement, he did, with great industry and perseverance, enquire con-

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cerning all persons who might give him \*information about the relationship of the complainants with the said Margaret Butler; and that in addition to those named to him as aforesaid, he did discover several others himself; and that he did institute a suit in equity for perpetuating their testimony, and did procure the same to be perpetuated. But then this defendant solemnly denies that he obtained from the said witnesses, as discovered by himself, any evidence at all prior to his purchase of the said shares, or any material information after the said purchase: or that the evidence given by them was to be compared with the testimony which was given by Mrs. Cordes and Mr. Repult, the witnesses named by the said George Butler himself; which witnesses this defendant never saw, and whose testimony was never revealed to this defendant after it was taken until it was disclosed at the trial. This defendant therefore denies, that by means of his investigation he became fully and perfectly acquainted with the nature and extent of the rights and expectancies of the said complainants. On the contrary he avers, that all the material information he obtained proceeded

from the said George Butler himself, and that so ignorant was this defendant of that information, and its operation in the cause, and such unfavorable opinions he had heard coming from men of learning and abilities on the subject of this cause, that to the last he was highly anxious, and uncertain as to its issue.

And as to so much of the said bill as charges that, "by means of the said investigation this defendant became fully and perfectly acquainted with the value of the said estate," he answering saith, he positively denies this charge to be true; because he says that on the 23d of June, 1804, he purchased from the complainant, Charles Butler, his share, and on the same day the share of James Butler, jun. that on the 9th of July, 1804, he purchased of William Butler his share, and on the same day the share of Thomas Butler; and that in the interval, between the time of his receiving the letter or power of the 4th of February, 1804, and the purchase of the last share from Thomas Butler, on the 9th of July, 1804, he had not discovered any witnesses, or procur-

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ed any further in\*formation on the said subject; and that all the information which he then possessed came from the said George Butler himself; which information not only exceeded all other information which he ever procured, but exceeded also the actual amount; so that this defendant knew no more concerning the value of the said estate than the said parties did themselves.

And as to the charge that, "by means of the said investigation this defendant became fully and perfectly acquainted with the probable and estimated duration of the said Margaret's life," he answering saith, that he denies this charge to be true, and avers that he never saw her in his life, never went into her neighborhood till after her death, and, in short, knew no more on this point at the time of the said purchase, or afterwards, than the complainants themselves did.

And this defendant further answering saith, that he believes the complainants did enter into the agreement filed with the bill; but when the same was actually done this defendant does not know, though it purports to be on the 29th of March, 1804. But of this he is certain, that it could not have been during the pendency of the suit, as is stated in the bill; because no suit was then commenced, nor for some time after—the bill to perpetuate not being filed till the 2d of May, 1805; and as to the fact charged, that the same was done with the knowledge, and at the instance of this defendant, he positively declares, that such fact is absolutely false; because the first knowledge this defendant received of the same, by a sight of a copy of the said agreement, was by a letter from Benjamin Hart, Esq. dated the 21st day of November, 1809; and al-

though he had been informed of the fact at the time of the purchase, and notice of the same is accordingly stated therein as coming from them, yet that he had never advised this measure, nor knew of it till he had made the purchase, when they informed him of it as aforesaid; and that the information then given concealed from his view the fact, that if he died after every exertion, and before the final termination of the cause, he was to receive nothing for his services.

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\*And as to the charge of the complainants, Thomas Butler, James Butler, William Butler, and Charles Butler, "being extremely ignorant and illiterate, and perfectly unacquainted with the nature of legal transactions," this defendant answering saith, that he never knew that general knowledge or learning, or acquaintance with legal transactions, were necessary to the validity of a contract, and cannot conceive that the possession of those qualifications could ever be considered by the law as necessary thereto; as otherwise most contracts, however fair, would be avoided for the want of one or the other of them: but as to their "imperfect acquaintance with the nature of their claims, and of the evidence of their relationship, and their entire ignorance of the value of the said estate, or of the probability of their speedily succeeding thereto," this defendant says, that he believes and is satisfied that they knew as much on the subject as he did, and that all the information he obtained thereupon, prior to his purchase of their shares, was obtained from themselves, or their brother George Butler. And supposing that this defendant may, in the lapse of time, which has taken place since the period to which he alludes, forgotten any facts of new evidence obtained by himself, prior to the purchase of any of the said shares from them, yet of this one fact he is very certain, and can speak positively—which is, that he always communicated the information he had received, concerning the said claim and estate, to the said complainants, or to George Butler, as occasion offered, whether the same was in favor or against their claim; and therefore, as far as depended upon any knowledge received by himself, the said complainants knew just as much as he did.

And this defendant further answering saith, that he positively and solemnly denies that he was "ever desirous of taking, or that he ever did take, any undue or fraudulent advantage of his knowledge of the nature, evidence, and value of the complainants' claim, or that he ever availed himself of the ignorance and necessities of the complainants, or of the confidence reposed in him; or that he ever, in the first instance, applied

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to the said Thomas, \*William, James, and Charles Butler, to sell and assign to him

their right, interest, and expectancies, in and to the estate of the said Margaret Butler, representing that the claims were uncertain, that the value of the said Margaret's estate was uncertain, that it would be a long time before their claim would be reduced into possession, and that perhaps they might never obtain any thing for their said claims; and that it was better, as the complainants were in indigent circumstances, to take something certain and present, than to wait for a distant and uncertain expectancy." But he avers that the said complainants first applied to this defendant to purchase their shares from them, and used the very same arguments themselves, which they have imputed to him, as reasons why they ought to make the said sales; and that if he ever addressed them afterwards on the subject, and said any thing on the propriety of their opinions, it was only in consequence of their prior application to him.

And this defendant further answering saith, that the said Charles, James, William, and Thomas Butler, did sell and convey their shares in the said estate to him, upon the days and terms mentioned in the bill; and that he complied with the terms as specified on the said agreements by the receipts of the several parties; but this defendant denies that to his knowledge he delivered to any of them diseased negroes, or negroes of little or no value.

And as to the charge, that at the time of the purchase of the said shares by this defendant, they were worth, in the event of the idiot's death, twenty thousand dollars each, or thereabouts; and that the same was annually and rapidly increasing, from the interest on bonds due the estate, and the crops and small expenses of the idiot, this defendant further answering saith, that at the time he purchased the shares of the said Charles, James, William, and Thomas Butler, he did not know at what their shares might be estimated, if they succeeded in the prosecution of their claims, nor whether they would succeed at all; nor had he then nor since any further or better light upon the subject than they themselves possessed at the time of the sale, his whole information being derived

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from \*them. But this defendant certainly supposed and believed that the property was considerable; that they had some chance of success; and although others might come in for a share, as six others did, viz. Mrs. Graham, Mrs. Alston, John and Joseph Pyatt, and Joseph and Ann Labruce; yet that if they succeeded, their shares would compensate him for the property which he had given to them, for the great trouble he was about to undertake, and for the number of years during which he might be obliged to wait, not only for the death of Margaret Butler, but also for the termination of the disputes of affinity.



That as to the place where the said Margaret Butler then lived being sickly and unwholesome, her state of health, constitution and age, at the time of the said sale, this defendant knew nothing more than the complainants did, as his information on the subject was derived from themselves; and some of them, viz. George Butler and James Butler the elder, had been to Georgetown to enquire into the business; but this defendant denies that she was at the age of forty-five or fifty at the time of the purchase, and believes that she was then only about thirty-five years of age. This defendant therefore avers, that the charge of complainants, stating that the value of their shares in the idiot's property, at the time of the purchase, the annual and rapid increase thereof, her inconsiderable expenses, her residence in a sickly and unwholesome part of the country, her state of health, her constitution and age—were known to this defendant, and unknown to the complainants, and to Charles Butler, deceased, is wholly false.

And this defendant further answering saith, that he believes the said Charles Butler, and the said Margaret Butler, died about the time mentioned in the bill, (the latter in September, 1809;) and shortly after her death a suit was instituted in the court of equity at Georgetown, by the administrators of the said Margaret Butler, for the purpose of ascertaining who were the next of kin of the said Margaret Butler, and legally entitled to her estate; and that the said suit

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was conducted by this defendant in \*the name of the complainants, and their brothers and sisters; that their claims were established, the estate ordered to be distributed, and delivered over to the parties interested therein.

And as to the charge, "that a short time after the obtaining of the said decree the defendant applied to the said Thomas, William, and James Butler, to sign a further instrument of writing, which the defendant then and there produced, and which the defendant represented to be a further power and authority for defendant to receive, from the administrators of the said Margaret Butler, those shares, or proportions of the said estate, to which the said Thomas, William, and James Butler were entitled; and also that share and proportion of the said estate to which the heirs, executors, or assignees of the said Charles Butler were entitled, by virtue of the covenant or agreement aforesaid; and also the said one-tenth of the whole amount, which had been, by the said agreement, allotted and given to the said Elnathan Haskell for his trouble and services in the premises"—this defendant answering says, he admits, that shortly after the said decree, he did apply to the said parties to sign other instruments of writing; but he positively and most solemnly denies, that he ever made such a

representation as is charged above: that on the contrary he applied to the said parties for the purpose of signing deeds to complete their agreements with him, and transfer to him those rights formally, which they had already substantially vested in him; and that, although the said deeds, from their nature, necessarily included powers of attorney, as all transfers of choses in action do, yet that he never regarded a further power of attorney as material, supposing that his original power was sufficient, and that his whole object was to obtain the execution of those deeds which he supposed were proper, if not necessary, to vest in him formally the rights to which he was then entitled by his agreements with the said parties; and that he did not represent to them, or any of them, that the said deeds, or any of them, were further "powers and authority;" but substantially represented to them, though he

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cannot now recollect the pre\*cise words, that they were deeds to complete their agreements with him.

And as to the charge, that "the said Thomas, James, and William Butler, at the time of signing the said last-mentioned instrument, were entirely ignorant of the tenor and contents of the said instruments, except from the representations of the said Elnathan Haskell, and that they are still ignorant of the same"—this defendant answering saith, that such charge is not and cannot be true: for besides that this defendant hopes that he may be able to prove, that the said deeds were read to the parties, or by them, he solemnly avers, that he did communicate the nature of them truly to the said parties; that he did not represent them as "further powers and authorities;" and that it is inconceivable, that the wives of these three men should be privately and separately examined before a justice of the quorum, and release all their right and claim of dower to this defendant, in the property mentioned in the deed to which their renunciation is affixed, and yet that their husbands only supposed them to be "further powers and authorities."

And as to the charge of the complainants, Thomas, William, and James Butler, "that they were induced to sign the said instruments from their ignorance of their rights, and from their supposing themselves bound by the sale and assignment of their claims and interest in and to the said estate formally made to the said Elnathan Haskell"—this defendant says, that it is preposterous for the said complainants to alledge ignorance of their rights, not only after they had expressly declared in their own exhibit that certain evidence to be examined would prove their rights, but also after the decree of the court had established them. But as to the supposition, that "they were bound," this defendant believes that they did think so at the time,

and that they did think they were fairly and legally bound, as he in his conscience thinks they were and are. And to prove to this court that the said Thomas, James, and William Butler, at the time they signed the aforesaid deeds, must have supposed themselves not merely bound, but fairly and just-

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ly bound, this defendant \*states, and doubts not to prove, that after the death of the said Margaret Butler, when the objection arising from an apprehension of a long delay in the receipt of their rights no longer existed, this defendant, in a conversation with them, proposed to give up their respective agreements, upon their returning to him the property he had actually given to them, and releasing him from the further compliance with the conditions contained in the said agreement; when they objected to the rescission of the said contract, and expressed themselves well satisfied with the same, however the event might prove.

And as to the amount of eighty thousand dollars, stated by complainants to have been received by this defendant out of the estate of the said Margaret Butler, he says he never has received such an amount, but that for the four shares transferred to him he received the sum of \$52,481, and for his tenth for conducting the business for all the Butlers \$11,372.

And this defendant further answering saith, that he denies with indignation every intention and act of fraud charged in the complainants' bill, and declares on his oath that they are wholly false. He avers on his oath that he has conducted himself in the transaction of purchasing their shares, and the share of Charles Butler, openly, honorably, and even generously, in acting on the lights they themselves gave him; in reporting to the said parties whatever information he otherwise received, whether in favor or against their claims; and in offering them, even after the death of the idiot, (when the approach of enjoyment might have altered their minds,) to rescind their contracts, if they thought proper so to do.

He avers that he could have purchased other shares, but refused them; that he has offered to sell off those he bought after the death of the idiot for a moderate advance; that whatever impression the abstract statement of the consideration, in contrast with the shares of the complainants, might make on the mind of the court on the first view of the case, he begs that it may be recollected that on this head all was uncertain on the part of the complainants at the time of

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the contract. That when the \*idiot would die, whether in five, ten, or twenty years, was wholly uncertain; that whether the Butlers would prove their affinity after her death was wholly uncertain; that how many other persons might prove themselves entitled to a

distributive part was wholly uncertain; that what would be the nett amount of each share was wholly uncertain; and that in what space of time the suits between the parties claiming distributive shares would be ended was also uncertain; that on the other hand a part of the consideration moving from him was certain, and the residue as certain as the complainants' claims; that he gave a choice of three young slaves and two hundred dollars for the chance of each of the complainants; that the worth of this property by increase, produce, and interest, might be doubled and trebled before the death of the idiot took place, which would be to that extent a loss to him, and a gain to them; that if the claim of the complainants was not substantiated, the defendant had to pay all the costs, which were heavy; and that if their claims were substantiated, he was to pay them two thousand dollars each thereout, although the amount of each might not exceed two thousand dollars, whereby he might receive very little, and possibly nothing.

The agreement to allow the defendant one tenth of the amount to be recovered for the Butlers is dated the 9th of April, 1804, and recites that the allowance is made in consideration of services rendered by him.

The original contract with Charles Butler, for the purchase of his share, is dated the 23d of June 1804, and is in the following words:

Whereas it is believed that myself, brothers, and sisters, are as near, or the nearest akin to Peggy Butler of Waccamaw, and that we, some of us, or our heirs, will inherit the whole or part of the said Peggy Butler's estate on her demise;—but, as this is uncertain, or, if true ultimately, it may be many years before the decease of Peggy Butler, and we or any of us get possession of her estate; and being of opinion that in my circumstances, a certain sum in hand will be

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more for my interest and hap\*piness than to take all risks and delays, I have, under these impressions, on mature deliberation, sold, and do hereby sell, to E. Haskell, all my right, or which I or my heirs hereafter may have, in or unto the estate above-mentioned; and I do hereby promise and engage to enter into obligations properly drawn up, whenever required so to do by said Haskell, to transfer all my right, or the right of my heirs, which I or they may now or hereafter have, to the said estate of the said Peggy Butler, (both real and personal, be the same more or less,) to have and to hold, to him or to his heirs forever; and I promise and engage to execute all such acts, deeds, and writings, as are finally requisite for putting the said Haskell, or his heirs, into possession of all the property that I or my heirs may be in any manner entitled to, of the said Peggy Butler, on the following conditions, viz. the said Haskell shall, on or



before the fifteenth day of January next, pay to me or my order, two hundred dollars, three African negroes about fourteen years old, one of which is to be a female; and on the said Haskell, or his heirs, being put in possession of the estate aforesaid, then he or they shall pay to me or my heirs two thousand dollars more; this sum shall be in full. It is also agreed, that from and after this day, that the said Butler, party hereto, is to be at no expense in prosecuting for, or getting possession of, the aforesaid estate. All such expenses are hereafter to be paid by said Haskell, who stands in all respects, as relates to said estate, in Butler's stead.

It is likewise to be understood, that the said Haskell is made acquainted with an agreement entered into between the subscriber, Charles Butler, and his brothers and sisters, purporting (as described to said Haskell,) that in case of the death of one or more of them, before the death of Peggy Butler, the heirs of such, or the person to whom he, or she, or they, may have sold their right, (as the case may be,) shall have an equal proportion of all the property heired or inherited by the survivor or survivors of them, viz. explained—there being nine Butlers, (brothers and sisters,) who have signed said agreement; now if four should

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die before Peggy Butler, \*it is understood that whatever is heired or inherited by the other five of Peggy Butler's estate, shall be divided into nine equal parts, and four of which shall be paid or conveyed by the survivor or survivors to the person or persons to whom the deceased have transferred their right, or, if such right has not been transferred, to the heirs of the deceased. This last part is by way of explaining what said agreement contains, or the principles of it.

(Signed) Charles Butler,  
E. Haskell.

Witness—George Butler,

W. J. Myddleton.

The following memorandum was endorsed on this agreement, viz.

We the subscribers, parties of an agreement mentioned within, agree to the principle recognised, for dividing whatever is received of Peggy Butler's estate mentioned within, and did consent to the within Charles Butler's transferring his right to E. Haskell.

(Signed) George Butler,  
James Butler,  
Thomas Butler.

The executor of Charles Butler endorsed on the same agreement the following receipt, viz.

Received the 1st of March, 1813, of Major E. Haskell, his obligations for two thousand dollars, being in full of the foregoing obligation, which obligations of the said Haskell are made conformably to the will of the said

Charles Butler, deceased, and shall be applied agreeably to it.

(Signed,) Wm. Pauling, Qualified Exec'r.

Witness—Wm. J. Myddleton.

James Butler sold to the defendant, on the 23d of June, 1804, and William Butler and Thomas Butler on the 9th of July, 1804, by deeds similar to the deed executed by Charles Butler.

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\*The following certificate, without date, was signed by William, Thomas, and James Butler.

We the subscribers do jointly and severally acknowledge to have received of Elnathan Haskell payment in full of what we fell heirs to lately by a decree of the court in the case of the administrators of Margaret Butler, deceased, against Butlers, and others. And we do also hereby declare and make known, to all whom it may concern, that the said Haskell did, after the death of the said Margaret Butler, offer to each of us to give up our respective agreements for the sale of our several shares, upon our returning him the property he had actually paid us, and releasing him from the further compliance of the conditions contained in the said agreement. To this we disagreed, being well satisfied with the contract we had made, let the event prove as it might.

(Signed) his  
William + Butler,  
mark  
James Butler,  
Thomas Butler.

Signed in presence of us,  
Jacob Hill,  
Nathan Haskell.

The deeds relied on as confirmations are dated the 27th of February, 1813. They are in the same form as the one executed by James Butler, which is in the following words.

State of South Carolina.

Know all men by these presents, that whereas I, James Butler, of Amelia Township, in the district of Orangeburgh, in the state aforesaid, planter, one of the sons of Charles Butler, deceased, have, by a late decree of the court of equity at Georgetown, in the case of the administrators of Margaret Butler, deceased, against Butlers and others, been established as one of the heirs or distributees of the said Margaret Butler, deceased, and as such entitled to one undivided fifteenth part (1-15,) of the real and personal

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estate of the said Margaret But\*ler; and whereas I, the said James Butler, did in and by a certain instrument in writing, bearing date the 23d of June, 1804, for the considerations therein mentioned, sell unto major E. Haskell, of the same place, all my contingent estate, right, and title, to the estate real and personal of the said M. Butler, and did,

by the same instrument, promise and agree to execute all such acts and deeds as might be necessary, upon the decease of the said Margaret Butler, in order to put the said Elnathan Haskell into possession of all the property of the said Margaret Butler, to which I might be entitled as one of her heirs or distributees. And whereas the death of the said Margaret Butler having since taken place, and the aforesaid decree given, it is now ascertained to what part of the real and personal estate of the said Margaret Butler I am now entitled: And whereas the said Elnathan Haskell has since the execution of the aforesaid instrument in writing, complied with all the conditions in the said instrument contained: Now, therefore, know ye, that I, the said James Butler, of Amelia Township, in the district of Orangeburgh, in the state aforesaid, in pursuance of the said instrument in writing, and in consideration of the true and faithful performance of all the conditions therein mentioned, and particularly of the payment of the sum of two thousand dollars to me, before the execution of those presents, have granted, bargained, sold, and released, assigned, transferred and set over; and by these presents do grant, bargain, sell, release, assign, transfer, and set over unto the said Elnathan Haskell, all that my one undivided fifteenth part (1-15) of all the real and personal estate of said Margaret Butler—together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident or appertaining: To have and to hold, all and singular, the premises before mentioned, unto the said Elnathan Haskell, his heirs, executors, administrators, and assigns for ever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and for ever defend all and singular the said premises unto the said Elnathan

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Haskell, his \*heirs, executors, administrators, and assigns, against myself, and my heirs, executors, and administrators, and against every person whomsoever, lawfully claiming or to claim the same or any part thereof, by, from or under me. And for the purposes aforesaid, I do hereby constitute and appoint the said Elnathan Haskell, his heirs, executors, administrators, and assigns, my true and lawful attorney and attornies, for me and in my name, as far as may be necessary so to do, but for his and their own use and behoof, to prosecute to full and complete execution the said decree, and to sue for, take, receive, and possess the said one fifteenth (1-15) part of the said real and personal estate of the said Margaret Butler, to his and their own use and behoof for ever; and on receipt thereof good and sufficient discharge for the same in my name to give.

Witness my hand and seal this twenty-seventh day of February, in the year of our Lord 1813, and in the thirty-seventh year of

the Independence of the United States of America.

James Butler.

Sealed and delivered in the presence of

W. S. Thomson.

Jno. L. Thomson.

Nathan Haskell.

The following is the substance of the evidence given on the hearing.

George Butler for complainant.—The circumstances of his brother were needy. Coming from Charleston he met the defendant near his mill. He asked witness how he was coming on in the business he had gone on. Witness told him he had made poor speed. Mr. Barsh rode up. Defendant told him that he would never go on well until they got some person to go on with the business that the lawyers were afraid of—they then parted. Afterwards Barsh and himself, and the other heirs consented to employ major Haskell. They went to Bellville, where he resided, and made him this offer, that if he would undertake the business, they would give him an equal share with them. The de-

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fendant consented, and the contract \*was entered into on the 9th April, 1804. William Butler cannot write. Witness had been in pursuit of evidence to prove his affinity about three years. Major Haskell called on the heirs for money to fee lawyers. M'Kenzie could not raise his part. Witness at that time was streightened. His brothers more so. Witness does not know whether his brothers could have refunded when major H. offered to rescind the contract. He does not think that James Butler could have borrowed the money. His brothers had no negroes but what they got from the defendant. James was in debt. They were satisfied they were the heirs of Margaret Butler. Mrs. Cordes, Mrs. Graham and Mr. Repult were the witnesses to prove their relationship. Witness told his brothers all the information he could procure. He had frequent interviews with defendant and gave him all the information he possessed. Charles Butler was inferior to major Haskell in understanding. They put great confidence in him. William Butler was needy and wanted his share. James Butler was a weak man and easily imposed on. Thomas was not as easy to be imposed on as the rest. Witness does not recollect being present at the signing the covenants of sale. He has said since the decree that if the thing was to do over again, he would as soon employ the defendant as any other man. When the witness and defendant were together, the defendant always communicated to him what he had done.

John Butler.—This witness lived with major Haskell when he purchased of Thomas Butler, and he wished to purchase of him. He told witness two or three times to tell Thomas to come and sell him his share. The reason that witness did not sell was that he



did not stand in need. Witness told Thomas twice. He hardly thinks his brothers were able to have supplied money to carry on the law suit. James Butler was weak and easily imposed on.

Henry Tralick.—Charles Butler, (the father of some of the complainants) died in the minority of some of his children; he was poor and hired out some of his children

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\*as day laborers. William Butler cannot write, and James is ignorant.

Jacob Hill for defendant.—Proves the certificate signed by William, Thos. and James Butler, without date; it was signed at defendant's house in May, 1813. Major Haskell read the paper before it was signed. Witness was present at the defendant's with Barsh, William, Thomas and James Butler, about the last of May or first of June of the same year. The defendant asked Barsh if he had ever proposed to these Butlers to enter suit against him concerning this estate, the same suit they have now entered. Barsh said he had proposed it to them, and that he would pay all costs of suit and take one third, if he succeeded. Barsh said the Butlers would not, because major Haskell had acted honestly and uprightly. After Barsh had gone away, William Butler said that Barsh had often proposed this to them, and rather tried to persuade them; but that they never would do any thing of the kind, nor ever had such an idea.

Col. Middleton.—He is acquainted with John Butler. He offered to sell witness his share of Margaret Butler's estate, after major Haskell had bought. John Butler afterwards sold to Mr. Darby, and he has offered Darby's bond of \$3000 for \$500, payable after the recovery. Witness knew Thomas and James Butler well. He went to school with them. The natural capacity of complainants is upon a level with the generality of the people of the country. James has impaired his by intoxication. Major Haskell is careful of his interest, and acute in guarding it. Witness has seen George Butler once or twice at defendants. He heard major Haskell tell him some circumstances he heard in Charleston concerning the Butler estate. The complainants came to major Haskell's with their wives to renounce their dower in that estate. The deeds were executed and dower renounced. One of the deeds was read aloud in the presence of the complainants and they are all alike. He told them that the deeds were all alike. Every thing that could be done to explain the deeds was done, and the complainants appeared to be

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satisfied. Witness was \*present at the execution of the deeds of 1813. They were examined: one was read to the parties audibly. They understood the nature of them and appeared satisfied.

John Thompson.—The deeds of 1813 were all executed the same day, and were read aloud to the parties, who were all apprised of their contents and appeared perfectly satisfied.

Doctor Haskell.—Witness resided at major Haskell's in 1804. He saw three or four of the Butlers (but he does not know their names) come twelve or fourteen times to major Haskell; he understood they were brothers of George Butler. He heard them frequently propose to sell their shares to major Haskell. He endeavored to persuade the defendant not to buy. He has seen George Butler very frequently at defendant's, and heard him before and after the sale converse with the defendant concerning the Butler estate. Witness signed the receipt for them, and they appeared satisfied. John Butler proposed to sell his share to witness, but he declined. He heard George Butler propose to the defendant to undertake to recover the Butler estate for him and his brothers. Defendant told him he had better employ an attorney—that a lawyer was best calculated to succeed in it. George Butler replied that he would rather the defendant would employ the lawyer as he was a better judge than himself. The defendant recommended Mr. Parker. The defendant knew little about the Butler claim. The capacity of the Butlers was equal to the commonalty of their class.

After the hearing, Chancellor Thompson pronounced the following decree:

#### Decree of the Circuit Court.

This bill was brought to set aside an agreement entered into between the parties, under the following circumstances. Margaret Butler, who had been an idiot from nativity, and was possessed of a large real and personal estate on Waccamaw, had no near or immediate kindred known in this state.

The complainants considering themselves as next of kin, and heirs at law of said Margaret, employed their brother, George

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Butler, to investigate and ascertain the \*degree of relationship that subsisted between them and the idiot, and after having been engaged three years in making enquiry, he acknowledged he had made little or no progress therein.

The complainants considering the defendant as a man of great experience and skill in the management of transactions of that kind, applied to him and agreed to give him one-tenth part of all he could recover as compensation for his trouble and expenses, and on the 29th of March, 1804, entered into an agreement to that effect. That on the 23d of June following, he purchased of Charles and James Butler all their right and title to the said Margaret's estate; and on the 9th of July, in the same year, he purchased of William Butler and Thomas

Butler their respective claims thereto. That on the 2d of May, 1805, a bill was filed to perpetuate the testimony, and that Margaret Butler, the idiot, died in 1811; shortly after which event a suit was instituted in the Court of Equity at Georgetown, for the purpose of ascertaining who were her next of kin, and the decree was in favor of the complainants and certain other persons therein mentioned. It further appears, that after the death of the idiot, and subsequent to the decree, the complainants executed deeds of conveyance to the defendants, with a full knowledge of every circumstance relating to the case, and were apparently satisfied, and expressed themselves to that effect. The first ground contended for by complainants' counsel is, that they were ignorant of their rights.

There are cases in which the ignorance of a particular fact will be a ground of relief, but every kind of mistake is not relievable even in Equity—for although it will grant relief against a plain mistake or misapprehension, yet it will not interpose if the fact was from its nature doubtful, or at the time of the agreement equally known or unknown to both parties, or where there has been a long acquiescence.

As to ignorance in law, it is laid down as a general rule, that it shall not affect agreements or excuse from the legal consequences

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of particular acts. But in this \*case it does not appear the parties were ignorant of their rights, for defendant gave them all the information he had received from time to time, as is expressly alledged in his answer, and strengthened by the testimony of George Butler. Under this head it has been contended and attempted to be proven, that the complainants are men of very moderate intellectual faculties, and easily imposed on; but this fact has not been supported by evidence. Colonel Myddleton and Dr. Haskell testify that their capacities are on a level with men of their class generally; and if this Court was once to sanction the principle that inequality of talents was a ground for annulling contracts, there would be no end to litigation; upon this ground the complainants must fail.

It is further contended that this contract ought to be set aside on the ground of misrepresentation and concealment. The defendant unequivocally denies this allegation in the bill, and as no testimony has been adduced in support of it, it must also fall to the ground.

The next ground upon which the complainants rely for relief is gross inadequacy of price. This principle, although familiar in the English courts, is somewhat novel in this country. The most of the cases there under this head, arise from young heirs selling their expectancy, and the policy of that country seems to require that there should be one great and influential man in a family, to

the impoverishment and disinheritance of the others. A similar policy does not prevail here, nor do I think the doctrine should be carried to so great an extent.

In the cases laid down in the books there is no particular rule by which to ascertain what disproportion will be sufficient to annul a contract. In some cases it is more, in others less. The civil law lays it down at twice as much as the price given. The disproportion in this case is by far the largest to be met with, but it may be observed that in some respects it was contingent and remote; and being a speculation, the defendants might have lost all, in which event the complainants would have gained and defendant lost to the amount advanced by him. Upon this point it seems to be generally agreed

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\*that mere inadequacy of price is no ground for the court to set aside an agreement,—although executory, if it appears to have been fairly entered into and understood; and there is an abundance of evidence to establish the fact, that they were perfectly apprised, and great pains taken to inform them of their rights after the decree had been obtained, and nothing left in uncertainty; and still less is it to be considered as a ground for recinding a contract already executed, and forasmuch as the exorbitancy of price has not been held sufficient to discharge a defendant from the performance of his contract, by the same parity of reasoning, the complainants shall not be relieved if they have disposed of their property for less than the value. It does not appear to the court that the contract ought to be set aside on the score of inadequacy of price, as there is no actual fraud proven against the defendant; and the complainants, eleven years after the first contract had been entered into, when they possessed every light the case was capable of reflecting, recognized the transaction, and executed a solemn deed of confirmation.

The last and by far the most difficult and important point in this case is, supposing the transaction to have been fair in every respect, and unpolluted with the least tincture of fraud, was the relative situation of the parties such as legally to allow them to contract? There can be no doubt but in June and July, 1804, when the defendant purchased of the complainants, that he acted as agent or trustee for them. The question then will arise, can a trustee purchase of his *cestui que trust*? I am decidedly of opinion that such purchase cannot be valid under any circumstances, during the continuation of such relationship. The probable indigence of the *cestui que trust*, who, under the pressure of necessitous circumstances, would prefer the present enjoyment of a small portion of his estate to a distant and remote expectancy of the whole; the opportunity the trustee has of obtaining information as to the nature



and extent of the trust estate; the undue influence which the trustee may have over the cestui que trust, render it dangerous and

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\*impolitic that they should be permitted to contract for any thing relating to the trust estate. But here another question arises, will lapse of time and subsequent confirmation render that valid which in its creation was invalid? It appears that eleven years after the relationship of trustee and cestui que trust had been dissolved, the complainants with their eyes open, with a full knowledge of the nature and extent of their rights, voluntarily executed solemn deeds of confirmation, ratifying and sanctifying the original contract. I am therefore of opinion that this last act of the complainants completely shuts the door against their recovery. Upon the whole, I am of opinion, that the complainants have failed in establishing the fact of actual fraud, and that there does not exist in this case, those combinations of circumstances to presume a legal fraud: that the parties are not entitled to the relief prayed for, and that the bill must be dismissed with costs.

W. Thompson.

From this decree there was an appeal on the following grounds:

First—That there was evidence of actual fraud, which rendered the contract void, and incapable of confirmation.

Secondly—That fraud was to be implied from the inadequacy of consideration; especially when the implication was strengthened by the evidence of the weakness and necessities of the complainants, the relative situation of the parties, and other traits of fraud and concealment.

Thirdly—That the contract ought to have been avoided, as an unconscionable bargain made with an heir concerning his inheritance.

Fourthly—That fraud was to be implied from the relative situation of the parties, the defendant having purchased of the complainants while acting as their trustee and agent.

Fifthly—That the contract ought to have been declared void from all the foregoing grounds taken in combination, and strengthening each other.

Sixthly—That neither in the length of

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time, nor the \*arts of confirmation, was there such a confirmation as would render the contract valid.

Seventhly—That from the principles of the decree itself it ought to be reversed, as far as respects the share of Charles Butler, who died before the idiot, and never did any act of confirmation.

Harper and Felder, complainants' solicitors.

May, 1816.

The appeal came to a hearing at Columbia, before the Chancellors Desaussure, Gaillard, Waties, James, and Thompson.

After a very able argument of three days by the counsel, the court took time to deliberate.

December, 1816.

At the subsequent meeting of the court of appeals at Columbia, it was signified by Judge Thompson that he adhered to the decree given in the circuit court; and it was also stated, on the behalf of Judge Gaillard, (who was then absent from the state,) that he was of opinion that the judge, who had heard the case on the circuit, had taken a correct view of the case, and therefore that the decree should be affirmed.

The Judges Desaussure, Waties, and James, being of a different opinion, Judge Desaussure delivered the following opinion and decree as the judgment of the court:

This cause was argued with great zeal and ability by the counsel on both sides, to the great assistance of the court. As the case involved the discussion of many difficult points, and a vast property depended upon the decision, an unusual length of time has been taken by the judges in making up their opinions. In forming my own judgment, I have gone deliberately over all the documents and all the evidence, and I have examined all the decided cases quoted by the bar. I have also reflected on the arguments of the counsel, and deliberated long on the opinion pronounced by the circuit judge who tried the cause. The result has been a very clear and full conviction, which I shall proceed to state.

This suit was instituted by the complainants, who are the present appellants, and who are alledged to be ignorant and necessitous men, in an humble condition of life, against the defendant, who is stated to be

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an intelli\*gent man, of great skill in the management of business, and of high standing and influence in society. The object of it is to set aside certain contracts, for the sale of a large property, at a very inadequate price, on the ground that these contracts were obtained from them by the superior judgment and skill of the defendant, acting upon their ignorance and distress, when they were under the pressure of necessity: And also on the ground, that the defendant having been employed by the complainants and others, at a great price, to prosecute and establish their claims to the property in question, was their agent, enjoyed their confidence, obtained important information relative to their rights, and then obtained from them the contracts for the sale thereof on the inadequate terms complained of.

It appeared in evidence that the complainants were all in very narrow circumstances, illiterate and ignorant. One of them could not write his name; another of them was addicted to drink, and none of them were experienced in business. There was no pretence however of idiocy, or such extreme

weakness in any of them, as to amount to legal incapacity to contract. They lived in the neighborhood of the defendant's country residence, and they appeared to have had high confidence in him. The defendant himself was a man of judgment and experience, of considerable property, and of weight and consideration in society.

It appears that there were nine of the Butler family, brothers and sisters, who learnt sometime in the year 1801, that they were related to a Miss Margaret Butler, who was an idiot, possessed of a considerable estate near Georgetown, at the distance of nearly one hundred miles from them. George Butler, one of the brothers, who appears to have been the most intelligent among them, was employed to make enquiries into the nearness of their relationship to the idiot, and into the probability of establishing their claims. He seems to have acquired some information, and to have discovered some important witnesses; but he was ignorant of the proper

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method of proceeding, and was discouraged by the little satisfactory progress he made in pursuing the claims.

In this state of discouragement two of the claimants met the defendant, and entered into conversation with him respecting their claims, and the little success which had attended their exertions to establish them. The defendant thereupon advised them to employ some skilful person, who should be competent to manage the business, and bring it to a happy issue. The family seem to have been so much influenced by his advice, that they resolved to pursue it: and as they knew no person so competent as he was, and in whom they had so much confidence, they determined to employ him in their behalf. Accordingly they applied to him, and after some negotiation an agreement was entered into, by which the claimants agreed to allow him a tenth part of what might be recovered of Miss Butler's estate, for his services in establishing their claims.

The first paper presented to the view of the court was a letter from George Butler and George Barsh (who had married one of the sisters,) to the defendant, dated the 4th of February, 1804, in which they request him to act as the agent of the claimants, for the purpose of perpetuating the evidence they were able to produce to establish their relationship to Peggy Butler of Waccamaw. They stated that they had been about two years flattered with the prospect of being heard before a court, and permitted to prove their relationship, but without effect. They added that their witnesses were very old, and they apprehended that further delay would endanger the loss of the property, which they stood much in need of; and they urged the defendant to lose no time in proceeding on their behalf.

The defendant says in his answer to the

bill, that he agreed to the proposition; and on the 9th of April, 1804, a paper was signed by George Butler, Charles Butler, and William Butler, which calls itself a memorandum of an agreement made between them and the defendant, though it was not signed by him. This paper was in the handwriting of the defendant, and recites that whereas E.

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\*Haskell had rendered them certain services, they have agreed to compensate him for them by transferring to him and his heirs, whenever they or their heirs should come into possession of the estate in question, one-tenth part of all the estate of Peggy Butler, to which they should be entitled; and they promised to execute such writings as might be required to give effect to the agreement: the said Haskell first paying one-tenth part of all the charges which might accrue in establishing them the lawful heirs of the said estate.

The defendant then went to Charleston, and had some communication with some agents formerly employed, and made some inquiries on the subject of the estate. On his return into the country, he entered into agreements with four of the Butlers for the purchase of their claims on the estate. One of the agreements was with Charles Butler, dated the 23d of June, 1804, in which (after reciting that it was believed that the said Charles Butler, and his brothers and sisters, were as near, or the nearest of kin of Peggy Butler of Waccamaw, and that they would inherit the whole or part of her estate—but as this was uncertain, or, if true, it might be many years before the decease of Peggy Butler, and before any of them might get possession of her estate—and that he, being of opinion that in his circumstances it would be more for his interest and happiness to take a certain sum in hand, than to take the risques and delays,) it was agreed that he, the said Charles Butler, should sell to E. Haskell all his rights, or those which his heirs might hereafter have, in and to the said estate, real and personal; and he promised to execute proper deeds to perfect the conveyance to said Haskell and his heirs, on condition that he should pay to the said Charles, on or before the first day of January then next ensuing, the sum of \$200, and deliver him three African negro slaves, about fourteen years old; and on the said Haskell's getting possession of the estate, then he should pay to the said Charles \$2,000 more, which should be in full, without any expense to the said Charles in prosecuting the claim. This paper also noted, that the said E. Haskell was made acquainted with an agree-

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ment made \*by and between the Butlers, that in the event of the death of one or more of them before the death of Peggy Butler, the heirs or assignees of the deceased should have an equal proportion of all the property



inherited by the survivors. This paper was signed by Charles Butler and E. Haskell, and witnessed by George Butler and W. J. Myddleton. A memorandum was added, signed by George, James, and Thomas Butler, acknowledging the agreement respecting the survivorship, and consenting to Charles Butler's transferring his rights to E. Haskell.

There are receipts endorsed on the agreement, from June, 1804, till July, 1805, for successive payments of the \$200, and of the three negroes; and on the 1st of March, 1813, for major Haskell's obligations for \$2,000, signed by the executor of Charles Butler, who was dead.

James Butler on the 23d of June, and Thomas and William Butler on the 9th of July, 1804, entered into precisely similar agreements with major Haskell, for the sale of their respective shares at the same price; on each of which was endorsed similar consent of some of the brothers and with nearly similar receipts.

The strength of the charge alledged by the complainants in their bill lies here—that the defendant being the agent of the Butlers, possessed of all their information and papers, had opportunities of making discoveries relative to their prospects of establishing the rights of the complainants; and that availing himself of his knowledge, and of their entire confidence in him, and profiting by their necessities, he made purchases from them of their rights at most inadequate prices. The answer of the defendant, admitting the agency and the purchases from the complainants, denies that he got perfect knowledge of the nature and extent of the estate, and of the rights of the complainants in his character of agent; and that at the time he purchased the shares of four of the Butlers, he had not procured any further information on the subject from the time he had agreed to become the agent; that all the information he possessed he got from the brother, George Butler; that he had made no new discoveries, and the testimony had not been perpetu-

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ated at the time of his purchases. There appears to be some discrepancy between some part of this answer and the agreement to allow the defendant a tenth part of what might be recovered of the estate of Peggy Butler: for that paper recites, that the allowance of a tenth is agreed to be given on account of certain services rendered by the defendant to the complainants. What could those services have been, since the testimony was not yet perpetuated, but some essential discoveries as to their rights, and the proofs in support of them? If this were not the case, and the answer states it so, then the language of the agreement is incorrect, and the great premium of a tenth part of the estate recovered might be impeached; as was done in a case where similar services were said to be rendered, by the party's assisting a poor and

necessitous man in deducing his pedigree, and supporting his claims to an estate. See *Proof v. Hines*. Cas. Temp. Talbot, p. 3. And nothing can show in a more striking light the entire confidence reposed by the Butlers in the defendant, and their ignorance and want of capacity, than their signing a paper, drawn up by the defendant in April, 1804, reciting that he had returned them services in relation to the Butler estate, for which they agree to allow him a tenth of their rights, though the amount was totally unknown to them, (but believed to be very considerable,) when the defendant himself states in his answer, that as late as June and July, 1804, he had made no discoveries, knew no more than what they had communicated to him, and had not perpetuated the testimony, consequently had rendered no essential services. Another strong mark of the confidence reposed in the defendant by the complainants is their signature of the agreement for the sale of their interests in the estate, drawn up by the defendant, without any legal adviser on their part, which has always been considered unfavorable to such contracts. See 2 P. Wms. 205, and 2 Schoales and Lefroy, 474. The reasons assigned in the deed for the sale are very unusual and seem to indicate a suspicion that some excuse was requisite for so great an inequality. It is alledged that their claims were uncertain, and that many years

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might elapse before they could get \*the benefit of them, and that it was better for them to have a certain sum in hand, than to run the risks and endure the delays they must do. These expressions inserted in the agreements by the defendant indicate that the complainants were greatly discouraged in their hopes by the clouds thrown over them by some means; and it is not wonderful that they were discouraged, when a gentleman of intelligence and judgment, after being employed some months as an agent to investigate their rights, and to take measures to establish them, returns to them without having made any discoveries, and without giving them any encouragement. In this frame of their minds he becomes the purchaser, at a most inadequate price. It is to be lamented that judicious witnesses were not present at the discussion and settlement of the terms of the contracts. The witnesses do indeed prove the regular and voluntary execution of the deeds or papers; but they do not prove the discussions and representations which led to them. And this is unfavorable to the defendant; for the rule is quite clear, that in all cases of this kind, where a great advantage is gained in a contract by an agent from his principal, the proof lies on him to show that the transactions were perfectly fair and pure. See 6 Vesey, 276; 9 Vesey, 369; 12 Vesey, 240.

It must be remembered in the consideration of this question, that the rules at law

and in equity are quite distinct. That eminent chancellor, lord Hardwicke, says expressly, that this court will relieve against presumptive frauds; so that equity goes farther than the rule of law: for there fraud must be proved, and not presumed only—and that to take an advantage of a man's necessity is as bad as to take advantage of his weakness—1 Atk. 352; and lord chancellor Eldon agrees with him. He says, though there had been a strong inclination in Westminster Hall, in the time of Lord Mansfield, persuaded to it by judge Buller, to say that whatever is equity ought to be law, this has been reformed by lord Kenyon—and that the clear doctrine of lord Hardwicke and all his predecessors was, that there are many in-

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stances of fraud that \*would affect instruments in equity, of which the law could not take notice. See 1 Vesey, and Beames, 98.

It was insisted that the defendant had not sought or solicited the complainants, but that they had pressed the sale on him; and this was relied upon as a circumstance of much weight: more especially as it was said that offers were made to others of a similar nature. The proofs were not very distinct on this point, except as it related to one of the brothers: and another of them swore that he was requested by the defendant to desire his brother to come to him, and sell him his share. But if the proofs had been unequivocal, it would not have been very conclusive; for the offers to sell it to others at low prices might be the effect of their necessities.

A good deal of stress was laid upon the signatures of some of the brothers to the deeds by which the complainants agreed to transfer their rights to the defendant, either as witnesses, or as expressing their approbation of the bargain and the terms. And it was insisted that this was clear evidence of the fairness of the transaction. If these men had been intelligent or judicious men, this evidence would have had great weight; but they were generally illiterate, and they were all discouraged and hopeless; and their judgment upon the subject before them does not seem to be entitled to the high consideration attempted to be given to it. But certainly it does give the impression that they apprehended no fraud was practising on their brothers who were selling their rights.

Again, great reliance was placed on the fact that the defendant had refused to purchase the share of John Butler, another of the brothers, who offered to sell his share at about the same price which the others got, as evidence that the defendant did not consider the bargain a great one: and undoubtedly it is presumptive evidence of that. But it is susceptible of the view taken of it on the other side, that by refusing to make this purchase, the defendant expected to give a coloring of fairness to his other purchases, the great inadequacy of which might other-

wise bring them into suspicion. On which of these principles the defendant acted, it is im-

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possible for us to determine \*with absolute certainty—that must be left to the Searcher of Hearts.

It was further urged, that if the defendant had not become the purchaser at the price he gave, others might and probably would have purchased at even lower rates. But I do not conceive that because others might have availed themselves of the necessities or doubts of the Butlers, to obtain an unconscientious bargain from them, this would form any excuse for the defendant, more especially clothed as he was with the character of an agent.

We will now proceed to consider whether the great inadequacy of the price alone, or coupled with other circumstances, does not furnish a ground from which the court is bound to infer, that the bargain was too unconscientious to be supported in a court of equity? That the inadequacy was very considerable appears from the comparison of the price agreed to be given, and the amount of the value of the estate, and the shares the Butlers were entitled to. The defendant was to pay to the amount of \$1,200 for each share purchased, at all events, and \$2,000 in case of success. The amount of the estate, by the defendant's exhibit H. was \$219,853, not including some expectancies. The defendant makes various deductions, which reduce the value of each share of the nine surviving Butlers to about \$11,372. My view of it would make each share worth, independent of the defendant's transactions with them, about \$12,636: to which some additions were to be made, which would make each share worth from 13 to \$14,000. This exceeds the price to be paid for each share more than fourfold. Great inadequacy of price has every where been considered an evidence of unfairness in the contract, so as to induce the courts of justice to look upon such transactions with a very jealous eye. By the civil law, a sale was declared to be void if the property was sold for less than one half its value. The French code civil has adopted the Roman rule, but enlarged its limits a little. The seller may obtain a rescision of the contract of sale of real estate, not made at public auction, if the property was not sold for five twelfths of its value, even though he had

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expressly \*renounced, in the contract of sale, the action for the rescision—See 4th vol. Cod. Civ. p. 370. Loi Relative a la Vente. Ch. 6. Sect. 2. Neither the English nor the American legislators have thought it advisable to lay down any precise rule on the subject. It has been left, perhaps wisely, to the experience of the courts of justice to apply the great principles of equity to each case, according to its particular circumstances; and thus gradually to form a practical system of



pure justice. And the courts have never decided, as a broad principle, that mere inadequacy of price, unconnected with direct fraud or imposition, or concealment, or advantage taken of extreme weakness, or great necessity, should be a distinct and independent ground of vitiating contracts. But the courts have said, that the inadequacy may be so gross as to furnish strong, and even conclusive, presumption of fraud; and that in this way the grossness of the inadequacy may avoid the sale.

In comparing the inadequacy existing in the case under our consideration with the degrees of inadequacy existing in the decided cases, it seems to come completely within that degree of gross inadequacy which furnished the presumption, and vitiated the contracts. And I should therefore feel obliged by the authorities to pronounce, that the inadequacy was too great to be borne by a court of justice. But there can remain no doubt, when to a most gross inadequacy it is added, that the complainants were uneducated and ignorant men, in very narrow and even necessitous circumstances, dealing in business out of their depth, with a very intelligent and experienced man, in whom they had great confidence. I am not aware of any case, containing this combination of circumstances, in which relief has not been given by the court. It will be seen, on an examination of the authorities, that the risk run by the defendant, and which was much relied upon to support the contract, has not been held to be sufficient for that purpose.

Before I go into a short examination of the decided cases, I will remark, that there is a distinction made between the cases of

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young heirs selling expectancies and \*of other persons, which I am not disposed to support. It is said that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in chancery have gradually applied the great principles of equity, on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not. This just principle, the safeguard of society, and the tutelary genius of the court, watching over the imbecile and the needy, I adopt in all its extent. It is proper that there should be a perfect accordance between the principles of the contracts of the citizen, and the great principles of constitutional liberty which they enjoy. The former should be as pure as the latter are liberal and extensive. The only solid foundation for the liberty of the country is the virtue of the citizen.

Let us proceed to examine the decided cases, and see their application to the one un-

der our consideration. The first that I shall notice is that of *Berney v. Pitt*, 2 *Vernon*, 14. The plaintiff was a young man entitled to a great estate on the death of his father, who was tenant for life. He got in debt, and borrowed 2,000*l.* of the defendant, and entered into two judgments, of 5,000*l.* a-piece, defaced that if the plaintiff outlived his father, and paid the defendant 5,000*l.* the defendant should vacate the judgment: and if the plaintiff did not outlive his father, the money should not be repaid. The father lived four years; and complainant filed a bill to be relieved against the judgments, upon the payment of the 2,000*l.* and interest. The bill complained of fraud, and of the defendant working upon the plaintiff when in distress. Relief was given on the ground of its being an unconscionable bargain, though there was no proof of any practice used by the defendant, or any on his behalf, to draw the plaintiff into this security. See too 1 *P. Wms.* 313.

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\*In the case of *Knott v. Hill*, 2 *Vern.* 27, it was decided, that the sale of an estate in remainder by a son who was in necessity, was void on account of the gross inadequacy, though the purchaser would have lost all if the son had died first. The decree was affirmed on a rehearing, the lord chancellor declaring it was an unrighteous bargain in the beginning, and that nothing could help it.

In the case of *Wiseman v. Beake*, 2 *Vern.* 121, relief was granted against a bargain on account of gross inadequacy, though the purchaser was to lose all if the seller did not survive his uncle, and get his estate. *Wiseman* was 40 years old, and an experienced man; and an offer had been made to relinquish the bargain, which he had refused. The court said, that when he had spent the money, then a specious offer was made to relinquish the bargain on payment of the money advanced, with interest, which at that time it was impossible for him to do.

So too relief was given in the case of *James v. Oades*, 2 *Vern.* 402, and of *Ardglass v. Muschamp*, 1 *Vern.* 237. In the latter case the contingency relied upon, in support of the bargain, was held to be of no importance in such a case.

In the case of *Stanhope v. Toppe*, 2 *Bro. P. C.* 183, Lord Chancellor Macclesfield gave relief against an advantageous bargain obtained by Stanhope from a person of weak understanding, though there was no direct proof of fraud; and the answer denied all fraud: and the decree was affirmed on appeal.

In *Twisleton v. Griffith*, 1 *P. Wms.* 310, Lord Chancellor Cowper set aside a contract, by which the defendant had got a good bargain from a young man who sold the reversion of an estate tail, his father being tenant for life, and an old man. The hazard run of losing the money paid, in case of the

son's dying before his father, was not allowed to have any influence in the cause.

In the case of *Curwen v. Miller*, Lord Chancellor King set aside a contract, on which an heir about 27 years of age borrowed £500 on condition to pay £1000 if he survived his father and father-in-law. It

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was said \*the bargain being hawked about, only shewed the necessities of the party—See note C in 3 P. Wms. 292.

Lord Chancellor Talbot gave relief in *Bosanquet v. Dashwood*, in *Forrester's Reports*, 37, though the party had submitted to the imposition from necessity for fourteen years. In that case, several decisions by Lord Chancellors Harcourt and King were referred to, in which it was declared, that relief would be given against all offences against the law of nature and reason.

The case of *Proof v. Hines*, *Forrester p. 3*, was a very important one. The plaintiff was a poor illiterate man, who was supposed to be entitled to part of an estate; and he applied to the defendant to assist him in making out his pedigree, and getting such proofs as were necessary to make out his title to the estate. They advanced some small sums, and took some pains in the affair; and a bond for £1,000. was given, payable after the estate should be recovered. Lord Chancellor Talbot in giving relief said, that the bond was obtained from the plaintiff when under necessity, and that the plaintiff's poverty is not to be omitted in such a case.

In *Baugh v. Price*, decided in the exchequer, and reported in 3 *Wilson*, 320, relief was given, and actual conveyances set aside, though the inadequacy did not exceed one half the value. This is very important case.

In giving relief against a contract for the sale of a remainder in tail, made by the remainder-man, who was in necessitous circumstances, at a very low rate, Lord Chancellor Hardwicke said, that though the buyer might lose his money, if the remainder-man died before the tenant for life, this risk was immaterial; it was common in such transactions. *Barnardiston v. Lingard*, 2 *Atk.* 133.

In *Walmsly v. Booth*, 2 *Atk.* 25, Lord Hardwicke gave relief against a bond obtained by an attorney from his client in distress, and reversed his first decree.

In the great case of *Chesterfield v. Janssen*, 1 *Atk.* 301, Lord Chancellor Hardwicke made many important observations, explaining the doctrines of this court. He said that the

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court relieves against all kinds of \*fraud;—that frauds may be either *dolus malus*, a clear and express fraud, or fraud may arise from circumstances, and the necessity of the person at the time. And there are also hard, unconscionable bargains, which have been construed fraudulent; and this court will relieve against presumptive fraud. To

take advantage of another man's necessity, is equally bad as taking advantage of his weakness. Fraud is presumed from the circumstances and condition of the parties; weakness and necessity on one side, and extortion and avarice on the other—and merely from the intrinsic unconscionableness of the bargain.

The court had previously given relief in the cases of *Clarkson v. Hanway*—2 P. Wms. 203. *Lawley v. Hooper*—3 *Atk.* 278.

We come now to the important case of *Gwynne v. Heaton*, decide by Lord Thurlow—See 1 *Bro. C. C.* p. 1. By this decision, the grant of a reversionary rent charge, after the death of the plaintiff's father, who was old and infirm, upon unreasonable terms, was set aside; though it was contended for the defendant, that he was not a dealer in such transactions, and was invited into the bargain, and the terms deliberately settled by the plaintiff with his friends; the same terms having been offered to other persons:—also, that Gwynne was not an expensive young man, following his pleasures; and this was not like the case of a young man dependant on his father—that there was a contingency too, by which the defendant might have lost all his advances; and that the disproportion was not enormous—for if the father had lived seven years, there could not have been any pretence of such inequality as the court would relieve against. So that it was reduced to the single question, whether this agreement was upon such an inadequate consideration that this court will set it aside on that ground alone, there being no pretence of imposition. But all these reasons were urged in vain, as it appeared that the consideration was grossly inadequate, being, as was stated, three or four for one.—The lord chancellor said, the ground for relief was gross inequality—that the charges of fraud and oppression were not proved—that the ven-

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dor made \*the offer to the purchaser, who accepted it in the very shape it was offered, and did not labor to lower the terms. There was no confidence subsisting between the seller and the buyer; there was no misleading the judgment of the vendor, nor tampering with his poverty. On the other hand, said the lord chancellor, the terms are so very grossly inadequate, as to deserve all that has been said to be necessary to the setting the bargain aside. To set aside a conveyance, there must be an inequality so gross, strong, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. The chancellor then proceeds to take a masterly view of the decided cases, in which he shows that inadequacy alone cannot, as mere inadequacy, be made a ground for setting aside a contract; yet it was, when very gross, a mark of fraud, and in that way would operate to vitiate the



bargain. That was the ground in *Sir Thomas Mear's case*, cited in *Forrester*, p. 40. The case of *Nott v. Hill* was clear of fraud, except what arose from the inequality. Lord Hardwicke treated gross inequality as a mark of fraud in many cases. *Curwen v. Miller* was clear of direct fraud; but the bargain was set aside, though the inequality was only two to one. In modern cases it is admitted, that the owners of reversionary interests are as competent to dispose of them as the owners of other interests, but with this qualification—that there is a policy in justice, protecting the person who has the expectancy, and reducing him to the situation of an infant against the effects of his own conduct. The court avows the disability, but not the length to which it disables. Its being hawked about is not an objection to the relief; it only shows the necessity the vendor was under.

In the case of *Gartside v. Itherwood*, 1 Bro. C. C. 558, Lord Chancellor Thurlow again gave relief against a bargain obtained from a man of weak intellects, by his agent, on inadequate considerations, though the party came for relief seven years after the transactions. He said it used to be held, that a contract ought not to be set aside merely for inequality in the bargain, or merely up-

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on the \*ground of the weakness of the person selling; but the court has since gone further.—Inadequacy is the basis of the relief; the thing to be inferred from the inadequacy is fraud—it is evidence of fraud; but for that purpose it must be gross.

In *Heathcoat v. Paignon*, 2 Bro. C. C. 167, a purchase of an annuity was set aside, on the inadequacy, the purchaser having given only two-fifths of the value. There was no appearance of distress. The chancellor said that mere inadequacy, as a distinct ground, was scarcely sufficient. But there was a difference between that and evidence arising from inadequacy. Lord Chancellor Redesdale in remarking on this case said, he did not think that mere inadequacy was a sufficient ground to impeach a contract, unless very gross.—2 Schoales and Lefroy, 395. In a note to the case of *Heath v. Paignon*, that of *Herne v. Mears* is stated, in which it appears that an inadequacy of half the value, and the distress the seller was in, induced the court to set aside the contract.—See 2 Bro. C. C. 176. 7.

In *Underhill v. Horwood*, 10 Vesey, 211, the Lord Chancellor Eldon stated, that if the terms are so extremely inadequate, as to satisfy the conscience of the court that there must have been imposition, or that species of pressure on the party's distress, which, in the view of this court, amounts to oppression, the court will order the instrument to be delivered up.

In *Mortloke v. Buller*, 10 Vesey, 292, Lord Chancellor Eldon refused to decree specific

execution of a contract for the sale of land, where the inadequacy did not exceed half the value, though there was no imputation on the conduct of the buyer; but the agent of the vendor had not communicated to him the survey and valuation, which would have shown him the true value.

Lord Alvanby refused to decree specific execution of a contract in a case clear of all fraud, where the inadequacy was very gross, being about half the value.—*Day v. Newman*, 10 Vesey, 30.

In *Tilley v. Peers*, decided in the court of exchequer, and stated by Sir Samuel Romilly,

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10 Vesey, 301, \*the chief baron said, that laying out of consideration all circumstances of fraud, the court, upon the mere consideration of its being so hard a bargain, will not enforce it. Baron Thompson said, the plaintiff could not be assisted by the court, the consideration not being one-third of the value.

In *Morse v. Royal*, 12 Vesey, 355, though the chancellor refused to set aside the contract, on the peculiar circumstances, said that gross inadequacy will go a great way to constitute fraud. In that case the vendor was anxious to sell, and pressed it on the purchaser. An intelligent relation of the vendor, and a trustee, concurred in the transaction. The seller was not ignorant, weak, or necessitous. There was no imputation on the buyer. There had been long acquiescence, and a confirmation made on receiving an additional price; and the buyer was dead, who might have explained many things. Yet Lord Chancellor Erskine barely sustained the transaction, and expressed his regret that the rule of policy had not barred more absolutely contracts between trustees and their cestui que trust, as well as it did in some other cases, such as attorneys and clients, trustees selling to themselves, &c.

In *Lowther v. Lowther*, 13 Vesey, 103, Lord Chancellor Erskine agrees with his predecessors, that gross inequality is strong evidence of fraud. The disproportion was about six to one in that case.

In *Pickett v. Loggon*, 14 Vesey, 214, 224, 243, Lord Chancellor Eldon gave relief to the plaintiffs, and set aside the agreements, and the formal conveyances, and even a fine, conveying the estate to the defendant, upon the ground of gross inadequacy of price, (about one-fifth of the value,) and the vendors being in distress, ignorant of their real interests and its value, and not properly protected by counsel, though a great lapse of time had occurred. In this case the answer denied, that the plaintiffs were drawn in by any advantage taken of their ignorance or distress; and denied that the defendant was possessed of any information which was withheld from the plaintiffs. The defendant also relied on

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the risk ran of losing the \*whole purchase, if a nearer heir should appear; and it was

known that one formerly existed, though he had not been heard from for many years. But this was not allowed to be any reason against the relief, according to Lord Hardwicke's opinion in *Barnardiston v. Lingood*, 2 Atk. 133. The evidence in *Pickett v. Loggon* stated, that the deeds were read and explained to the plaintiffs by the attorneys, and they were made to understand the nature and value of the property. But they were in great poverty and distress; they were very ignorant people; and though some description of the property was given in the deeds, it was not as full as it should have been. The price being so inadequate, the chancellor had no difficulty in giving the relief sought. This case is one of the most important that ever was decided; and has great weight in settling and illustrating the doctrine as gradually developed by a series of authorities. It has also many features of resemblance to the case now under our consideration.

*Purcell v. Macnamara*, 14 Vesey, 91, 110, was decided by Lord Chancellor Eldon, and afterwards by Lord Chancellor Erskine, assisted by the Master of the Rolls, on a rehearing. It was decreed that absolute deeds of conveyance should be set aside, in bargains of great inadequacy, on the nature of the deeds themselves, and the circumstances under which they were obtained, from feeble persons reposing confidence in the defendant.

The case of *Murray v. Palmer*, 2 Schoales and Lefroy, 474, decided by Lord Redesdale, is in concurrence with the preceding cases. In that case the chancellor decided, that the conveyance of property obtained from a woman, in ignorance of the extent of her rights, and upon a misrepresentation of the circumstances of the property, should be set aside; though she was of full age, had consulted her friends, and had their assent; and she had received the interest on the purchase money for twelve years. The deed was prepared by the purchaser.

There have been few cases decided in our own courts on this subject. Speculations of this kind do not appear to have been fre-

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quent; and it is to be hoped that the decision of the court will be calculated to restrain them altogether.

The first of the cases occurring in our courts was that of *Clitherall v. Ogilvie*, [1 Desaus. 250,] in the year 1792, in which the plaintiff filed a bill for the specific performance of an agreement for the sale of a very valuable plantation, of which the defendant and his brother were joint owners. The defendant refused to comply, on the ground that the land was worth three times as much as the agreement stipulated to give; that the defendant was a young man inexperienced, just of age, ignorant of the value of the land, and rather importuned by the plaintiff, who was an experienced man, and well acquainted with the nature and value of the land. The

court decreed against the plaintiff, and dismissed his bill with costs. The judges said that though inadequacy alone is not a sufficient ground to set aside a contract, yet, if gross and palpable, the court will not lend its aid to enforce it; that the inadequacy was enormous, the defendant was young and inexperienced, ignorant of the value of the property, was rather too much importuned into the bargain, and had included in the agreement his brother's half of the land, which he had no authority to sell; and that under these circumstances, though there was no direct fraud proved, the court would not decree a specific performance.

The case of *Gregor and others v. Duncan and others* [2 Desaus. 636] was decreed in May, 1808. The court refused to set aside the contract, though the price was enormously inadequate. The court said that there was not a tittle of fraud in the case; that the complainants were of full age, competent to transact their business; were as well informed of their rights and interests as the defendant was, and probably better: for they had an intelligent attorney in this country, who doubtless informed them of their rights, and the value of the property; and there was no sort of concealment on the part of the defendant—and it appears from the case, that there was no relationship or confidence subsisting between the parties. The court also added, that mere inadequacy of price is not a ground to set aside agreements, executory

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or executed; and it seemed to \*lay some stress on the ground that if the purchase had turned out to be a losing one, the court would not have relieved; and therefore the court ought not to relieve when it was an advantageous bargain. I am not quite satisfied with either of these positions; and am inclined to think, that relief would be given to a purchaser as well as to the vendor, on a proper case made out—though there are strong reasons why the court would relieve vendors, even if it did not the buyers.

The case of *Bunch v. Hurst*, [3 Desaus. 273, 5 Am. Dec. 551,] decided in the year 1811, and affirmed by the court of appeals, was not decided on the ground of mere inadequacy alone, though that was enormous; but the bargain was obtained from a poor creature, who was nearly an idiot, though capable of the common transactions of life.

After this long examination of the decided cases, which form precedents to assist our judgment, I come now to the results, and the application of them.

I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been



taken of the ignorance, the weakness, or the distress and necessity of the vendor: and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct; and the relief is given by the court, either by refusing to enforce the contract, or by setting it aside altogether, according to the circumstances of the case. The relief is extended not only to young heirs selling their expectancies; but to all who are weak, or necessitous, or not perfectly conscious of their rights, whether selling expectancies or absolute estates; more especially where the purchaser is very intelligent and acute, and avails himself of his superiority in an unreasonable manner. And the answer of the defendant denying fraud in the transaction, though entitled to much weight, is by no means conclusive; but the Court gives relief

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on strong counter testimony, or on the great intrinsic evidence of gross inadequacy, coupled with other circumstances, such as weakness or necessity in the seller, confidence reposed in the buyer, &c. And the decided cases further shew that the hazard run by the buyer of losing what he advances on some contingency, does not prevent the Court from giving relief; nor have specious offers to rescind the bargain, when the injured party could not refund the money, blinded the eyes of the Court to the real nature of the transaction.

In the case under our consideration, we have seen that the price was grossly inadequate; at least ten for one of the money actually paid on the risk, (if indeed there were any risk,) and four for one of the whole sum to be paid when the estate should be recovered. This inadequacy is greater than in many of the cases in which the Court gave relief.

It was relied upon for the defendant, that this great inadequacy was unknown at the time to the buyer as well as the seller. But if this were established, it would not alter the case under the circumstances. For it was known that the estate was very large; and it was quite easy for the defendant to have ascertained with some accuracy the value of the estate; and it was his duty, as the agent of the plaintiffs, to have done so. Besides, this mode of purchasing in the gross, without schedule, or description, or valuation, is itself objectionable; and is a feature in the cases, which has strongly led the Court to give relief, especially to weak or necessitous men. It appears further, that the sellers were uneducated and ignorant men—one of them could not write, and none of them had any experience in business—none of them appear to have had any accurate ideas of the value of the property, though they vaguely thought it large; and they were at a loss as to the mode of pursuing their claims. George Butler, who was said to be the most

intelligent of the brothers, was baffled and despondent. The sellers were also in narrow circumstances and necessitous. One of them could not raise about thirty dollars to pay his proportion of a counsel fee. None of

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\*them were wealthy. It seems also, that the purchaser was a gentleman of acute understanding, great experience in business, and much knowledge of men and things, and that he knew the defendants, their situation in life, their necessities and their incapacity to carry on their own claims to the estate. And above all, the defendant seems to have had their entire confidence, for they signed all the papers which he drew in their various transactions without ever resorting to counsel. Their necessity and their incapacity to conduct their business, is proved conclusively by all the family consenting to give a tenth part of the estate recovered, to an agent to pursue and establish their claims. Their confidence in the defendant is demonstrated by their selection of him for that agency.

It does appear to me that these circumstances, connected with the great inadequacy of price, are conclusive; and that the Court is imperiously bound to give the relief sought by the complainants' bill. Much reliance was placed by the defendant's counsel on the ground that the purchaser ran a great risk of losing his advances of \$1,200 to each of the vendors. We have seen by the decided cases that this risk would not in such a case have varied the decision of the Court—but the risk in this case was really small. The interests of the vendors, whatever they were, could not be shaken, for the estate was the property of a person, pronounced by a jury of inquest to be an idiot; consequently she could neither marry nor alienate her estate by deed or will, or burthen it in any way. Her expenses were necessarily small, and a surplus income was annually put out to interest. The vendors claimed as next of kin, and the chance of any one of them not surviving her, was at least equal, and the chance of a majority of them surviving her more than equal; and the Butlers had entered into a written agreement (of which the defendant was let in to the benefit) that if any one of them should die before the idiot, his representatives should be let in equally with the survivors.

The defendant's counsel also relied on the risk of not being able to establish the claim

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by proving the relationship to the idiot by any evidence; and of not being able to perpetuate the testimony in the case. But these risks do not appear to have been great, and were all overcome. The defendant states in his answer that the Butlers had furnished him with the names of the material witnesses, to establish, by their testimony, their relationship; and it seems that this testimony did chiefly establish their claims on the trial. As to the testimony, it was perpetuated in

due form without difficulty, and received on the trial. But it is stated that it was received by consent, and that if it had been resisted, it would have been refused by the Court under the decided cases; and that Reput, the principal witness, whose testimony had been taken, was actually dead at the time of the trial. I do not however, agree, that this testimony was improperly perpetuated, and might have been rejected. It was not opposed, and therefore the judge received it and gave no opinion on the point. If it had been argued, it would have been found that though the rule may be, as stated, that the interest which the next of kin of a lunatic has in his property, is not sufficient to support a bill to perpetuate testimony; yet there is a modification of the rule which enables parties interested to obviate the difficulty. For it is laid down that the next of kin of a lunatic, or an heir at law, may enter into contracts with respect to their expectancies; the evidence upon which they might perpetuate; for the law would frame an interest in respect of the contract; and with respect to that they would have a right to perpetuate testimony, though they could not as to any interest in the subject itself. See Cooper's Equity Pleadings, 54, 5; and Lord Eldon's opinion in *Dursly v. Fitzharding*, 6 Vesey 261. And in fact, the Butlers had actually placed themselves in that very situation by their contract to let in the defendant to one tenth of the property of the idiot, to which they might be entitled; and this was raising such an interest as would have enabled them to perpetuate the testimony.

Some stress was laid on the labor, time, trouble and expense bestowed by the defendant in the prosecution of the claims, as a set-off against the inadequacy of the

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\*price, all which would be lost if he did not succeed. But the defendant had stipulated for a tenth part of the claim of all the nine Butlers, as a reward for his agency, his time, his trouble and his labor in the pursuit of their claims, and therefore these cannot be placed to his account in his absolute purchase of their rights. He was bound to do as much under the first contract for the tenth, as he afterwards did under the contract for the whole of the four shares he purchased.

There is one other feature in this case which has struck my mind very forcibly as evidence of the want of sound understanding and capacity in the Butlers, and that they were as ignorant and weak as they were necessitous. When the decree of the Court had established their relationship to the idiot, and their claims to nine fifteenths of her estate, they were called upon to execute other papers and deeds, to complete the transfer of their rights to the defendant. And so little did they understand their rights, and what they were bound to do, that they

were induced by the defendant to prevail on their wives to renounce their dower in the valuable lands of the estate, without any new consideration, although the contract for the sale did not stipulate for the renunciation of dower. And they all joined in the execution of deeds prepared by the defendant without the plaintiffs' having the benefit of counsel.

It was insisted, that the offer of the defendant to the complainants, on the death of Miss Butler, to rescind the contracts, on their repaying him the \$1,200 a piece, which he had advanced them, was conclusive evidence of the fairness of the conduct of the defendant to them. Undoubtedly it is calculated to give that impression, but it is very far from being conclusive. We have no evidence of the manner and circumstances of the offer—whether they were to refund the advances immediately or to have time given to them to do so. The certificate of the offer says the money was to be first repaid. They were not in better circumstances than when their necessities obliged them to sell, nor could they repay him his advances. They were under the same necessity that

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they \*were at first, and they were compelled to go on as they had begun. Of their real situation the defendant could not be ignorant.

Upon the whole, after long and mature deliberation, my opinion is firmly made up that the inadequacy in this case was so gross, and the ignorance and necessities of the parties selling their rights so great, that the court is bound to set aside the contract.

There is also another ground of very great importance in this cause, on which I rely in forming my judgment. The defendant was, at the very time of his purchase of the rights and interests of the complainants, their agent and trustee, to take care of those very interests, and support those rights, for which he was to receive a very large compensation.

It is quite unnecessary to multiply authorities to prove that his agency made him a trustee. It is laid down as an universal maxim in *Legard & Hodges*, 1 Vesey, jun. 478, by Lord Chancery Thurlow, that wherever persons agree concerning any particular subject, that, in a Court of Equity, raises a trust, as against the party himself, and any claiming under him voluntarily or without notice.

But whether his agency precluded the defendant from becoming the purchaser from the Butlers, under any circumstances however fair, is a question of considerable difficulty. There seems to be two classes of decided cases on this subject; one where the relation of the parties is such that no contract can be permitted to subsist on any terms, if sought to be relieved against, as the case of attorneys dealing with their clients, or trustees selling to themselves:



the other where the relation of the parties does not interdict all contracts on the subject of the trust, but where a confidence being reposed, the court looks with a jealous eye at the conduct of the agent, and will set aside the contract, if there be any considerable inadequacy of price in the transaction: and the more especially if there be any weakness or necessity in the vendor.

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\*The decided cases will illustrate the doctrine and the distinctions. In *Gartside v. Itherwood*, See 1 Bro. C. C. 558, the lord chancellor decided that leases for lives obtained by agents from a person of weak intellects, on inadequate considerations, should be set aside. He referred to the case of *Filmer v. Gott*, 7 Bro. P. C. 70, as supportable on the principle that a confidence was reposed, and that confidence abused, by obtaining an advantageous purchase from the principal. And he added, that fraud may be collected from gross inequality; especially if one of the parties employed and confided in the other, or was pressed by necessities which made him more readily give way to the other.

The case of *Fox v. Mackreth*, 2 Bro. C. C. 400, was one of the most contested causes ever tried in the English courts. It was there decided, that an agent or trustee for the sale of an estate cannot become the purchaser, at any rate; and on his making a profit of only twenty per cent. on a resale, he was compelled to account for it to his principal. Mr. Fox was a young man, but there was no pretence of weakness—the estate was absolutely his own, and though his estate was greatly encumbered, and he was therefore necessitous, he had an immense estate. He reposed confidence in the agent to make a good sale. There was no proof of any direct fraud, and Fox had signed the agreements most deliberately, after twenty-two days' reflection, and he had a valuation of the estate in his own hands, made by his own agent. The master of the rolls, the Lord Chancellor Thurlow, and the house of lords, successively decided, that the contract could not be supported, and that the agent must account for the profit made on his purchase.

In the case of *Crow v. Ballard*, 3 Bro. C. C. 117, it was decided, that an agent employed to sell a contingent legacy, and buying it in for himself, though in the name of another, the contract was void, though the gain of the agent was less than half the amount. The agent could not be permitted to be the buyer and the seller, even if the sale had been perfectly fair.

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\*In *Gibson v. Jeyes*, 6 Vesey, 266, 271, it was decided, that the sale of an annuity by an attorney to his client should be set aside. The disproportion was considerable, but not so great as necessarily to involve fraud; but there was a confidence in one party, and

a gain made by him which could not be supported. There was some imbecility in the party, but she knew what she was about. The lord chancellor said he did not mean to contradict the cases of trustees buying of their cestui que trust—but then the confidence in the party must be withdrawn, and the relation changed. It is a great rule of the court, that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.

In the case of *Coles v. Trecothick*, 9 Vesey, 234, 244, the same doctrine is laid down. A trustee may purchase of his cestui que trust; but he must have divested himself of the character of agent or trustee, and he must prove the utmost fair dealing. The same doctrine is in 10 Vesey, 385, *ex parte Benet*.

In *Morse v. Royal*, 12 Vesey, 371, Lord Chancellor Erskine stated the law of the court to be clear, that certain contracts may be avoided as being contrary to the policy of the law—such as gifts obtained by an attorney whilst engaged in the business of the donor: a deed by an heir just of age to his guardian; trustees selling to themselves; purchasers of reversions from young heirs; and assignees or solicitors under a commission of bankruptcy. In all these the contract is void by reason of the relation of the parties, or the policy of the law; and he added, that he should have been glad to have added to this list the case of trustees purchasing from the cestui que trust. He thought the difficulty was so great for a trustee to make out a case where the purchase at a low price could be supported, that it would have been better to have embraced that class of cases under the rule; but the rule had not been carried so far. In fact, the rule is so rigorous in requiring demonstrative proof that the

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confidence has not been abused, where \*the trustee becomes the purchaser from the cestui que use, that it seems almost impossible for him to do so; and very few have ever been able to do it. It would therefore be wiser to shut the door altogether, and to exclude all such contracts absolutely, as has in reality been done by some of the cases.

Again, in *Lowther v. Lowther*, 13 Vesey, 95, Lord Chancellor Erskine recognizes the principle, that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his principal with all the knowledge he possessed; and that gross inadequacy is strong evidence of fraud.

The case of *Purcell v. Macnamara* is a very important one—See 14 Vesey, 91, 107. It was decided, first by Lord Eldon, and afterwards affirmed by Lord Chancellor Erskine, assisted by the master of the rolls, who delivered a most elaborate and luminous

opinion. It was decreed, that the deeds complained of should be set aside, upon the nature of the deeds themselves, the circumstances under which they were obtained, and the confidential relation of the person by whom obtained.

I am bound then to say, that if the agent in the case under consideration was at liberty to become a purchaser from his cestui que use, under any circumstances, however fair, it is incumbent on him to shew demonstratively that he had not abused the trust reposed in him; that he had given all possible information to his employers; that he had enlightened them as to their interests; and had advised them as he would have done against a third person, offering to become the purchaser at such an enormously inadequate price; and some of the authorities say the connection should have been entirely dissolved; and that he had given a fair price for the property. Instead of this the contract was made whilst the agency subsisted. It is not made out in proof that the agency was at an end at the time of the contract; or that he advised the principals as he would have done against a stranger; or that he gave any thing like a full price for the property in

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question. It does appear \*to me therefore, that the contracts cannot be sustained, and that this Court is bound to give relief against them.

But it was insisted for the defendant, that whatever may have been the character of the original transaction the various acts of acquiescence and confirmation by the complainants, bound them completely, and rendered it improper for this Court to interfere. This point deserves particular consideration, because it was on this ground that the Judge, who tried the cause on the circuit, decided in favor of the defendant, and I have long paused on it.

Acquiescence from the time of the original contract in 1804, to the time of filing the bill in this cause, was relied upon by the counsel. It will be remembered, however, that the idiot never died till the year 1809; and that the absolute rights of the complainants did not accrue till that event. And that is the true time, from which the acquiescence should be reckoned. But count from either date, the time of the contract, or of the death of the idiot, the acquiescence, as it is called, does not exceed the time in many cases in which relief was given. In *Walsmley v. Booth*, 2. Atk. 25, lord chancellor Hardwicke relieved the representative, after six years' acquiescence by the party aggrieved, who died without seeking relief. In *Gartside v. Itherwood*, lord Thurlow relieved after seven years' acquiescence, from the time the right accrued.

In *Beaumont v. Boulton*, 5, Vesey, 485, the Chancellor relieved, after many years' delay, in the case of an agent, in whom confidence

had been placed; stating that though lapse of time might be a good objection for others, it was not so for one so situated. And Lord Eldon affirmed this decree on a rehearing. 7 Vesey, 599.

In *Purcell v. Macnamara*, 14 Vesey, 91, Lord Eldon gave relief after 14 years had elapsed, though the deeds were solemn, and repeatedly acknowledged.

So in *Pickett v. Loggon*, 14 Vesey, 214, relief was given 12 years after the transaction. And in *Murray v. Palmer*, 2. Schoales & Le-froy, 474, after 12 years. In *Hatch v. Hatch*,

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9 Vesey 292, after 20 years; and \*in *Deloraine v. Brown*, after 20 years. Thus we perceive that mere lapse of time will not bar a claim, otherwise good, unless it be so extreme as to furnish very strong presumptions against the claim; which the Court will attend to more readily, if some of the witnesses or the party whose acts are impeached, are dead; as was done in the case of *Morse v. Royal*, in 12 Vesey, 355. That being one of the very few cases in which the purchase of a trustee from his cestui que use, at an inadequate price, was supported; for the acquiescence had been long, and there had been a full confirmation (on an increased price) by a gentleman of full age and sound understanding, deliberately made, not in necessitous circumstances, and not at all ignorant of his rights, and the trustee was dead, who, if living, might have explained many things.

We come now to the consideration of the direct acts of the plaintiffs, which are relied upon by the defendant, as amounting to a confirmation.

The first paper relied upon, is signed by William, James and Thomas Butler. The first of them signing by a cross or mark. Charles Butler was dead. The paper bears no date, but it was signed after the decree at Georgetown, in February 1813, for it refers to that decree. It then recites or declares, that the defendant did, soon after the death of Margaret Butler, the idiot, offer to each of them, to give up their respective contracts or agreements, for the sale of their shares, upon returning him the property he had paid, and releasing him, &c. And it is added, that they had disagreed to the offer, being well satisfied with the contract, let the event prove as it might.

I confess it does not appear to me, after full consideration, that this paper is at all calculated to strengthen the defendant's case, in any point of view, either as affording evidence of the fairness of the transactions, or directly as an act of confirmation.

The declaration obtained from the plaintiffs, and couched in the defendant's own words, he being the penman, was signed sev-

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eral years after the verbal offer \*was said to have been made. It seems not to have been called for; but to be obtained to support



transactions, the fairness of which might be questionable. It is signed also by two witnesses, but no evidence is given, that at the time of the offer made the defendant explained to the complainants the true situation of affairs; that the death of Miss Butler had opened the door to the speedy establishment of their rights; that the testimony had been perpetuated which it was believed would establish their claims; that the property was immense; and that it was greatly their interest to accept such an offer.—There is no evidence that the defendant, knowing as he did, their poverty and necessity to be still bearing hard on them, and rendered them incapable of returning the money advanced by defendant, offered them to forbear his demand for reimbursement, till they should recover their property. On the contrary, the paper states that the offer was made, provided they would return the money; which, it was well known, it was out of their power to do. Such an offer was exactly what the decided cases, we have seen, call a specious one; which the party knew could not be complied with. And an offer like this, relied upon as an act of confirmation, in a case not sustainable on its original ground, ought to be supported by the clearest and strongest proofs of the utmost purity and good faith. It should not have the appearance of being an illusory act, done, not to give the other party an advantage, but to bind faster on them the chains already twisted round them. The signature of such a paper drawn up by the defendant, at such a time, shews the continued confidence reposed, and the continued influence which governed the Butlers through all these transactions.

But the great reliance of the defendant's counsel was on the deeds executed by the three Butlers, in February and March 1813, which are called deeds of confirmation. These deeds refer to the decree which was delivered at Georgetown, early in February 1813, which established the rights of the Butlers. They recite the agreement in June 1804, by which four of the Butlers contracted

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to \*transfer their rights to the defendant; and that, in pursuance of that contract, they severally transfer and convey their shares of the estate in question to the defendant. These deeds were executed in the presence of respectable witnesses, who prove that the deeds were explained to the plaintiffs. But there is no evidence that the Butlers were more enlightened or less necessitous than they were originally. There is no evidence that they were informed that their rights being established, and no appeal made, each share of the estate was worth from 12 to 14,000 dollars. It is not pretended that these men were informed that they were free to confirm the original contracts or not; and that the original transaction not being sustainable at law or in Equity, they could be

relieved from it. On the contrary, they seem to have gone on, under a persuasion that they were so bound by the original contracts that they could not be relieved; and they therefore executed any papers drawn up and presented to them by the defendant, in order to get the stipulated price.

That the complainants thought themselves legally bound to go on, appears by the wording of the deeds, and they allege the fact in their bill. The defendant in his answer admits, that they thought themselves bound, both legally and fairly. Now I understand the doctrine, as to confirmations, to be quite settled, that the party who gives them must be shewn to be no longer under those circumstances of necessity, or of overbearing influence, or blind confidence, which led into the first agreement; and that he is aware that he is not bound by the original contract, but may be released from it; but that nevertheless he chooses deliberately, and without imposition, to confirm what he had first done. To this it must be added, that in many cases, particularly of great abuses of confidence, confirmations are not allowed to have any effect. A short examination of the decided cases will illustrate the doctrine.

In *Ardglass v. Muschamp*, 1 Vern. 237, a release and confirmation were decided to be of no avail, in a case of great inadequacy,

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and imposition on a weak man. \*The lord keeper hesitated at first about interfering with contracts, however unjust; but upon searching for precedents, from the time of Lord Bacon, he became satisfied, and, after two re-hearings, decreed that the contract, though executed and confirmed, should be set aside—adding emphatically, that if he were to die immediately he would make that decree. So in *Ardglass v. Pitt*, 1 Vern. 439.

In *Wiseman v. Beake*, 2 Vern. 121, the court relieved against an unconscientious bargain, by which the plaintiff, a remainderman, had agreed to pay ten for one of the money advanced, if his uncle, who was tenant for life, with remainder to his issue male, should die without such issue in the life-time of the seller. The vendor was a man of thirty years of age, trained to business, and not weak; but he was necessitous, and the price grossly inadequate. The confirmation in this case was of the strongest kind; for the defendant Beake had filed a bill, in the uncle's life-time, against the plaintiff Wiseman, to compel him to repay the money advanced with interest, or to be foreclosed from relief against the bargain; and in his answer thereto he said, that he elected to stand by the bargain, which had been fairly made, and that he would not seek any relief against it—and this confirmation was relied on. But the court said, that when he had spent the money, a specious offer was made him to relinquish the

bargain, on payment of principal and interest, which it was impossible for him to do, and that this was a contrivance to double-hatch the cheat; and the court set aside the contract.

In this case there was no pretence of weakness in the plaintiff, or imposition practised on him; nor was he a young heir. But he was necessitous, and selling an expectancy at a most inadequate price. This was considered conclusive; and the confirmation made whilst the necessity lasted, was of no avail.

In *Taylor v. Rochford*, 2 Vesey, sen. 281, 2, the court of exchequer decided that a bargain of about three for one was unconscientious, and should be set aside. The vendor was a

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poor ignorant sailor, selling his prize \*money. A very deliberate confirmation was set aside, and the court said that confirmations though made over and over again, would be broken through, if they were not obtained properly.

In the case of *Stanhope v. Toppe*, 2 Bro. P. C. 183, the Lord Chancellor Macclesfield decreed, that deeds obtained by artifice, (though no direct proof of fraud,) from a weak man, who confided in the other party, should be set aside; notwithstanding a subsequent release, and notwithstanding the answer denied fraud. The decree was affirmed on appeal.

*Baugh v. Price*, 3 Wilson's Reports, was decided by the court of exchequer; and it was decreed, that several successive articles, deeds and conveyances should be set aside. It was the case of an attorney, who purchased an estate for half its value, from a man who was tenant in tail in remainder, (his father being tenant for life, but old and infirm,) and in necessitous circumstances. The attorney had been previously employed, confidentially, by the family. He drew the deeds himself, and the other party had no counsel or attorney concerned for him. It was relied upon for the defendant, that letters from the vendor to defendant, written after his father's death, shewed that he thought the bargain a fair one; but the court said that the letters were written soon after his father's death, before his eyes were open, and before he knew the real value of the estate. Reliance was also placed on this, that the party alleged to be injured, had filed a bill after his father's death to be relieved, and defendant had put in an answer denying the fraud charged; and afterwards the plaintiff consented the bill should be stopped, and he then executed a deed reciting that the purchase was a fair one, and he confirmed and released the premises to the vendee—and the party lived several years, without ever questioning the last transactions. But the court said that under the circumstances of the case, the release and confirmation could not be supported;

for the party was never fully apprised of his rights. The whole transaction was set aside,

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though the party was of competent age, \*capable of transacting ordinary business, not at all intoxicated. But he was in necessitous circumstances, and had confidence in the other party. In *Walmsley v. Booth*, 2 Atk. 25, Lord Hardwicke on a re-hearing, disregarded an acquiescence of six years by the party aggrieved, and by his representative, who allowed a judgment to be obtained on the bond, improperly obtained; and the chancellor set aside the bond and judgment. At the first hearing the lord chancellor refused to interfere, but on a re-hearing he used these words, so honorable to his candor. "Upon the case being re-argued and re-considered, I am thoroughly convinced that my former decree was wrong." In that case there was no weakness, but the man was in distressing circumstances.

In the celebrated case of *Fox v. Mackreth*, 2 Bro. C. C. 400, decided by Lord Chancellor Thurlow, affirming a decree of the master of the rolls, it was decreed, that several successive deeds amounting to recognitions, and intended to operate as confirmations, should not be binding on the party who made them; over whom an advantage had been gained by another person, in whom he had confidence, and had employed him to sell his property. The advantage gained was not above one fifth of the value of the property, and there was no direct proof of fraud: which was also denied by the answer. The lord chancellor said the executing the subsequent deeds, did not amount to a confirmation, "as it was done without any knowledge in Fox, that he could impeach the transaction;" and he cited the cases of *Baugh v. Price*, *Taylor v. Rochford*, and *Cole v. Gibson*, 1 Vesey, sen. 503. In this case of *Fox v. Mackreth*, a distinction was taken, which was important. It was stated that in the case of *Janssen v. Chesterfield* and others, in which confirmations had been supported, there were clear acts of confirmation. But that in Fox's case, the parties executing the second deeds were only carrying into effect the original contract, (vide p. 419); and that the execution of the duplicates shewed how much Fox was in the power of Mackreth. It

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was done for \*the purpose of getting something which might be called an act of confirmation—and Fox did not think he had not been fairly dealt with, for several years after the transactions. So, in the case under our consideration, the execution of the papers, after the decree, now relied upon as acts of confirmation, were not intended as acts of confirmation, but as an execution of the original articles of agreement. The defendant expressly says, that neither he nor the plaintiffs thought an act of confirmation necessary to give validity to the agree-



ment; for that they thought themselves already bound.

In *Crow v. Ballard*, 3 Bro. C. C. 117, 118, and 1 Vesey, Jun. 220, the lord chancellor refused to permit a confirmation to prevail, though made with such deliberation that one of the most eminent counsel arguing for the defendant said, "if the confirmation in this case does not prevail, there never can be a confirmation." But the lord chancellor said, if a person, conceiving he has made a hard bargain, and knowing that the bond is bad, will give a new bond, that will maintain the right of the holder, and that shall be a good confirmation; "but not any act done under the influence of the former transaction, and under the opinion that that bond is good." That the bond was given under the influence of the former transaction, and the payment of interest on it, is of no avail, being still under the same impression. Surely this was precisely the case of the plaintiffs, the Butlers. They believed themselves bound, and signed any papers presented to them; and such acts cannot amount to confirmations.

In *Deloraine v. Brown and others*, 3 Bro. C. C. 633, which was the last case decided by Lord Chancellor Thurlow, the bill charged fraud. A demurrer was put in on the ground that the transaction had been confirmed by deed twenty-three years since. But the chancellor disallowed the demurrer. He said it did not appear that the complainant was undeceived at the time of the confirmation, which was made whilst the party remained in the same distress that he was originally.

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But he also disallowed the demurrer, because *proprio juro*, length of time was no reason for a demurrer.

The case of *Purcell v. Macnamara* was decided by Lord Eldon, and afterwards by Lord Chancellor Erskine, assisted by the Master of the Rolls. It was decided and affirmed that several deeds executed at large intervals, should not prevail as confirmations; the other party being throughout under the same influence, control and ignorance of their rights; and every instrument signed under the same blind confidence.

In *Picket v. Loggon*, 14 Vesey, 214, conveyances, releases, and even a fine, were set aside on great inadequacy, combined with misrepresentation, to parties in great distress, and ignorance of their rights. A bill had been filed, and dismissed on the plaintiff's not appearing to prosecute it, which was a very strong act of acquiescence. The answer denied all misrepresentation, or that the defendant possessed any knowledge withheld from the plaintiffs. But all this was of no avail, when it appeared that the plaintiffs were poor and ignorant, and that the defendant had extracted conveyances for property, worth £5,000, for about £1,000. The chancellor said, that this court protected on public principles, persons in distress, who, acting under the influence of that distress, though

with knowledge of the circumstances, are to have the same protection as if they were entirely ignorant, being compelled by hard necessity.

The same doctrine is laid down by lord chancellor Redesdale, in *Murray v. Palmer*, 2 Schoales and Lefroy, 474. He says that nothing will amount to a confirmation of a fraudulent transaction but an act done by the party, after he has become fully aware of the transaction. He must at least be aware that the act he is doing, is to have the effect of confirming an impeachable transaction; otherwise the act amounts to nothing as a confirmation.

The application of the doctrine of these cases, to which our reason assents, is conclusive on the case we are to decide upon. The Butlers thought themselves legally bound to go on and complete their ruinous bargain, and therefore signed these papers, which are

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called confirmations; but which do not come under that character, as stated by the Judges; for they were not aware, that the original acts and contracts were impeachable, and from which, they could be released. The papers executed, were a mere completion of the original agreements, by which they thought themselves bound; and not new and substantive acts of voluntary confirmation. Their ignorance and their necessities remained in full force.

I am, therefore, obliged to say, that they were not bound by these last deeds, any more than by the first.

The few cases in which confirmations have been allowed to prevail, have been cases of the greatest fairness and deliberation, where very intelligent men, fully aware of their rights and of their title to relief, have nevertheless thought proper to confirm contracts impeachable in their character, or of very doubtful character: And this after the necessity which led to the first bad bargain had ceased: such were the cases of *Cole v. Gibbons*, 3 P. Wms. 290, *Chesterfield v. Janssen*, 1 Atk. 314 to 354, *Morse v. Royal*, 12 Vesey, 355, and some others. But these have no similarity to the case under our consideration.

Upon the whole, after a very long and laborious examination, and after the maturest deliberation, my judgment is clear that the complainants are entitled to relief, both on principle and on the authority of the decided cases; because the inadequacy of price in these contracts was so gross as to shock the conscience, and raises that violent presumption against the correctness of the transaction, which amounts to intrinsic evidence. This coupled with the ignorance of the complainants, their necessitous situation in life, and their want of full and correct information of their rights, and of the value of the property, makes a case of the highest claim to relief. Again, the defendant was the agent of the vendors to support and establish their

claims to the estate: and if the agent is allowed to become the purchaser at all, under any circumstances, from the *cestui que use*, it is of the most imperious obligation on him to shew that the purchase was perfectly fair

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in all respects, and is not liable to any sort of objection. But he has not done this, for the objections of gross inadequacy of price, ignorance and necessity on the part of the vendor, and skill on the part of the purchaser, are made with irresistible force by the principals, against their agent, the purchaser. And finally, this very strong case is not weakened by the acts relied upon by the defendant as confirmations; for the ignorance and necessity of the complainants remained, and they were not aware that the contracts could be impeached, and that they could be relieved—what they did was in compliance and submission to the original contracts.

HENRY W. DESAUSSURE.

We concur in the foregoing opinion, on all the grounds and in all the views which it has taken of this case,

THOMAS WATIES,  
WILLIAM DOBEIN JAMES.

It is therefore ordered and adjudged, that the decree of the circuit Court be reversed.

And it is further ordered and adjudged, that the agreements and deeds executed by William, Thomas, James and Charles Butler, for the sale, transfer and conveyance of their shares of the estate of Margaret Butler, be

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and the same are hereby declared to be null and void, set aside, and cancelled.

It is further ordered and adjudged, that the defendant do account with the complainants, before the commissioner of Orangeburg district, for all the monies received by him from the estate of Margaret Butler, on account of the said shares, with interest, and pay over the same to the complainants, after deducting one tenth part thereof, conformably to the original agreement. And that the defendant do also deliver over to the complainants, or their representatives, such negroes, bonds, notes, or other property, as he has received on account of the said shares, and account for the hire of the negroes with a similar deduction.

And that in accounting before the commissioner, the defendant shall be allowed credit

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for the sum of three thousand two hundred dollars, advanced or paid by him to each of the said Butlers, with interest thereon from the time of the payments.

And that the defendant be also allowed credit in his account, proportionably, for all just expenditures and disbursements in the prosecution of the claims of the said Butlers, under the direction of the Court, or by consent of parties, and the costs and counsel fees paid to the solicitors.

The costs of this suit to be paid by the defendant.

HENRY W. DESAUSSURE,  
THOMAS WATIES,  
WILLIAM DOBEIN JAMES.















REPORTS  
OF  
EQUITY CASES  
DETERMINED IN THE COURT OF APPEALS OF  
THE STATE OF SOUTH CAROLINA

BY WILLIAM HARPER  
STATE REPORTER

SECOND EDITION, WITH NOTES, ETC.

CHARLESTON, S. C.  
M'CARTER & DAWSON  
116 Meeting Street  
1860

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**ANNOTATED EDITION**

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# EQUITY CASES

DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON, MARCH TERM, 1824.

CHANCELLORS PRESENT.

HON. H. W. DE SAUSSURE,  
" THOMAS WATIES,  
" THEODORE GAILLARD,  
" W. THOMPSON,  
" W. D. JAMES.

### Harp. Eq. \*3

\*SAMUEL CANNON, Administrator, MICHAEL DAKERT and Others, Legatees of Henry Caloff, v. THOMAS RAINE and ABRAHAM JONES, Executors of Henry Caloff.

(Charleston. March Term, 1824.)

[Wills 525.]

Testator and his wife had by deed divided their estate equally, each having the absolute disposition of a moiety. By his will, he devised his whole estate to his wife for life, at her death one half to be at her disposal, the other to be disposed of among his relations, in manner following, that is to say "my half part to be divided," &c. *Held*, that the wife took a fee in one half of the husband's moiety reserved by the deed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1130; Dec. Dig. 525.]

This case depended upon the construction of a deed in connection with the will of Henry Caloff. Caloff and his wife executed a deed, by which they divided their estate equally, leaving to each the disposition of the moiety. By his will Caloff devised all his estate to his wife, for life, one half to be at her disposal at her death, the other to be disposed of in manner following, that is to say, "my half part to be divided," &c. The complainants contended that this must be construed in connection with the deed, and that it was but a confirmation of it, as to the dis-

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positions after the death of the wife, whereas it was contended on the other side that the will conveys in fee, the half of the moiety reserved by the deed.

Gaillard, Ch.—The testator, Henry Caloff, devised and bequeathed as follows:—"The whole of the property I may possess at the

time of my death (except any estate or property I may be entitled to or have by the will of my mother, which I do hereby give to my sister Susan Siffly and her heirs, after paying all just demands) I give and bequeath to my wife, Mary Caloff, during her natural life; and at her death to be divided, one half to be at the disposal of my wife, in any manner she may in her lifetime think proper to give it, and the other half to be disposed of among my relations, in the manner following, that is to say, my half part to be divided into fifteen shares and given as follows," then follow the names of different persons. There are lands about the quarter house and in the vicinity of Charleston, half of which, subject to a life estate in Mrs. Caloff, the testator could dispose of. It is contended that the words, "my half part" directed to be divided into fifteen shares, relate to the testator's half of the lands mentioned, which he and his wife held under a deed, the whole of them to the survivor during life, one half at the absolute disposal of him, Caloff, and the other at the disposal of his wife. This construction would do away the previous devise to the wife, by referring the words, "my half part" to the testator's half part or the fourth, which was all that remained, giving effect to the devise to his wife—both clauses of the will are reconciled. This I take to be the true construction. The widow is therefore entitled to three fourths of the land in fee; two under the deed and one under the will of her husband, the bill is therefore dismissed with costs.

On appeal, DE SAUSSURE, Ch., delivered the opinion of the Court.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The Court is satisfied with the decree of the Circuit Judge. There appears at first sight to be some complexity or difficulty in the case. But on a careful inspection of the

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deed and of the \*will, the doubts vanish, and we do not see that any other construction could be put on them than that which has been done.

It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed.

GAILLARD, WATIES and JAMES, CC., concurred.

### Harp. Eq. 5

Ex parte ABRAHAM DUPONT and His Wife, JANE. and DANIEL and ANN PEPPER.

(Charleston. March Term, 1824.)

[*Aliens* ⇨9.]

By the common law of England, the children of native subjects, born in a foreign country could not inherit lands in England, of either parent.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 21–29; Dec. Dig. ⇨9.]

[*Aliens* ⇨9.]

The Stat. 25 Ed. III., § 2, only provides that children born in a foreign country, both whose parents were native subjects, may inherit; or by the largest construction, only the children of a native father by an alien mother. (Whether that statute is of force, dubitat.)

[Ed. Note.—Cited in *Sasportas v. De La Motte*, 10 Rich. Eq. 45.

For other cases, see *Aliens*, Cent. Dig. §§ 21–29; Dec. Dig. ⇨9.]

[*Aliens* ⇨1.]

A native of Great Britain, born before the revolution, is not a citizen of this country, as being born under a common allegiance, before the severance of the two countries.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

[*Aliens* ⇨1, 13; *Citizens* ⇨4, 8, 9.]

A woman born in this State, and residing here till the revolution, who in 1781 married a British officer and removed with him to England, where she resided till her death, was an American citizen and not a British subject, within the provisions of the treaty of 1794, stipulating that the British subjects holding lands in the United States, may continue to hold, sell or devise them; and her children born in England, of an alien father, are incapable of inheriting her lands in this state:

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 1, 50; Dec. Dig. ⇨1, 13; *Citizens*, Cent. Dig. §§ 3, 7, 8; Dec. Dig. ⇨4, 8, 9.]

[*Aliens* ⇨9.]

Nor are they rendered capable by Acts of Congress of 29 January, 1795, [1 Stat. 414, c. 20] or 14 April, 1802, [2 Stat. 153, c. 28] giving the rights of citizenship to the children of citizens, born in a foreign country: their father never having been a resident of the United States.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 21–29; Dec. Dig. ⇨9.]

[*Aliens* ⇨6.]

[But, as an alien cannot take by descent, no inquest is necessary to vest title in the state on the death of the ancestor intestate.]

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 6; Dec. Dig. ⇨6.]

[*Aliens* ⇨9.]

[British subjects born before the Revolution are equally incapable with those born since to inherit, or transmit the inheritance of, lands in this country.]

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 27; Dec. Dig. ⇨9.]

This came on upon a petition, which set forth, that Thomas Scott, a citizen of the State of South Carolina, died some time in the year of our Lord, 1782, intestate, seized and possessed of a real estate on James Island, and leaving a widow and two daughters, Sarah and Ann; which daughters were, according to the laws of descents then of force, the sole co-heirs of the said Thomas Scott: that the said widow hath since departed this life: that the daughter Sarah intermarried

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with Daniel Pepper, a citizen of the said State, by whom she had issue born in this State, who are the petitioners in this case: that the said Daniel Pepper and Sarah his wife, have both departed this life: the latter in the year 1802, without having sold or otherwise disposed of her interests in the real estate descended from her father: whereby the same descended to her children the petitioners. That the other daughter, Ann, intermarried in the year of our Lord, 1781, with Joseph Shanks, a native of Great Britain and a British officer, who returned to Europe and carried his wife with him: they have resided ever since within the British dominions. Mrs. Shanks died in the month of June, of the year 1801, leaving five children, who are British subjects, and are respondents opposing the petition in this case.

The petition further set forth, that the real estate left by the said William Scott, came by tortious means into the hands of other persons, who set up a false claim thereto; but that the right has been adjudged against them, and the Court on application made an order that the land in question should be sold, and that one half of the proceeds should be paid to these petitioners, and the other half to be held and kept, to await the further order of the Court. The petitioners pray that the said reserved half or moiety may be paid to them, as the only heirs of Thomas Scott, capable of inheriting the said land; because the children of the above mentioned Mrs. Ann Shanks, being born in Great Britain, are aliens, and incapable of inheriting any part of the real estate, situated in this State, of their grandfather the said Thomas Scott, or of their mother the said Ann. That the said Ann, being a citizen of the State and entitled to hold real estate, the treaties between Great Britain and the United States of



America, of November, 1782, and February, 1783, and of November, 1794, had no application to her case, which did not require their protection: and this is the ordinary case of aliens claiming to take and hold lands by descent, which is contrary to law.

The petition was referred to the commissioner in equity, to report upon the facts of the case. He thereupon reported that he had examined the petition and found that the statement of facts was established by the

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records of the Court, and by the admission of the parties who were opposed to the prayer of the petition, namely, the children and heirs of Mr. and Mrs. Shanks.

De Saussure, Ch.—This case has been ably and learnedly argued by the counsel on both sides. The single question for the judgment of the Court, is, whether the defendants to the petition, the children and heirs of Mrs. Ann Shanks, born in England, are capable of taking and holding real estate, in this State, either at common law, or under any statute, or under the protection of the treaties between Great Britain and the United States of America. If they are capable, then they are entitled to that moiety of the proceeds of the sale of the lands in question, which descended to their mother, and which moiety has been reserved, subject to the order of the Court. If they are not capable of taking and holding lands in this State then they are wholly out of the way, as if they were not in existence, and the petitioners will be entitled.

There can be no doubt, that on the death of Thomas Scott, a citizen of South Carolina, intestate, in the year 1782, his real estate in this country descended to his two daughters: Sarah, the mother of the petitioners, and Ann, who intermarried with Mr. Shanks, a British officer, in the year 1781. It appears that she went with her husband to England, had lawful children there, who are the defendants and she died there in June, 1801, without ever having returned to America.

It was argued for the defendants, the children of Mrs. Shanks, that she, being a native citizen of South Carolina, her children, though born in England, are entitled to hold real estate in this country by descent from her. This is a question of great importance. The common law of England was recognized and declared to be the law of the State, by our colonial statute of 12 December, 1712, 2 Stat. 401; and it remains the law of the State, except so far as the same has been changed by British statutes made of force in this country, or by our colonial statutes, or by laws enacted since the Revolution. By the common law, it is understood that the children of English parents born out of the king's ligeance, except the children of ambassadors,

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born abroad, are aliens, and cannot take

lands in England by descent from their parents. But it is contended for the defendants, that the 25 Edward III., stat. 2, is of force in this State, 2 Stat. 549, and that by its provisions, the defendants can take by descent from their mother. That statute declares that all children born out of the ligeance of the king, whose fathers and mothers at the time of their birth be of the faith and allegiance of the king of England, shall be capable of inheriting as other inheritors; so always that the mothers of such children do pass the seas by the license and will of their husbands.

On examining the colonial statute of 12 December, 1712, which enumerates such of the acts of the British Parliament as it was intended to adopt, and reenacted them verbatim, exclusively of all others, I do not find the Statute of 25 Ed. III. included. But the late Judge Grimké, in his collection of the public laws, which has generally been considered correct, has introduced it in an appendix, as if of force. The appendix is headed with a statement that the third section of the above mentioned colonial Statute of 1712, makes all the statutes following (that is contained in the appendix) of force in Carolina, as confirming magna charta. The third section alluded to, of the Act of 1712, enacts *inter alia*, "that all such statutes in the kingdom of England, as declare the rights and liberties of the subjects and enact the better securing the same, are hereby enacted and made of force, as if particularly enumerated in this Act." I am not aware of any judicial decision which has established that the Statute of 25 Edward III. in question, is comprehended within the general terms of the said third section. Nor am I satisfied that such a decision would be made on a discussion; for the terms of that section may well be construed to apply only to such English statutes as related to the public liberties and privileges of the subject, and not to private rights, such as the right in question.

The same difficulty occurs in some degrees as to the Statute 7 Ann, ch. 5, which enacts, that the children of all natural born subjects, born out of the ligeance of her majesty, her heirs or successors, shall be deemed, judged

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and taken to be natural born subjects of England, to all intents, constructions and purposes whatever, which statute was confirmed by 4 George II., ch. 21, with a proviso, restricting the privilege to the paternal line, that is to the children whose fathers should be natural born subjects. I repeat, that I have very great doubts whether the 25 Ed. III., stat. 2, or 7 Ann, ch. 5, are of force. My reasons for thinking so are the following:—The Act of 1712 appears to have been drawn with great care, and it does not expressly adopt either of them, although there are statutes enumerated and adopted, of the

same years in which these statutes were enacted; and Judge Grimke himself, who introduces in his appendix the Statute 25 Edward III. does not notice the Statute 7 Ann, ch. 5, though both relate to the same subject, the enlargement of the privilege of inheriting real estate. The colonial Legislature too, which enacted the Statute of December, 1712, seems to have been informed of the Statute of 7 Ann, yet did not expressly adopt it. For in the eleventh section of that statute, it is declared that as few of the statute laws of England, made since the eighth year of Queen Ann, have been transmitted to the province, all British acts (except &c.,) since the eighth year of the Queen shall be of the same force as if that Act (of 1712) had never been made. And I repeat that I am inclined to think the third section of the colonial Act of 1712 meant no more by its sweeping provision, than to adopt those English statutes which secured public rights and liberties. If a broader construction should be given to it, the effect would be to introduce a prodigious number of statutes, not specially enumerated in the adopting Act of 1712. For there are few statutes of a general character, which do not enlarge or modify private rights, and the doubts and confusion which would ensue, would be very mischievous. If, however, Judge Grimke should be considered correct in introducing the Statute of 25 Edward III. and rejecting the statute of 7 Ann, ch. 5, then it becomes necessary to consider the operation of the statute of Edward III. on the question before us.

It was contended that by the construction of that statute, the defendants, the children of Mrs. Shanks, who was a citizen of South Carolina, could inherit lands in the State

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from her, \*and some authorities are relied upon to support that position. In 1 Bac. Abr. 126, title Alien, it is stated that if an English merchant goes beyond the sea and takes an alien wife, the issue shall inherit him. So it is if an English woman goes beyond sea and takes an alien husband, the children there born shall inherit her, for although the statute be in the conjunctive, yet it hath been construed in the disjunctive, to hinder the disability, and the word and taken instead of or, as sometimes it is, it not being reasonable that the child should not inherit the parent that is of ability, for the defect of the other that is not. This is the dictum of the writer, Mr. Bacon, and he cites the case of Bacon v. Bacon, Cro. Car. 601, 2, in support of his opinion. But on examining that case, as reported by Croke, who was himself one of the judges who decided it, it appears not to furnish the least support to the latter part of the assertion. For Croke says that after argument at the bar, it was agreed that judgment should be given for the plaintiff, for her father being an English merchant and living abroad for merchandizing, his daugh-

ter (though born abroad,) is a denizen, and shall be heir to him. And it is added, that it is not material that his wife was alien; she is, as Berkly, Justice, said, sub polestate viri, and quasi under the allegiance of the king, so that his issue shall inherit, either by the common law, or by Statute 25 Edward III. It is proper to remark too, that in the principal case of Bacon & Bacon, the mother is also stated to have been the daughter of an English merchant residing abroad, and therefore not an alien. The citations from Siderfin & Littleton's Reports, are of the same case, which was decided in the sixteenth year of Charles I. There is a query put in a marginal note of Bacon, whether the cases referred to support the construction of Bacon, to which the answer is that they do not. Afterwards, on another difficult question of alienage, in the reign of Charles II., Lord Chief Baron Hale, in delivering the judgment of the Court in the exchequer chamber, had occasion to speak of the very question we are now considering, and he states explicitly, that though an Englishman marry an alien beyond the seas and have issue, there the issue will be denizens, as hath been often resolved; yet it is without question

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that if an \*English woman go beyond the seas and marry an alien and have issue beyond the seas, the issue are aliens, for the wife was sub polestate viri; yet the issue born in England should inherit though the husband be an alien. See Ventriss, 413, 422, Collingwood v. Pace. In the case of Durour v. Jones, 4 Term. Rep. 300, it is decided that the son of an alien father and an English mother, born out of the king's allegiance, cannot inherit to his mother in England. That point of the case was not decided solely on the ground of the Statute of 4 Geo. II., ch. 21, explanatory of 7 Ann, ch. 5. Lord Chief Justice Kenyon goes fully into the question, and states his opinion to be, that if there were no decided cases, giving a construction to the Statute of 25 Edward III. in order to be entitled to the benefits of the Act, the children must be born of natural born parents, both father and mother, within the ligeance of the king, and that he did not find any of the cases cited, which established the contrary; and if there had been any, he thought the opinion of Lord Hale in Collingwood & Pace would have overturned them. He then examines the latter statutes, which it is unnecessary for us to do, because I do not understand them to be of force here. The judges, Ashurst and Grose, agree fully with the Chief Justice, and Grose quotes Judge Blackstone, as giving that construction to the Statute 25 Edward III. Mr. Hargrave, in note 1, to page 8 of Co. Litt. states the Statute Edward III. as enabling children born abroad to inherit, if both their parents were within the king's allegiance. There is



a quotation by Mr. Hargrave, in note 7 Co. Litt., page 12, of importance; but it manifestly relates to a denizen man marrying an alien woman, or a denizen woman marrying an alien man, and having issue born in England. This issue shall inherit; as indeed Lord Hale had said in *Collingwood & Pace*.

I come, then, to the conclusion, that by the common law, children born abroad could not inherit lands in England, even from their parents who were native subjects. The character of a natural born subject, anterior to any of the statutes, was incidental to birth alone; as was distinctly stated by Lord Kenyon, in *Durour & Jones*. And the Statute 25

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Ed. III., if of force in \*this State, which I doubt, gave this privilege only to children whose parents were both native subjects; or at any rate, under the largest construction, to the children of a native father by an alien mother. It further appears that the Statute 7 Ann. ch. 5, is not expressly adopted, and there is no authority to say that it was adopted by implication; and it contains no clause specially extending it to the colonies. The children then of Mrs. Shanks, born abroad, of an alien father, are not entitled to inherit lands from her in Carolina, on any of the grounds heretofore examined.

It was faintly argued, that as the tribunals in England have decided that Americans born before the Revolution, are not made aliens by that event, but continue to be entitled to hold lands in Great Britain, notwithstanding the severance of the two countries, the same doctrine ought to be allowed to prevail in this country. In which case, Mr. Shanks, though born in Great Britain, and never in Carolina, but for a short time, and as a hostile invader, would not be an alien, and the impediment to his children's inheriting from their American mother would be removed. This point was not much relied on by Mr. King, and I do not think it open for discussion. The Supreme Court of the United States has decided, that a British subject, born in Great Britain before the Revolution, cannot since that event take lands by descent in the United States, upon the ground of his being an antenatus, born under a common allegiance before the separation of the two countries. He is alien to this country: see 4 Cra. 321 [2 L. Ed. 634]; *Dawson's lessee v. Godfrey*, and 7 Cra. 603 [3 L. Ed. 453]; *Fairfax's devisee v. Hunter's lessee*. Mr. Shanks, the father of the defendants, is in this predicament; and we have seen that the children of a female denizen, born abroad of an alien father, cannot inherit to their mother here.

The defendant's counsel next rely on the treaties between Great Britain and America for the protection of their rights; and the decision of the Supreme Court of the United States in the construction of those treaties. The preliminary treaty of peace, signed No-

vember 30, 1782, article 5, and the definite treaty of peace, signed September 3, 1783,

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article 5, contain clauses \*in the same words; by which it was stipulated that Congress should recommend to the States to restore the estates which had been confiscated, belonging to real British subjects; and also the estates and rights of persons resident in districts in possession of his majesty's forces, who have not borne arms against the United States. It is sufficient to remark that these clauses do not apply to the case before us, even if they had been positive stipulations to restore confiscated estates; for there was in fact no confiscation of the estate of Mrs. Shanks, and if her children are deprived of their inheritance, it will not be by the operation of any confiscation laws, but of other principles not touched by these treaties.

By the ninth article of the treaty of November 19, 1794, it is stipulated, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominion of his Majesty, shall continue to hold them according to the nature and tenure of their estates and titles, and may grant, sell, or devise them to whom they please, as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as regards the said lands and the legal remedies thereto, be regarded as aliens. This is a precise and obligatory agreement, and it would be satisfactory to find that the defendants could be protected under it.

It was, by its terms, intended to preserve the rights of British subjects in America, and of American citizens in Great Britain. Mrs. Shanks was living at the time of the formation of this treaty. The first inquiry to be made is, was she a British subject? On the Declaration of Independence of 1776, Mrs. Shanks, a native of South Carolina and resident here, was a citizen. Her marriage in 1781, with a British officer, did not change her character. Her children, if born in America, could have inherited her property, though their father was an alien. Her going abroad and residing in a foreign country, did not take away her civil character and rights. She could continue to hold her land. The State of South Carolina claimed the allegiance of its inhabitants, by various acts passed during the Revolution. And the Su-

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preme Court of the United States \*has decided, that a citizen of New Jersey, who joined the enemy and adhered to them, claiming to be a British subject, and receiving compensation from that government for his loyalty and sufferings as a refugee, had a right to take lands by descent in the State of New Jersey. That State had claimed his allegiance as an inhabitant, and his acts could not change it. See 4 Cranch, 209 [2 L. Ed. 598]; *M'Ilvaine v. Coxe's lessee*. Thus the

strongest acts which a man could perform to throw off his American citizenship, could not effect that object. The case of Mrs. Shanks does not appear to me so strong as this. It does not therefore appear to me that she can be considered as a British subject, within the meaning and provisions of the treaty of November, 1794, I am not aware that she could sustain the double character of American citizen and British subject. She could have granted, sold or devised (as far as a feme covert can devise) her lands in Carolina. She did not then stand in need of the protection of that treaty for the exercise of those rights. Now the treaty was intended for the protection and benefit of those who stood in need of its provisions, to wit., British subjects, who otherwise have been deprived of their lands in America. I acknowledge, however, that this is to me new and untrodden ground, and I cannot be sure that my view of the subject is the correct one; but as it appears to me, I am bound to declare it. I should have been glad if the Supreme Court could have felt themselves justified by the principles of law, in taking a different view of the effect of the separation of the two countries on private rights. But I am bound by their decision.

To this it may be added, that if Mrs. Shanks could be considered a British subject, within the provisions of the treaty of 1794, she has neither granted, sold nor devised her lands, as the treaty permits; but died in 1801, leaving them to descend to those on whom the law would cast them. The treaty makes no provision for that case. It does not stipulate that the lands of British subjects may descend to aliens, who, by our municipal laws, are incapable of taking and holding lands by descent. I am constrained, then, to come to the conclusion, that the chil-

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\*dren of Mrs. Shanks, born in Great Britain, and alien to this country, are not entitled to take lands by descent from her, either by law or by the treaty.

It ought to have been noticed earlier, that there are two Acts of Congress which have a bearing on the question we are considering; the one is of the date of January 29, 1795, see 3 vol. of the Laws, p. 163. The third section enacts, *inter alia*, that the children of citizens of the United States, born out of the limits of the jurisdiction of the United States, shall be considered as citizens of the United States. Provided, that the right of citizenship shall not descend to heirs whose fathers have never been resident in the United States. This statute is analogous to that of 25 Ed. 3. This Act continued in force till 1802, when it was repealed by Statute of 14 April, 1802, 6 vol. Laws, p. 79, 81. But a similar clause was then reenacted. Mrs. Shanks died in 1801, and her children, it seems to me, could inherit to her lands in this State under the Statute of 1795, unless

the proviso stands in their way; for the enabling words do not say, that these children shall have both parents citizens. Let us examine the effect of the proviso. Mr. Shanks, the father, never was a resident of the United States, for I cannot consider his presence for a short time, in the character of an enemy, as a resident within the meaning of the statute. But it may be made a question, whether this proviso was meant to be operative on the immediate children, one of whose parents was a citizen, and the other an alien and non-resident, or merely on their remoter descendants. I believe there are no decided cases or constructions to guide the judgment on this question; we must therefore look to the words of the proviso itself. They are very general, and taken literally, they import that the right of citizenship created by the enabling clauses, shall not go or descend to persons whose fathers have never been resident in the United States. The provisions of this statute may be compared to the Statute of Ann, ch. 5, and 4 Geo. 2, Ch. 21, the former gave a new right of citizenship to the children of all natural born subjects; so does the enabling clause in ques-

## \*16

tion. The latter restricts the benefit to the paternal line. The proviso in our statute prevents the enjoyment of the privilege by children of citizens, whose fathers have never been resident in the United States. I apprehend, therefore, that the children of Mrs. Shanks, who was a citizen, cannot inherit to her, under the provision of our statute; because their father never was a resident in the United States. No office has been found in the case we have been considering; but it does not appear to me to be material. The distinction seems to be that aliens may take and hold lands by purchase, which includes devise, against all the world, till office found; but they can take nothing by descent.

We have now finished our examination of this tedious case. Many of the points were of a nature which seldom arise in our Courts, and of course we have not always had the aid of the judgment of other and abler minds, though there are luminous decisions on some of the questions I have been obliged to examine. I am far, therefore, from being assured that I have been correct in all my conclusions; and it would not be a subject of regret, if a higher tribunal should take a different view of the subject. For it seems peculiarly hard that these unfortunate persons should lose their inheritance, because their father was an alien, and they being born abroad, cannot inherit their American mother, on account of his alienage, and because their mother was a citizen, and therefore her children are not protected by the operation of the treaty of 1794, as they might have been if she had been a British subject. Judges, however, do not make, but administer the law.



It is ordered and decreed, that the money arising from the sale of the land in question, heretofore reserved, subject to the order of the Court, be paid over to the petitioners, the only heirs of the late Mrs. Shanks, who are capable of taking the same.

From this decree the respondents appealed, on the grounds:

1. That Mrs. Shanks was a British subject, within the meaning of the treaties of

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1783 and 1794; and \*the respondents, as her heirs, are entitled to the benefits of these treaties.

2. That should the Court be of opinion that Mrs. Shanks was not a British subject within the meaning of the treaty, she was an American citizen, and her children, under the Acts of Congress of 29 January, 1795, and of 14 April, 1802, can inherit lands owned by her in South Carolina.

King, for the appellants, contended that Mrs. Shanks was a British subject and within the protection of the treaties of 1783 and 1794. There can be no doubt that she was born a British subject, nor has she changed that character. On the Declaration of Independence, the natives of America had a right to choose between the two states, the old and the new. The Act of the Legislature of this State, passed on March 16, 1783, regulating confiscated estates, (P. L. 323, 4 Stat. 568) speaks of persons who were formerly citizens; implying that they have lost that character. What is meant by the terms, British subjects, used in the treaty? Can there be any doubt that Mrs. Shanks, who was confessedly born a British subject; who went to England as the wife of a British officer, was to all intents and purposes, a British subject after her removal, entitled to dower, &c. If she is within the provisions of the treaties, her children are entitled to take land from her by inheritance. Cited, 7 Co. Calvin's case; 1 Hales' Pl. Cr. 61; 2 Mass. Rep. 246; Hening & Mun. 613, 14; 2 Cra. 280; 4 Cra. 24; Vaughan's Rep. 283; 8 T. R. 31, 45; 1 Bos. & Pul. 443; 2 Comyn's Rep. (1 Scott, q. t. v. Schwartz;) 2 Mass. Rep. 179; 3 Dall. 133; 4 Wheat. 453; 2 Dall. 225; 3 T. R. 726; 8 T. R. 584; Vattel, chap. 17, 4 Johns. 74-5.

Legare, contra, denied that Mrs. Shanks was a British subject. She was born here; she was here at the Declaration of Independence, and so till she went away in 1782. At what period or by what act, did she lose her character as an American citizen? It seems, however, not to be denied that she is an American citizen, but contended that she is also a British subject; but there seems to

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be some inconsistency in this notion of \*a double allegiance. It is said that she had a right to choose her allegiance; if she had, was not her election made by remaining here several years after the Declaration of Inde-

pendence? The treaty of 1783 did not give American Independence, but recognized it; and what British statutes or British Courts may have declared, cannot alter our doctrines on the subject. Was she a subject, owing allegiance to Great Britain, when residing in this her native country, then at war with Great Britain? Lord Coke says, if the realms of Great Britain, (England and Scotland) should be separated, the subjects would be *utriusque ligeantiae*; but this cannot apply to a violent separation—a state of war. If her character of American citizen was determined after the Declaration of Independence, her subsequently marrying a British subject cannot divest her of it. 1 Wilson's Lectures; 7 Cranch, 609, 10; 2 Tucker's Blac. Ap. note c. p. 54. Pub. Laws, 306; 2 Cranch, 294, 5; 3 Dall. 238, 243; 1 Dall. 402; 2 Cra. 280; 4 Cra. 214; 3 T. R. 726.

BY THE COURT.—This case is of great importance, and involves principles of great delicacy and difficulty. These have been very fully examined in the decree of the Circuit Court. On a careful consideration of that decree, we are fully satisfied therewith. It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed.

DE SAUSSURE, WATIES, THOMPSON  
and JAMES, CC., concurring.

GAILLARD, Ch., dissenting.—It was admitted by the counsel for the petitioners, on the argument of this case, that if Mrs. Shanks was a British subject, her children are entitled to take; which renders unnecessary any other enquiry than whether she was a British subject. In making it, the law of England must govern, and it is immaterial whether Mrs. Shanks could or could not take by descent under the laws of this State; for in neither case, would her rights as a British subject be affected.

The Supreme Court of the United States, in *M'Ilvaine v. Coxe's lessee*, 4 Cranch, decided that a citizen who joined the enemy and adhered to them, claiming to be a British

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\*subject, and receiving compensation from that government, had a right to take lands by descent in New Jersey; upon the principle that the several States which composed the Union, so far, at least, as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and that they did not derive them from concessions made by the British king. South Carolina, as regarded her municipal regulations, was a sovereign State prior to the Declaration of Independence in 1776; for she had before that time thrown off her allegiance to Great Britain, and governed herself by her own authority and laws; and every nation that governs itself, under

whatever form, without any dependence on foreign power, is a sovereign State. Vettel, b. 1, ch. 1, s. 4. The claim in *M'Ilvaine v. Cox*e's lessee, was decided under the laws of New Jersey. The Shankses set up no claim under the laws of South Carolina, but under the treaties of 1783 and 1794, between the United States and Great Britain; and admitting that Mrs. Shanks could take by descent under the laws of the State, this right could not impair her rights as a British subject; treaties being the supreme law of the land. Mrs. Shanks married a British officer, a subject of Great Britain, in 1781, and went with him to Wales, where she resided until her death in 1801. Her father, from whom she claimed, died in 1782, and in *Ogden v. Folliott*, in error, 3 Term Reports, 726, the Court considered as a nullity, the acts of confiscation passed in the several States of North America, after the Declaration of Independence, and before the treaty of peace; recognizing the independence of the United States only from the definite treaty of peace. I have no doubt that, according to the law of England, Mrs. Shanks was born a British subject; that she was a British subject when she married Mr. Shanks in 1781, and that she continued so until her death. I am therefore of opinion that the decree of the Circuit Court should be reversed.

This case was taken by writ of error to the Supreme Court of the United States, and there the decree was reversed. See [*Shanks v. Dupont*] 3 Pet. 242 [7 L. Ed. 666]; [*Sasportas v. De la Motta*], 10 Rich. Eq. 45.

### Harp. Eq. \*20

\*Ex parte, the Creditors of JAMES STANYARNE.

(Charleston. March Term, 1824.)

[*Judicial Sales* ⇨7.]

On a rule against the master, it was held incompetent to go into proofs of the irregularity or unfairness of a sale of lands made by him; either for the purpose of invalidating the title of the purchaser, or making the master accountable for the value.<sup>1</sup>

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 20; Dec. Dig. ⇨7.]

On a rule against the master, W. H. Gibbes, to show cause why he did not proceed to sell two certain tracts of land, belonging to J. Stanyarne; the master made a return on oath, and showed for cause, that he had duly sold the said two tracts of land to Mazyck, and executed titles for the same, on the 6 February, 1823: that they composed a part of the plantation called in the said titles, Laurel Hill; which contained three hundred and forty-nine acres; having under that name comprehended the said quantity of land while owned by Mr. Stanyarne, and

which was declared at the sale. The master further stated that the report of the sales made by him of the lands of Stanyarne had been duly confirmed by the Court. Mr. Hunt, in support of the rule, admitted that the two tracts of land before referred to, had been conveyed by the master to Mr. Mazyck; but he insisted that there was no regular and valid sale of them, and that the master should still proceed to sell them or be made to account for the value to the creditors of Stanyarne. He offered to go into proof of the irregularity of the sale; and the master stated that he was prepared to show the fairness of it, by opposite proof.

WATIES, Ch. I think it would be highly improper to permit, under the present proceeding, such an investigation. It would implicate the title of the purchaser of the lands, who is no party to the rule, and would lead to no result on which the Court could make any definitive order. It would be to no purpose to show any irregularity in the sale, for the Court could not set it aside in a summary way; nor would the Court make the master liable to the creditors of Stanyarne for the value of the two tracts said to be improperly conveyed to Mr. Mazyck; for this would be assuming the power of assessing damages, which properly belongs to a jury. If the creditors have been injured by the conveyance, they must seek their redress against the master and Mr. Mazyck; either

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by a bill in this Court to set it aside, or by an action at law for damages. They have no right, under this rule, to any other enquiry than whether the two tracts of land said to be unsold, have been actually conveyed by the master to Mr. Mazyck; and this fact has been admitted. The rule therefore must be discharged.

On appeal, decree confirmed by the whole Court.

### Harp. Eq. 21

VALENTINE RUGER and HANNAH DIZELL v. HUGH M'BURNEY.

(Charleston. March Term, 1824.)

[*Execution* ⇨301.]

Complainant having a life estate in a negro man, who was about to be sold at sheriff's sale, requested defendant to bid him off for her; which he did. Complainant and her husband agreed in writing to "warrant and defend" the negro to the defendant, till they should refund to him the money paid; which they promised to do on or before the first sale day of September, ensuing; and that otherwise, defendant might retain him or sell him at their risk. Bill claimed that the negro should be delivered up or sold. There being no proof of the money paid by defendant having been refunded or tendered, bill dismissed.<sup>1</sup>

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 884; Dec. Dig. ⇨301.]

<sup>1</sup> Key v. Griffin, 1 Rich. Eq. 67; infra, 50, 256.

<sup>1</sup> See post, 153.



Bill states that the late Benjamin Dizell, by a post nuptial settlement, conveyed certain negroes, and among others, the negro slave Morris, hereinafter mentioned, to the late Arthur Hughes, in trust for his wife, the complainant Hannah. The complainant, Valentine Ruger, has since been substituted in place of the said Arthur Hughes, deceased. That the said Benjamin Dizell was indebted at the time of the settlement, but was possessed of property more than sufficient to pay all his debts. That after his death, the negro slave Morris, was taken in execution to satisfy a debt to one Isham Hutson, and the complainants do not question or dispute the right of the execution creditor to be satisfied. But complainant, Hannah Dizell, applied to Dr. Hugh M'Burney to buy in the said negro slave for her, which he consented to do, and promised to convey the negro to said complainant, if the money which he might advance should be repaid within a given time. That the said Hugh M'Burney informed the by-standers at the sale, that he was bidding for the complainant, and dissuaded them from bidding, by which means competition was repressed,

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and the \*negro was set down to him at the price of one hundred and thirty dollars or thereabouts, whereas the real value was six hundred dollars.

That complainant Hannah, by the intervention of her friends, raised the money, and within the time agreed on, offered to repay to the said Hugh M'Burney the money advanced for the said negro; but he refused to return the negro, without an allowance for the trouble and expense which he had been at, in addition to the interest of the money and the use and labor of the slave since the sale. That complainants have since tendered him the full amount of principal and interest, which he has refused to accept, and claims to hold the negro as his own. Bill prays that the said H. M'Burney may be declared to hold the said slave as a security only for the money actually paid, and that the negro may either be reconveyed to Valentine Ruger, in trust for complainant Hannah, or re-sold for the benefit of said complainant and the creditors of Benjamin J. Dizell, and for general relief.

The answer states that complainant Hannah came to defendant, with her husband Benjamin Dizell, some time before July, 1821, and solicited him to buy the negro Morris, and they promised that they would refund the amount which he might pay, on or before sale day in September following, and that in case of their failing to do so, defendant might retain the negro, or sell him at their risk. That defendant agreed to these proposals, and bought the negro at the sheriff's sales, in July, 1821, for one hundred and forty-five dollars, which he paid to the sher-

iff, and two dollars for the bill of sale. Denies that he prevented any persons from bidding, but acted openly and without disguise. Denies that the price was inadequate. The complainants' mistake arises from misapprehension of the interest sold, which was only the use of the negro during the lifetime of the complainant Hannah, as by the bill of sale will appear. But in fact the negro was not worth more than four hundred dollars at an absolute sale, being of base character and diseased in the glands of the throat; that he has often been sick in defendant's possession, and occasioned considerable expense for medical attendance.

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\*Defendant denies positively that complainant, or any one for her, offered to refund the defendant the money he had paid for the negro, within the appointed time. Defendant carried the negro again and again to Jacksonborough, seventeen miles from his house, to meet Dizell and receive his money, but was always put off by excuses, or an offer of a note and mortgage instead of the money. Such conduct was a violation of the agreement which destroyed its obligation. He admits that after the death of Dizell, John L. Hunter called on him on the part of complainant but denies that he tendered any money or made any arrangement to pay. He denies that the services of the negro were an equivalent for the use of the money, as he was sickly and disorderly, the more so, considering the uncertainty of defendant's title. He avers that he sold a note for two hundred dollars, with a year's interest due, to raise the money to pay the person who lent him the money to pay for the negro, which was a loss occasioned by the failure of Dizell, and contends that he has a special lien or equitable mortgage to the full extent thereof. But defendant submits, that as the complainant has failed to comply with her agreement, this Court will not interfere, but leave the complainants to their remedy at law.

The complainants examined witnesses. General Oswald was present at the sale, and heard the conversation between the parties, was proceeding to speak of the agreement, but on its appearing that the agreement had been reduced to writing, evidence of its contents were rejected, and the paper was introduced in the following terms:

"We, whose names are underwritten, do hereby state, that we requested Dr. M'Burney to purchase at sheriff's sale, a negro fellow of ours, named Morris, and we warrant and defend the said fellow Morris to said Dr. M'Burney, until we refund to him one hundred and forty-seven dollars, being that which he the said Dr. Hugh M'Burney paid to the sheriff on our account, which we promise to pay on or before the first sale day in September next, otherwise the said Dr. Hugh

M'Burney shall retain him, or to be sold at our risk." Signed, Benjamin J. Dizell, Hannah Dizell.

Witness, James Smith.

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\*John F. Myers, was present at a conversation between Hunter and M'Burney. Hunter said he had one hundred dollars to pay M'Burney for Mrs. Dizell. M'Burney said the time for payment past, as by the terms of the agreement, and he had lost considerably by the sickness of the negro and his being unruly. The money was not produced by Hunter—believes it was one hundred dollars. Hunter said he would rather pay the whole amount than M'Burney should keep the negro.

Defendant was about to call witnesses to prove the negro's sickness and the expense incurred by physician's bills, (defendant being ill at the time, and unable to attend himself,) when the judge stopped him, saying the plaintiff had made out no case, and therefore ordered the bill to be dismissed.

From this order the complainants appealed, and moved that the same might be reversed and a decree made for the complainant, or the cause sent back for a re-hearing, for the following among other reasons:

1. Because the defendant had, at most, no more than a pledge or mortgage of the negro, and complainant had a right to redeem, and should have been allowed so to do, or the negro should have been decreed to be sold, and the defendant ordered to account for his hire.

2. Because it is unjust and fraudulent, as to the creditors of Benjamin Dizell, for whose benefit this bill is filed, for the defendant to hold the negro absolutely.

THOMPSON, Ch. Isham Hutson, having an execution against the complainant Hannah Dizell, it was levied on the negro Morris, who is the subject of the present litigation, in whom the complainant had a life estate.

On the day of sale, complainant applied to defendant to purchase in the negro for her, and that she would redeem him by a specified time. The defendant did purchase the negro at the price of one hundred and forty-five dollars, and repeatedly tendered him to complainant and demanded a compliance with a written agreement between the parties, that the money should be refunded by the first sale day in September following. It is contended that this transaction must be considered as a mortgage. I admit that it

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must \*be viewed as a redeemable pledge, but surely it never can be considered that the mortgagor is entitled to redeem, unless upon payment of principal, interest and costs. No money has been tendered by the complainant, and until the amount of the purchase

money with interest and costs is tendered, the complainant is premature in bringing her action.

It is ordered and decreed, that the bill be dismissed, with costs.

On appeal, decree affirmed by the whole Court.

### Harp. Eq. 25

EDWARD WINSLOW and Wife and Others  
v. THOMAS P. CHIFFELLE and  
Others.

(Charleston. March Term, 1824.)

[Evidence ⇨215.]

J. A. conveyed to T. C. the undivided moiety of half of a lot of land, which he had held in common with complainants, and of which partition had been made. In 1817, complainants conveyed to J. A. and T. C. the other half of the lot, and took in payment two notes. J. A. and T. C. afterwards erected a steam mill on the part of the lot of which the moiety had been first conveyed by J. A. using the other part as appendant thereto. The business of sawing lumber was carried on jointly; bills for lumber were made out in the name of "A. & C." and they sued and were sued as "A. & C." In 1820, A. & C. became insolvent, and the bill was filed by complainants, to obtain payment of the notes mentioned, out of the mill and lot, as partnership property, in preference to the separate creditors of J. A. & T. C.

A certificate of J. A. and T. C. dated 1822, declaring that they had held the mill and lot as partnership property, was offered in evidence and held to be admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754-759; Dec. Dig. ⇨215.]

[Partnership ⇨55, 68.]

It was held that the circumstances were sufficient to establish that the mill and lot were partnership property, and that complainants were entitled to payment, in preference to separate creditors of the partners; subject, however, as to the moiety of A. to the claims of creditors who had obtained judgments against him before his conveyance to C, who were bound nevertheless, first to exhaust A's private estate.<sup>1</sup>

[Ed. Note.—Cited in Boyce v. Coster's Ex'rs, 4 Strob. Eq. 30.]

For other cases, see Partnership, Cent. Dig. §§ 78, 101, 104; Dec. Dig. ⇨55, 68.]

On the 17th of April, 1817, James Ancrum conveyed to Thomas P. Chiffelle, the undivided moiety of half a lot of land in Charleston, which he had held in common with the complainant, Mrs. Winslow, and of which

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partition had \*been made. On the 24th of April, 1817, the complainants, Winslow and wife, conveyed to James H. Ancrum and Thomas P. Chiffelle, the other half of the said lot; and for the purchase money took two notes, one of Ancrum endorsed by Chiffelle, the other of Chiffelle endorsed by Ancrum. After this purchase Ancrum & Chiffelle erected a steam mill on that part of the lot of which Ancrum had conveyed a moiety to Chiffelle, the other half being used as ap-

<sup>1</sup> Boyce v. Coster, 4 Strob. Eq. 30.



pendant thereto; and carried on the business of sawing lumber. In 1820, both Ancrum and Chiffelle became insolvent, and Ancrum assigned all his property for the benefit of his creditors. This bill was filed by Winslow and wife against Chiffelle, the assignees of Ancrum, and certain private judgment creditors of Chiffelle, to establish their notes above mentioned as a partnership debt, and to obtain payment from the mill and lot as partnership property, in preference to the private creditors of Ancrum or Chiffelle.

On the trial, in addition to the facts stated, the proof was, that while the business of sawing was carried on, bills for lumber were made out in the name of "Ancrum & Chiffelle," that they sued and were sued as "Ancrum & Chiffelle." A certificate, signed by James H. Ancrum and Thomas P. Chiffelle, dated April 30, 1822, declaring that the whole lot and mill were held by them as partnership property, was offered in evidence, but objected to and overruled by the Court.

Gaillard, Ch.—The defendants have failed in establishing the copartnership between Ancrum & Chiffelle. Bills, of lumber were sawed and sold by them in the name of Ancrum & Chiffelle, and they sued and were sued as Ancrum & Chiffelle, but whether they were to share equally, or in what proportions, the profits of the mill establishment, or what were the terms of the copartnership, if any existed, does not appear. But supposing the existence of a copartnership, there is nothing to show that the lands were copartnership property. The titles produced show on the contrary that they were private property. They must therefore be so considered. The injunction is dissolved and the bill dismissed with costs.

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\*From this decree complainants appealed, on the ground that the evidence did establish a copartnership in the business of sawing lumber; and that all property necessary thereto was a copartnership fund, and liable in the first instance to complainants.

Toomer, for appellants.—The questions are, whether there was sufficient proof of a partnership, and whether the lot and mill were partnership property. As to the first point there can be no doubt, they carried on the business of the mill jointly, their books were kept in the name of "Ancrum & Chiffelle," they sued and were sued as such a firm. The circumstances are amply sufficient to establish a partnership. 5 Ves. 308.

Lands may be the subject of copartnership. Wats. on Part. 72, 73. This is not to make all lands held by joint owners partnership property. The distinction is between agriculture and commerce; collieries, breweries, &c., are subjects of partnership. 1 Ves. 130. Partnerships frequently relate to real estate. Wats. 73. 1 Pr. Wms. 138; 3 Ves. 696; 2 Eq. Rep. 471. (Richardson v. Wyatt.)

Lance, for one of the creditors of Chiffelle.—The title to lot is a legal one and bound by the prior judgments. The legal character of the property must prevail, unless there is clear proof to bring it within the equity principle. The conveyance to Ancrum & Chiffelle, affords no evidence of its being partnership property, and their dealings with other people could not change the nature of their title. If Ancrum had died, would the property have vested in Chiffelle? It seems formerly to have been held that lands purchased for the use of the partnership should be distributed as personalty; but it is now clear that partnership agreements, to alter the nature of the property, must be express. In all the cases quoted, the inquiry is, whether the purchase was made with partnership funds, that was the case of Richardson and Wyatt.

Gadsden, for a creditor of Chiffelle.—At law, there can be partnership of land; and in this Court, land cannot be considered partnership stock, with a clear and express agreement. The power of every partner to dispose of the common stock is the leading char-

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acteristic of partnerships; 4 Mass. Rep. \*424, (Chancellor De Saussure.—The general proposition is not disputed. The argument is, that where land is purchased for partnership purposes, the character of partnership property attaches to it. Gadsden. There is no such rule at law, 15 Johns. 159, 161.) The creditors then have a legal lien on property not the subject of partnership. The partnership creditors have no more lien on partnership property than the private creditors on separate property; but in favor of partners, the Court will prevent the property of one from going to pay the debts of the other. There was in fact, no evidence of the lands being held as partnership property. To convert the mill and lot into stock, it should have been shown, either that there was an express agreement so to hold it, or that it was necessary for the partnership business. There is no proof of agreement, and nothing but the use of the mill was necessary for the business. There is no more necessity for considering the land as stock, than for holding ship owners to be partners. 4 Johns. 522.

Petigru, for the assignees of Ancrum.—Admit that there was a copartnership of the land, the lumber and all the transactions, still the complainants cannot establish their claims. The creditors of the individual partners have liens, which the Court is asked to destroy, in favor of the copartnership creditors who have no liens. There is but one case in the books in which such an attempt has been made, and that failed. The equity which secures partnership property for partnership creditors, is the equity of the partners and not of the creditors; the creditors have no equity whatever. The creditors of the copartnership having no lien, obtain a

preference over the separate judgment creditors, only on account of the equitable right of the copartner to have an account and a balance struck. The creditors can file no such bill; it is only the partner or his representatives. The copartnership creditor, who has no equity, will not be allowed to interfere with the legal lien; the separate creditor who has a lien has an equity too which cannot be shaken.

A judgment to a large amount, that of Wightman, was obtained against Ancrum before he conveyed to Chiffelle, and before any pretence of a partnership. This bound all his

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\*property, part of which was the half of the lot on which the mill establishment was built. Another judgment was obtained a few days before the complainants conveyed to Ancrum and Chiffelle. There were judgments, too, against Chiffelle before the copartnership or any of its transactions. Cited 4 Johns. 526, (Nichol v. Munford,) 3 Bos. and Pul. 6 Ves. 119; 11 Ves. 3; 2 Johns. Ch. Ca. 540; (Moodie v. Payne.) The last stated to be the only case of a bill like this.

Pringleau, in reply.—The principal creditor in this case is Winslow; who sold the land out of which he seeks to obtain payment for which he took the notes. A creditor who takes no security on the sale of lands has a lien. 2 Ves. & Beames, 306; 1 Mad. 346. To show cases in which land has been regarded as personal property, cited Wyatt v. Richardson; 5 Ves. 193; 7 Ves. 453; 3 Br. Ch. Ca. 199; 1 Atk. 59; Wat. part. 54; 1 Ves. 491; 2 Ves. & Beame, 242; 4 Johns. 526. There can be no doubt in fact, that the land was purchased for partnership purposes. There was indeed an express declaration of trust for the copartnership. The certificate of Ancrum & Chiffelle gave a true statement of the transaction. The judgment of Wightman was in 1816; and Chiffelle coming in under an adverse title, is protected against him by the Statute of Limitations. Further cited, 4 Br. Ch. Ca. 199; Amb. 409; Wats. 65; 3 Ves. 696.

The opinion of the Court was delivered by

WATIES, Ch.—The bill in this case was brought to establish a copartnership in certain lands, held by J. H. Ancrum and T. P. Chiffelle, on which they erected a mill for the sawing of lumber. It was proved that the mill was always called "Ancrum & Chiffelle's;" that bills of lumber were sawed and sold by them in the name of Ancrum & Chiffelle; that they sued and were sued, and their accounts were kept in that name. The question made in the case is, whether the lands so used in the business of the mill were copartnership property or not.

There can be no doubt that land may be the subject of a partnership concern. This has been repeatedly decided. In Lake v. Craddock, 3 P. W. 158, several persons purchased

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a tract of land, with intent to drain it, and the purchase was made by them as joint tenants in fee; but as they had contributed rateably to the purchase, they were held to be tenants in common, by reason of the partnership. The Master of the Rolls declared "that an undertaking upon the hazard of profit or loss, was in the nature of merchandizing."

So in the case of Foster v. Hale, 3 Ves. 696, and 5 Ves. 508, in which there was a lease to three persons of a colliery. The Court held that as the partnership was established, the premises necessary for the purposes of that partnership, were, by operation of law, held for those purposes. In Thornton v. Dixon, 3 Cro. C. R. 199; Lord Thurlow said, he had always understood where partners bought land for the purpose of a partnership concern, it was to be considered as part of the partnership fund, and he was at first disposed to think that this would make it distributable as personal estate; he determined however, afterwards, that it should result to the heir at law, as the agreement of the partners was not sufficiently expressed to change its legal nature. But whether land assumes the character of real or personal estate in becoming partnership property, is immaterial, as it affects the right of the joint creditors of a partnership; for if land under either character becomes partnership property, it must, upon principle, be necessarily liable to partnership debts. The rule on this subject has been fully settled. Where there are different classes of creditors, with respect to the joint and separate estate of copartners, each estate shall be applied exclusively in the first instance to the payment of its own creditors, and neither the joint creditors shall come upon the separate estate,<sup>2</sup> nor the separate upon the joint, but only upon the surplus of each that shall remain, after each has fully satisfied its own creditors.

It is only necessary then, in the present case, to enquire whether the lands used for the purposes of the mill became a partnership fund; and this fact appears to be fully established. It is admitted by the answer of Mr. Chiffelle, the surviving partner, and both the partners have declared it by a written instrument, executed after they had both be-

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come insolvent, which \*removes all objection to it on the ground of interest. But this evidence would otherwise be properly admissible. In Foster v. Hale, before cited, it was held that under a lease for a term of years to one partner in his own name, a trust would be raised by implication in favor of

<sup>2</sup> Contra, Wardlaw v. Gray, Dud. Eq. 113; Gadsden v. Carson, 9 Rich. Eq. 252 [70 Am. Dec. 207]; Wilson v. McConnell, Ib. 500; Fleming v. Billings, Ib. 149; Gowan v. Tunno, Rich. Eq. Cas. 377.



copartners, from letters and a paper referred to by them, in the handwriting of the partner, though not signed or dated; and the partner in whose name the lease was taken, was decreed to hold the premises for himself and his copartners in equal shares. In that case, too, great stress was laid on the circumstance that the land was necessary for carrying on the colliery, and the lease was held to be an incident to the partnership for that reason. So in the present case, the lands must be regarded as partnership property, although not so declared in the conveyances. But the partners have declared that they were brought into the partnership fund for the erection and use of the mill, and it is evident that they were necessary for those purposes; the notes also which have been given to the complainant, Winslow, manifest very strongly the joint interest of the partners in the transaction. The creditors then of the partnership have a right to be paid out of this fund, in preference to the separate creditors of the partners; but they cannot exclude the prior liens of the separate creditors of the copartner, Ancrum, who had obtained judgments against him before he conveyed his share of the land to the use of the partnership. It is just, however, that these creditors should first resort to his separate estate, before they are allowed to come on the partnership fund.

It is, therefore, ordered and adjudged, that the decree of the Circuit Court be reversed, and that the proceeds of the sale of the mill establishment of Ancrum & Chiffelle, be paid to the complainants in rateable proportions to their demands, as creditors of the partnership of A. & C., subject, however, as to the moiety of Ancrum, to the legal liens which his separate creditors may have obtained thereon, before his conveyance of the same to the use of the said partnership; provided, that the said creditors shall have first exhausted the separate estate of the said Ancrum, which may be liable to their demands.

DE SAUSSURE and JAMES, CC., concurred.

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\*GAILLARD, Ch., dissenting.—There is no doubt that Mr. Ancrum and Mr. Chiffelle made purchases of lumber, and that after it was sawed, it was sold on their joint account. They sued and were sued as "Ancrum & Chiffelle," in 1819 and 1820, and as the mill was erected soon after the execution of the deed in 1816, from Ancrum to Chiffelle, of half a lot he (Ancrum) owned, it is probable that some understanding between them existed at that time respecting the business of sawing and selling lumber in which they were to be concerned; and if the certificate signed by Ancrum & Chiffelle, dated April 22, 1822, containing a declaration that they held as partners the land, as well that part of which was sold by Ancrum to Chiffelle in De-

cember, 1816, as the adjoining lot conveyed to them by Winslow and wife in April, 1817, be admitted as evidence, it is still more probable; for the land conveyed by Winslow and wife was occupied with the land in the deed of 1815, as part of the mill establishment, the two lots being under one fence and used for one purpose. But I do not consider this certificate as evidence, as it is brought to contradict the deeds; on the face of which the land conveyed appeared to be private and not partnership property, and to divest the private creditors of Mr. Ancrum and Mr. Chiffelle of their legal liens on their separate estates, acquired between December, 1816, the date of the first deed, and the date of the certificate.

There were unsatisfied judgments against Mr. Ancrum, prior to his deed of 1816, and another judgment was obtained against him, between the date of this deed and that of 1817, from Winslow and wife; and soon after the date of the latter deed, other judgments were entered up against him, to considerable amount. It is not shown how the private affairs of Mr. Chiffelle stood at these respective periods; but it is admitted that Mr. Chiffelle is insolvent and that the estate of Mr. Ancrum is so also. The contest in this case is entirely between the mill creditors of Ancrum & Chiffelle and their private creditors, and it is important to fix the time from the partnership in the sawing business com-

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menced. Ancrum's deed to \*Chiffelle, in December, 1816, affords no evidence of the existence of a partnership between them of any kind at that time; the mill was erected afterwards, and Ancrum & Chiffelle in 1819 and 1820, sued and were sued as Ancrum & Chiffelle. The public had no means of knowing at the date of the deed of December, 1816, that Mr. Ancrum and Mr. Chiffelle had entered into a partnership, and the deed itself, which is merely a conveyance of half of a lot of land by Ancrum to Chiffelle in fee simple, furnishes a contrary inference. In Foster and Hale, in 3 Ves. jun., which is much relied on, a lease obtained by one partner in his own name, of land necessary to carry on a colliery, was declared to go as an incident; but the partnership was first established, and there appeared reason to believe that the money for the land was paid from the partnership funds. The letters of Burdon, the partner who took the lease in his own name, were admitted as evidence, as they might be in a question entirely between copartners. Many undertakings are carried on by partners in which the use of land is necessary, and where a purchase of land is made by one partner and a title taken for it in his individual name, but it is paid for out of the partnership funds, a trust is raised by implication, in favor of the copartners. The half of the lot conveyed by Ancrum to Chiffelle in 1816, on which the mill is built, was

not bought with partnership funds; the other lot is not yet paid for, nor is there anything to show that it was to be paid for out of the partnership funds. Upon the face of the deeds, the land is the private property of Mr. Ancrum and Mr. Chiffelle, and it is too much to say that the mere use of it for the partnership in sawing, is sufficient to convert them into partnership property against the private creditors of Ancrum & Chiffelle; more especially as the land might well continue private property and the business of sawing go on notwithstanding. If it were intended that the lot which Mr. Ancrum owned in December, 1816, and on which the mill was to be erected, should be partnership property, is it not reasonable to suppose that some declaration in writing to that effect would have been made by him instead of conveying as he did then, the half of it to Mr.

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\*Chiffelle? I doubt much whether they intended to hold these lands as partnership property; but whether they did or not, as the land on the face of the deeds is private property, I am of opinion it cannot be declared otherwise without infringing on the Statute of Frauds.

This case again heard on Commissioner's report, 1 McC. 100.

#### Harp. Eq. 34

JOHN L. NORTH and Wife, v. T. DRAYTON, Administrator of Glen Drayton.

(Charleston. March Term, 1824.)

#### [Lost Instruments ⇨23.]

A mortgage of negroes was proved, executed by defendant's intestate in 1790, reciting that it was given to secure the payment of a bond for £715. 18s. 9d. The intestate was afterwards appointed the executor of the obligee; and in 1810, the defendant, in a bill filed in this Court for an injunction, swore that he believed the bond to be lost. *Held*, that the existence and loss of the bond were sufficiently proved.<sup>1</sup>

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51–57; Dec. Dig. ⇨23.]

#### [Bonds ⇨130.]

The obligor being the executor of the obligee, and the defendant his administrator, raised a trust in defendant in favor of those entitled to the proceeds of the bond, under the will of the obligee; and this, as well as the defendant's recognition of the debt by his bill of 1810, with the circumstance that complainants had long been endeavoring to procure evidence to establish their claim, rebutted the presumption of payment arising from lapse of time.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 226; Dec. Dig. ⇨130.]

#### [Chattel Mortgages ⇨164.]

If the proceeds of the sale of the mortgaged negroes should not be sufficient to satisfy complainant's claim, defendant was ordered to ac-

count for their hire, from the time they had been in his possession.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 294; Dec. Dig. ⇨164.]

It appeared in this case, that in January 1783, Glen Drayton, with defendant as his surety, executed a bond to Mrs. E. Elliott, the mother-in-law of Glen Drayton; principal, six thousand seven hundred pounds currency, payable on January 28, 1784. On January 9, 1790, Glen Drayton, as complainants alleged, executed a second bond to Mrs. E. Elliott, condition, seven hundred and fifteen pounds eight shillings and nine pence, payable ; but no bond was produced.

Complainants relied on an original mortgage which they produced, dated January 11, 1790, and recorded January 14, 1790, in the Secretary of State's office, reciting such a bond as that above described. Complainants

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also relied on \*the inventory of G. Drayton's estate, made by the administrator in 1797, in which he notes some of the negroes in this mortgage, "as under mortgage." Likewise on a bill for an injunction, filed April 9, 1810, by the present defendant, against the late Judge Drayton, as assignee in trust of Mrs. E. Elliott, to stay the collection of the judgment on the bond of 1783. In this bill, the present defendant swore that he believed the bond of 1790 to be for the same cause and consideration as the bond of 1783. He also stated that the bond had never been in the possession of Judge Drayton, the trustee of Mrs. Elliott, nor did he know anything of it. That it must therefore be lost or mislaid.

In 1792, (November 30,) Mrs. E. Elliott made her will; appointed Glen Drayton, and Mrs. G. Drayton her executors, and divided and bequeathed to Judge Drayton, (after sundry dispositions of her property,) all the residue of her estate, real and personal, in trust for the children of Glen Drayton; of whom the complainant, Mrs. North, was the sole surviving child and representative. On May 29, 1783, Mrs. G. Drayton qualified. Neither the bond of 1783, nor the bond and mortgage of 1790 was mentioned either in the will of Mrs. E. Elliott, nor in the appraisement of her estate. John Drayton accepted the trust, and acted under it till a final settlement with complainants, in 18—. In 1794, April 19, G. Drayton executed to Judge Drayton, an assignment of a legacy to him from Governor Glen, in trust as a security for defendant, against the bond of 1783. In June, 1796, Glen Drayton died; defendant administered in January, 1797.

He rendered an inventory of the estate, but no accounts. G. Drayton died utterly insolvent, as appeared from a list of sixty judgments against him. It appeared that defendant had become his surety for a very large amount, from 1779, to 1788; and that Glen Drayton was indebted to his father's estate,

<sup>1</sup> As to proof of loss see *Wardlaw v. Gray*, Dud. Eq. 111; 2 Hill, 373, as to jurisdiction in case of loss.



(of which defendant was surviving executor,) in the sum of £984. at the time of his death.

In December, 1806, complainants were married. Mrs. North was of age at that

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time. Mr. North removed to Pen\*dleton in 1808. He applied to different persons for information, soon after his marriage, as to the estate of Glen Drayton, and continued his enquiries from time to time.

The mortgage was drawn by the late Judge Drayton; the schedule to the marriage settlement of the complainants, was also in his handwriting; he signed it as a trustee. The mortgage and bond were not noticed in it. In 1818, complainants filed a bill against said Judge Drayton, for an account and settlement of Mrs. Elliott's, estate.

Complainant proved by his acts and declarations, that he had never abandoned his claims on defendant. Defendant objected to this testimony, but it was allowed.

In the progress of the cause an objection was made for want of parties; the complainant, Mrs. North, being a cestui que use either her trustee or the executor or an administrator de bonis non of Mrs. Elliott, should have been a party. This objection was overruled.

Waties, Ch.—The bill in this case was brought for three distinct claims; but two of these being unsupported by any evidence, the counsel for the complainants insist only on the remaining one. This is founded on a mortgage of twenty-two negroes, executed by the defendant's intestate, Glen Drayton, to Mrs. Elizabeth Elliott, dated January 11, 1790, and recorded on the 14th of the same month. It was given (as it states) to secure the payment of a bond of Glen Drayton to Mrs. Elliott for the sum of £715, 18s. 9d. and also to indemnify her for his share of the debts of her late husband Samuel Elliott. It appears that Glen Drayton had acquired some of these negroes by his marriage with the daughter of Mrs. Elliott, and the rest by a purchase from her, as the executrix of Samuel Elliott. The bond referred to in the mortgage has not been produced, but in a bill filed by the defendant in 1810, praying an injunction against a judgment obtained on a former bond, given by Glen Drayton in 1773 to Mrs. Elliott, to which the defendant was security, he stated that this second bond had been lost; and in that bill he also alleged as the ground for relief, that this second bond and the mortgage had been given

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as <sup>a</sup> substitution for the first, but after an argument before Chancellor Rutledge the injunction was refused.

It is again insisted for the defendants, that this second bond was a substitution only and some memoranda of Glen Drayton have been offered, to show that this was his view of it; but these are very obscure and inconclusive, and are besides not admissible as

evidence, because they are the declarations of the obligor in avoidance of his deed. There are, however, some circumstances which seem to favor such a presumption. Mrs. Elliott's property was small, and so was that of the estate of her husband, Samuel Elliott, from which Glen Drayton received only twelve negroes as the share of his wife, and these were encumbered with the debts of the estate. It is not easy, therefore, to conceive how he could become a debtor to either for such large sums as his two bonds amounted to. But Mrs. Elliott may have had moneys at interest, which she loaned to him, or he may have used the funds of the estate; and there is one fact which goes very far to destroy the presumption that the second bond was a substitution for the first; which is, that Glen Drayton assigned, four years afterwards, a considerable legacy left him by his uncle, Governor Glen, to indemnify the defendant against the first bond. This makes it very improbable that he should have before given the second bond with the mortgage, for the same purpose, and shows, by almost a necessary implication, that these must have been given for a distinct consideration. What this could have been is certainly a matter of doubt, and if the claim rested on the extrinsic evidence of a good consideration, there might be some difficulty in establishing it. But the complainants have a legal ground in their favor, on which they have a right to insist; and I am more disposed to give them this ground, because all the equity now relied on for the defendant, was alleged in his former bill for an injunction against the first bond, and was not deemed of sufficient weight to entitle him to relief; the fair inference from which is, that this mortgage was not then considered as a substitution, but as the evidence of an independent debt. And this is the legal presumption. The mortgage appears to be unsatis-

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fied, and it recites <sup>that</sup> a bond was given by Glen Drayton to Mrs. Elliott, for the payment £715, 18s. 9d. which it was intended to secure, as well as to indemnify her against the share of the debts of her husband's estate. This recital is evidence that he owed her that sum of money, and the law presumes that the consideration for it was a good one.<sup>2</sup>

In *Annandale v. Harris*, 2 P. W. 434, "the recital in a deed that the covenantor had given a bond, is a sufficient evidence of there having been such; it is a confession by the obligor himself, and stronger than a verbal confession, it being under his hand and seal." So in *Skipwith v. Shirley*, 11 Ves. 65, it was decreed that a sum of money should be raised under a deed of appointment, on the recital of it in two other deeds.

It is contended that this claim of the com-

<sup>2</sup> As to the effect of recitals, see *Horry v. Frost*, 10 Rich. Eq. 113, 115.

plainants is barred by length of time. I can see nothing to support this ground. There has been no such laches or lapse of time as will affect their claim. The obligor was the executor of Mrs. Elliott, and the defendant is his administrator. This raises a direct trust in both, and the bonds and mortgage must be presumed to have been in their possession, or in that of John Drayton, the trustee of Mrs. Elliott; but no presumption can arise that the bond has been satisfied, for the defendant admits in the same bill that it had not been paid; and in the inventory which he returned of the estate of Glen Drayton, he describes the negroes named in the deed of mortgage, as "negroes under mortgage." This deed did not come in the possession of the complainant, Mr. North, for some time after his marriage, and it has been proved that he has since been persevering in his endeavors to procure testimony to support the claims. He has failed to do so with respect to two of them, but I am of opinion that the remaining one has been sufficiently established.

It is therefore ordered and decreed, that the commissioner do take an account of the principal and interest due on the bond recited in the mortgage from Glen Drayton to Mrs. E. Elliott, and that the negroes named in the said mortgage, with their issue, now in the possession of the defendant, be sold by the commissioner to satisfy the amount

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which may be found due on the said bond; and if the proceeds of such sale should not be sufficient to discharge fully the said amount, it is further ordered, that the commissioner do take an account of the annual hire and labor of the said negroes since they have been in the possession of the defendant, and the amount thereof, or so much as may be requisite to make up the deficiency in the said sale, be paid by the defendant to the commissioner, who shall pay over the same, together with the proceeds of the said sale, to the complainants; provided, that if there should be any legally subsisting liens on the said negroes, which may have a legal priority to the said mortgage, the parties claiming them shall be allowed to prove the same within three months after public notice for that purpose be given by the commissioner, subject, however, to any legal objections which the complainants may have on account of length of time or limitations; and such lien, if so proved, shall be first paid out of the said fund. And it is further ordered, that the costs also be paid out of the same.

From this decree the defendant appealed, on the grounds:

1. Because the parties before the Court were not sufficient.

2. Because the right to sue, having been vested in the legatee in trust from 1793, when Mrs. Elliott died, to 1819, when the bill was filed, it was such laches, that defendant is

entitled to the benefit of it against the complainants; although a part of the time Mrs. North was a minor, more than twenty years having elapsed between said two dates, without suit or even demand.

3. Because there was no proof that any bond ever existed, nor was there any account given of it if it had ever existed; nor was there sufficient evidence under all the circumstances, to justify the belief that there ever was such a subsisting debt.

4. Because if the evidence sufficed to show that such debt ever existed, yet the testimony justified the belief: 1. That it was a substitute for the bond of 1783. 2. That if it were not, yet the lapse of time and circumstances justified the opinion that it was paid, satisfied, or otherwise settled.

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\*5. Because the judge has ordered that the defendant should account before the commissioner for the annual hire and labor of the negroes under mortgage, since they have been in his possession. Whereas, it is contended by defendant, that the mortgagee is not entitled to an account of the mesne profits as a preferred creditor, but only a general creditor of the estate; that the mesne profits belonged to the common fund of assets, distributable among the creditors according to the legal order for payment; but if the mortgagee be entitled to any account, it can only be from the filing of the bill.

6. Because under the doubts and difficulties which prevailed in this case as to the supposed bond of 1790, the regular course would have been to send the question to be tried under an issue at law.

Grimke, Prioleau and Hunt, for appellants. —The proper parties are not before the Court. The complainant, Mrs. North, claims a legacy from her grandmother; but she is not the representative of her grandmother. If there was an assent on the part of the executor of Mrs. Elliott, to the legacy to John Drayton in trust, (which may be presumed,) the representatives of John Drayton, the trustee, should have been parties. If there was no assent, the representative of Mrs. Elliott should have sued. The complainants might have administered de bonis non, and ought to have done so. Such a bill cannot be supported, unless in a case of collusion between the executor and the person in possession of the fund. 3 Pr. Wms. 349; 2 Ath. 513; 3 Br. Ch. Ca. 25; Id. 624; 1 Vern. 51. If, however, the proper parties are before the Court, the complainants must prove the existence and contents of the bond. Bare recitals in a deed are not conclusive; they are never sufficient without the evidence of further circumstances. 6 Mod. 12 Vin. 233; 11 Ves. 63; Phil. Ev. 202. In the case of Annandale and Harris, the bond was in Court. The recital is not sufficient evidence of the contents of the bond. It states, to be sure, a sum of money due on the bond, but



it may have been qualified by conditions. The language of the mortgage affords a presumption that it may have been a bond to

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indemnify Mrs. Elliott, against Glen Drayton's share of the debts of her husband's estate. Several circumstances strengthen this presumption. The circumstances of Mrs. Elliott were very moderate; which renders it highly improbable that she could have advanced adequate considerations for debts so considerable as the bonds of 1783, and 1790.

The bond is not mentioned in the inventory of the estate of Mrs. Elliott. John Drayton, the trustee, was a subscribing witness to the mortgage, and must have known of its existence, yet never took any steps enforcing it for the benefit of his cestui que use, conduct which would have been fraudulent, if it had been a subsisting money debt. He drew the schedule of complainant's marriage settlement, in which no mention is made of this claim, as part of Mrs. North's estate. The complainants settled with and released John Drayton, without noticing that claim.

The bill of defendant filed in 1810, is relied on as the evidence of the loss of the bond. But his statement in that cause ought to be taken in connection with his answer in this. He stated in general terms, according to his belief, that the bond was lost, but it plainly appears that he had no knowledge on the subject, and only supposed it to be lost because it was not in his possession. But if the statements of that bill are used against defendant, the whole bill must be taken together; and if so, it proves conclusively that the bond of 1790 was given as a substitute for that of 1783. If the admissions of a party are used against him, his declarations in his own favor, made at the same time, are admissible. All the circumstances which have been adverted to, support this statement. 4 Bin. 339; 1 Phil. Ev. 426; 1 Ves. Jun. 128; 2 Atk. 72; 3 Bl. Com. 368; 10 Co. 93.

But if the existence, contents, and loss of the bond are sufficiently proved, and it was a bona fide debt, there is nothing to rebut the presumption of payment arising from the lapse of time. The circumstances relied on for this purpose are the character of the defendant and his intestate as trustee, his recognition of the claim by the bill of 1810, and the memorandum of the inventory, and the complainant's ignorance of their rights.

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\*The defendant is made a trustee by implication, because his intestate was the executor of Mrs. Elliott, and he took this property with notice of the trust. But if there was an assent to the legacy, as is presumed, the bond and mortgage were vested in the trustee, John Drayton. He might have enforced them, and against him the presumption from lapse of time would arise. The Statute of Limitations will run against a

trustee, in favor of any one but his cestui que trust. It has been so held in cases in which the cestui que trust were infants. 3 Pr. Wms., 309. In the case of Todd v. Todd, the presumption was allowed to arise in favor of executors, after a lapse of thirty years, though there were minorities all the time.

The memorandum respecting the negroes in the inventory only proves that the defendant knew of the existence of the mortgage; it was his duty to notice it; and certainly it is not a recognition of the bond or an admission that it was for a bona fide debt. If the statements of the bill of 1810, be all taken together, it aids the proof of the demand having been satisfied. The parties have shown no ignorance of their rights. They have been always as competent to sue as they are now, and it does not appear that they have any more information on the subject of their claim than they had when they commenced their enquiries.

All the circumstances go to strengthen the presumption. The doubts respecting the existence and character of the bond, favor the conclusion that Mrs. Elliott may have cancelled it herself, as well as the fact of its not being included in the inventory of her estate. So does the conduct of the trustee, John Drayton, who must have known of its existence if it was a subsisting debt, and who took no measures to collect it. Were further cited, 2 N. & Mc. 164, 166; 3 Br. Ch. Ca. 639, 644; 3 Johns. Ch. Ca. 135, 144; 1 Sch. & Lef. 413; 1 Johns. C. C. 594, 616; 3 Johns. C. C. 216; 10 Ves. 93.

But at all events, the defendant ought not to be made liable for hire and profits. They were in the possession of his intestate and came into his possession as administrator; he is bound to account for the hire, but to

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the general creditors. \*The profits of the slaves belonged to the estate and not to the mortgagee.

Ford and Petigru, for appellees. There can be no doubt but that Glen Drayton was a trustee for the benefit of the complainants. An executor is a trustee for those who claim under the will. The legal title to the negroes, after breach in the condition of the bond, was in Mrs. Elliott and her executor. He who takes trust property, with notice of the trust, is himself a trustee. Wamberzie v. Kennedy, 4 Eq. Rep. 747; 2 Bridg. Dig. 677; 15 Ves. 350. But cestui que use may always sue his trustee in this Court. 2 Bridg. 651; 3 Ves. 560; 3 Atk. 124.

Have we shown sufficient evidence of the existence, contents and loss of the deed? The recital of the mortgage deed is sufficient to prove the existence and contents, independently of defendant's statement in his bill of 1810. A recital of a deed in another deed, has been considered sufficient in chancery to set up a lost deed. 11 Ves. 64; 17 Ves. 134.

In *Annandale v. Harris*, the Lord Chancellor says "the recital in the deed, that the covenantor had given such a bond, is sufficient evidence of there having been such; it is a confession by the obligor himself, and stronger than a verbal confession being under seal." So the recital of a lease in a deed of release is good against the releasor and all claiming under him. 1 Salk. 286. A recital in a deed executed by one of the plaintiffs, evidence against all the plaintiffs; 17 Johns. 335. A writing signed by plaintiffs, admitting the execution of a bond and warrant of attorney to them, and stating the conditions, sufficient proof for defendants of such a bond, without producing it. 14 Johns. 404.

There is as little doubt with respect to the contents of the bond. The mortgage describes it precisely and unambiguously as intended to secure the payment of money, as well as to indemnify Mrs. Elliott. The supposition that it was not intended to secure the payment of money is utterly inconsistent and irreconcilable with the terms of the mortgage.

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\*As to the loss, Mrs. Elliott died soon after its execution in 1790; when it was payable does not appear. Her will, dated 30 November, 1792, recites that she was then ill, and the will was proved by the executor, Glen Drayton, 6 February, 1793. The bond and mortgage came into his hands; he died in 1796, and the defendant is his administrator. In 1810, defendant swears positively that the bond is lost. Can stronger proof of loss be required?

But the bond is to be presumed satisfied. Is it to be presumed satisfied because it is not found? In *Sluysken v. Hunter*, 1 Meriv. 40, a deed found among the donor's papers cancelled, was set up on the presumption that it had not been paid by him. The deed was executed in 1777 and interest was paid to 1795. In 1799 the deed was acknowledged as subsisting, and a negotiation ensued respecting it, which was interrupted. In 1802 the grantor died, and in 1813 the bill was filed. It was asked in that case with confidence, how did the deed come into Hunter's hands but by some arrangement. His Honor decided that if no compensation was made, it was improperly cancelled, and there could have been no compensation except between 1801 and Hunter's death. As there was no proof of such, the deed was set up.

Here no compensation could have been made except between the date of the bond in 1790 and Mrs. Elliott's death. The bond is very ancient, but the period within which satisfaction can be presumed, is very narrow, at the most, between January, 1790, and November, 1794. During that period, Glen Drayton received Mrs. Elliott's money which he never accounted for, and was utterly desperate in his circumstances. By defendant's

own showing, he had pressing creditors; but this was a creditor to befriend instead of pressing—to give more instead of receiving. Since her death there has been no one to receive, the debtor has been the payee. There is not the least evidence that the bond was ever in John Drayton's hands.

The inventory made at the death of Glen Drayton, shows it to have been a subsisting debt. The conduct of the defendant for twenty years has been consistent with this

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admission. He \*has never sold these negroes to pay the general creditors of Glen Drayton, as it was his duty to do, if this was not a subsisting debt; but retained them in his possession as covered by the mortgage. And this agrees with the statement of his bill of 1810.

Length of time can never bar a trust, as between trustee and cestui qui trust. *Norton v. Turville*, 2 Pr. Wms. 145; *Hovenden v. Annesley*, 1 Sch. & Lef. 630; *Arden v. Arden*, 1 Johns. Ch. Rep. 316; *Haig v. Clifton*, 4 Eq. Rep. 341; *Decouche v. Savetier*, 3 Johns. Ch. Rep. 215.

Defendant cannot rely on a defence inconsistent with satisfaction, and presumption of satisfaction, at the same time. See *Reeves v. Brymer*, 6 Ves. 516. There the defendant relied on the evidence that the creditor had forgiven the debt, and also on length of time as presumption of satisfaction; but proof of the release failing, the debt was enforced. The admission of 1810 was not qualified with any pretence that the demand had been satisfied.

The supposition that the bond of 1790 was a substitute for that of 1783, is a mere conjecture, unsupported by any evidence whatever. The defendant, in his bill of 1810, only speaks of it as matter of belief; and it is strongly opposed by the circumstance, that the bond of 1783 was not given up nor cancelled.

On the subject of hire and profits, cited, 1 *Bridg. Dig. Tit. Accounts*; 3 Pr. Wms.; 3 *Atk.* 124.

The opinion of the Court was delivered by

WATIES, Ch.—We are of opinion that the decree of the Circuit Court in this case should be affirmed. The bond claimed by the complainants has been sufficiently established, and must be satisfied out of the mortgaged negroes in the possession of the defendants; and in providing for this, it is just that the defendant should account for the profit of the negroes, if the proceeds of the sale of them should not be sufficient for the purpose. Although his original possession of them as the administrator of Glen Drayton was a lawful one, yet he had a full knowledge at the time they were mortgaged for the security of this debt; for he described them in the inventory

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of the estate as "negroes under mort\*gage,"



and no other mortgage has been shown. The trustee of the complainants was indeed also apprised of this mortgage, and his neglect to sue for the payment of the bond for which it was the security, would no doubt have barred their right under it, if there had been no subsequent recognition of the claim by the defendant. But in the bill which he brought in 1810, he has expressly admitted its existence, and insisted that it ought to have the legal effect of discharging him from the former bond of Glen Drayton, in which he was bound as surety. This destroys all presumption of its having been satisfied before that period, and the lapse of time since has not been sufficient to bring it within the rule of satisfaction. It appears also that the defendant has held the mortgaged negroes for his own benefit, without giving notice to the complainants that he so held them, which makes him personally liable to them as a trustee for this claim, and as such he is bound to account for the hire of the negroes. It seems just, too, under these circumstances, that the bond should continue to bear interest until it is paid,<sup>3</sup> as the delay in the payment has been occasioned by the acts of the defendant, and not by any laches or forbearance of the complainants. It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed, and further, that the commissioner do allow interest on the bond of Glen Drayton up to the time when the said decree shall be executed.

DE SAUSSURE, GAILLARD, THOMPSON and JAMES, CC., concurred.

<sup>3</sup> Not beyond penalty, *Bonsall v. Taylor*, 1 McC. 503; *Trenholm v. Bumpfield*, 3 Rich. L. 376; *Church v. Washington*, Ib. 380; *Harper v. Barsh*, 10 Rich. Eq. 149; *Cruger v. Daniel*, McM. Eq. 197. But see *Smith & Cullins v. Macon*, 1 Hill, Eq. 339.

Harp. Eq. \*47

\*JOSEPH R. ARTHUR v. MASTER IN EQUITY.

(Charleston. March Term, 1824.)

[*Receivers* ⇨101.]

The master, while acting as the receiver of a trust estate, which the Court had ordered to be invested in stock, suffered eleven thousand, five hundred dollars to lie unproductive three months and twenty days; he stated that he waited to invest it in stock bearing an interest of six per cent., but not succeeding, loaned it on that interest. It appearing that complainant, who was appointed trustee, had recommended such an investment, and had settled with the Master and given him a receipt, it was held that the Master was not liable for the loss of interest.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 189; Dec. Dig. ⇨101.]

[*Receivers* ⇨197.]

The Master, acting as receiver, was held entitled to a commission of one per cent. on the

amount of bonds delivered over by him to the trustee; though he had received the usual commission of five per cent. on the sales of the property for which the bonds were taken.<sup>1</sup>

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 388; Dec. Dig. ⇨197.]

[*Receivers* ⇨105.]

The Master having sold slaves for one hundred dollars less than might have been obtained, was held, under the circumstances, not to be liable for the difference.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 192-194; Dec. Dig. ⇨105.]

[*Trusts* ⇨218.]

[Where a cestui que trust, knowing the course pursued by his trustee, under an order of court for the investment of the trust fund, made no objection, and recommended a similar course, he was not afterwards allowed to charge the trustee with laches in such investment.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 313; Dec. Dig. ⇨218.]

[*Trusts* ⇨276.]

[A trustee, under an order directing him to pay over the income of the fund, but in no case to diminish the principal, will be chargeable to the trust fund with the amount of the capital disposed of by him.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 394; Dec. Dig. ⇨276.]

In November, 1817, a plantation on John's Island, together with a certain number of negroes, was ordered to be sold, and the proceeds of the sale, when collected, to be invested in stock of this State, or of the United States, or some incorporated bank.

Mr. William Simmons was appointed trustee to receive the moneys arising from that sale, and the bonds given for the credit part of it, and having made the necessary investments, to pay over the interest and dividends to Thomas Simmons for life, but on no account to break in upon the capital. But it was ordered, that if Mr. Simmons should decline to receive the said bonds and cash, they shall remain in the master's hands until the Court disposed of them otherwise.

In November, 1821, Mr. Joseph R. Arthur was appointed trustee, and the master was ordered to deliver up the bonds, et cetera, to him. The master had in the meantime received and paid away large sums of money belonging to the trust estate, and had taken the usual commissions of five per cent. In delivering up the bonds, he claimed a right to one per cent. upon them. The trustee refusing to allow this, and also finding fault with other parts of his administration, moved a reference of his accounts to the commissioner, who reported thereon, and the case came to be argued upon exceptions to the report.

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\*1. The first exception taken by the appellant was, that the master, while acting as receiver or trustee for the estate of Thomas

<sup>1</sup> See A. A. 1821, 7 Stat. 323, and Rule of Court. 3 Rich. 361. *Massey v. Massey*, Chev. Eq. 159.

Simmons and wife, had suffered eleven thousand five hundred dollars to be idle and unproductive for the space of three months and twenty days, and that the commissioner did not report him as liable to make up the damage or any part thereof sustained by the cestui que use; although it was proved that investments might have been made at any time within that period in the United States' stock, in which, or in some similar species of stock, the trustee was directed by the decretal order, authorizing the sale of the property, to invest the moneys of the estate on advantageous terms.

2. The second exception was, that the master paid over three hundred and sixty dollars, arising from the sale of a slave named Cudjo, (a part of the capital of the estate,) to the tenant for life, and that he was not reported as liable to make it up to the trust fund.

3. The third exception was, that a commission of one per cent. was allowed to the master for delivering up certain bonds taken in part payment by him for the property he sold by order of the Court, in addition to commissions allowed by law upon the sale itself. All these exceptions were overruled by the Court, and an appeal was now made from its decree upon all of them.

4. A fourth ground of appeal was, that the master having sold a negro woman and her two children for one hundred dollars less than it is admitted could have been got for her, the commissioner reported him as liable for the difference; but the Court refused to confirm the report in that particular; whereas, the appellant contended that it ought to have been confirmed, and appealed from the decree at the Circuit Court on this ground also.

The decree of the Court was delivered by

JAMES, Ch.—This cause comes on upon exceptions to the commissioner's report.

1. Exception—That the master, while acting as receiver for the estate of Thomas Simmons and wife, had suffered eleven thousand five hundred dollars to lie idle and unproductive of interest for three months and twenty days, which might have been vested at any time during that period in stock. Mr. Coch-

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ran certified that United States stock might have been procured at one hundred and two, one hundred and eight, or one hundred and ten. But the master states that he waited that time in the expectation of getting stock which would yield six per cent.; but not succeeding, he thought it most beneficial for the trust estate to loan it to Mr. Hort, on the same terms of six per cent., payable quarterly, and the bond secured by a deposit of stock. That afterwards, Mr. Hayne, under a power of an attorney from complainant, received all the moneys in his hands, and the bonds, including that of Mr. Hort, and gave a receipt

for them, which the master produces. He also produces a letter from complainant, in which he recommends to him to loan the unappropriated funds in his hands to William E. Hayne, upon his giving a mortgage of his house and lot in Columbia, and says, "he thinks it would be as well secured thereby as it could possibly be in any stock in the United States." But now, after the settlement with the attorney of the complainant, and this letter recommending a similar investment of the trust funds, and not complaining all the time of what had been done, it is too late for complainant to come forward with his exception. A reasonable time ought to be allowed for such investments, and no reasonable time appears to have been taken.

2. Exception—That the master paid three hundred and sixty dollars arising from the sale of a slave, part of the capital trust estate, to the tenant for life, and he is not reported as liable to make it up to the trust fund. The master was wrong to break in on the capital of the trust fund, as the case cited from 11 Ves. 604, as well as many others show. But still the complainant may have an easy remedy without making the master liable in the first instance. He is the trustee, bound to pay the dividends to Mrs. Simmons, and let him retain the amount, with interest from the time of the payment, out of that fund. But if that fund should fail, the master must be liable.

3. Exception—That a commission of one per cent. was allowed to the master for delivering up certain bonds taken in part payment for the property sold by him. The master in this case acted as a receiver, in a new and distinct character from that of his general official duties, and in one not contem-

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plated by the fee bill. Now it has been frequently decided in this Court, "that the master or commissioner, when appointed and acting as receiver, acts in a new and distinct character, and is entitled to compensation in that character;" *Shubrick v. Fisher*, Minutes Court Equity, 25 June, 1802; *Butler v. Ryan*, 3 Desaus. Eq. Reps., 182; *Wightman v. Lining*, decided in this Court. So that it is proper to follow the established course of this Court.

4. Exception—That the master sold a negro woman and her two children for one hundred dollars less than it is admitted could have been got for her. The commissioner reported the master as liable for the difference, but the Circuit Court overruled that part of the report, and the decree of the Circuit Court is now appealed from. Complainant wished her sold in Columbia, where he states in a letter to the master that he could get eight hundred dollars for her. But the auctioneer, Mr. Toomer, says she refused to go to Columbia and ran away, and afterwards came in under an express promise that she should be sold in Charleston, where her husband and chil-



dren lived. She was besides sickly and was not worth more than the money she brought. Under these circumstances, and upon every principle of humanity to slaves, the decree of the Circuit Court, both on this exception and all the others depending on the points above stated, must be affirmed. Therefore, the decree of the Circuit Court is affirmed.

DE SAUSSURE, GAILLARD and WATIES, CC., concurred.

THOMPSON, Ch.—I concur on all the points in this case, except the allowance of one per cent. on the transferred bonds.

**Harp. Eq. 50**

Ex parte WM. B. PERRY and JESSE J. WILSON and Wife.

(Charleston. March Term, 1824.)

[*Judicial Sales* ⚡62.]

Rule against the master, to show cause why he had not paid over the proceeds of slaves sold by him. There being no order of Court authorizing him to make the sale, it was held, that if he had done so, it was an act in his own individual capacity, for which he is not liable on a rule. Evidence could not be received to establish the fact of his having sold.<sup>1</sup>

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 125; Dec. Dig. ⚡62.]

This was a rule against the master, to show cause why he had not paid the pro-

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ceeds of certain negroes, sold by him \*in 1816 under a decretal order of this Court, to the late guardian of the complainants or to their attorney. The following are the circumstances of the case:

In 1813, the master recommended in his report, that the late guardian, John M. Ehrick, should be permitted to sell these negroes under his direction and vest the proceeds in other negroes or stock. This report was confirmed and the guardian authorized to make the sale accordingly. The negroes were not actually sold, until 1816, at which time they were disposed of by the master, during the absence of Mr. Ehrick the guardian at the North, where he was residing. A bill was filed in 1818, by William B. Perry against Mr. Ehrick, to account for these negroes, which was eventually dismissed by the Court of Appeals, on the ground that the negroes were sold by the master during the absence of Mr. Ehrick, and that the proceeds were never received by him or his authorized agent. Under these circumstances the rule was taken out against the master. On the return of the rule, the master showed for cause by his own affidavit, that there was no order of Court requiring him to make the sale, and that he had not done so. The decision of the Court of Appeals, stating that the master

had made the sale, was read to the Court to contradict the return, and the complainant's counsel offered to prove by further testimony that he had made the sale, and was therefore bound to account; but the chancellor on circuit refused to receive the evidence, and decreed that there was no order of Court authorizing the sale, and if made by him it was in his individual capacity, and that he was not liable upon a rule. From this decision the complainants appealed on the following grounds:

1. Because the master was directed to superintend the sale of certain negroes by the guardian of the complainants.

2. Because the sale was made by the master in his official capacity, and purporting to be under the authority of the Court.

3. Because his honor the presiding judge, decreed that a decision of the Court of Appeals in which the guardian of the complainants was a party, stating that the sale of the

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negroes \*of the complainants was made by the master of the Court, was no evidence against him, and that no further evidence could be adduced to render him liable in this summary way.

The decretal order of the Chancellor on circuit was affirmed, by the whole Court.

**Harp. Eq. 52**

JAMES BEARFIELD et al. v. JAMES STEVENS.

(Charleston. March Term, 1824.)

[*Execution* ⚡256.]

Bill to set aside sheriff's sale of lands.

The sheriff advertised "that tract of land situate in St. Bartholomew's Parish, containing — acres, more or less, to be sold as the property of J. B." The land was bid off by defendant at a very inadequate price; the money paid, and the sheriff gave a receipt promising to make titles. It appeared that J. B. had nine hundred and thirty-three acres of land in the parish; held under three different grants, but all adjoining. After he was out of office, the sheriff executed to defendant a deed for the nine hundred and thirty-three acres, which was antedated so as to appear to have been executed during his term of office. Plea of Statute of Limitations sustained, and bill dismissed.<sup>1</sup>

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 723-733; Dec. Dig. ⚡256.]

[*Execution* ⚡271.]

[A bona fide purchaser at a sheriff's sale will be protected in his purchase, though the sale is irregular; and he is not bound to see that the sheriff performs his duties.]

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 774; Dec. Dig. ⚡271.]

[*Execution* ⚡305; *Sheriffs and Constables* ⚡83.]

[A purchaser at a sheriff's sale paid the purchase money, and the sheriff gave a special receipt, with a promise to make titles. *Held*,

<sup>1</sup> Supra, 20.

<sup>1</sup> Cox v. Cox, 6 Rich. Eq. 275.

that a conveyance to the purchaser, by the sheriff, after he was out of office, was valid.]

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 905; Dec. Dig. ¶305; Sheriffs and Constables, Cent. Dig. § 109; Dec. Dig. ¶83.]

[Execution ¶317.]

[Equity will not sustain a bill to set aside a conveyance by a sheriff, invalid for irregularity in the sale; there being, in such case, an adequate remedy at law.]

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 934; Dec. Dig. ¶317.]

The bill stated that Jesse Bearfield was in his lifetime seized of three tracts of land in St. Bartholomew's Parish, containing nine hundred and thirty-three acres, and of the value of two thousand dollars. That in 1812 he went off, and was absent some months, having leased part of the land and having a tenant on each of the tracts. That while he was absent, Mr. Ford, then sheriff of Colleton district, put forth this notice:—"By virtue of sundry executions, will be sold before the court-house in Jacksonborough, on the first Monday and Tuesday in February next, being the third and fourth days of said month, between the hours of eleven in the forenoon and three in the afternoon, all that plantation or tract of land situate in St. Bartholomew's Parish, containing acres, more or less, to be sold as the property of Jesse Bearfield, at the suit of Adams and Deliesseleine." That the advertisement was not known to the tenants of Bearfield or the persons in the neighborhood, and on the day of sale one James Stevens having bid ten dollars, the land was set down to him as purchaser. That he did not complete his pur-

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chase by paying the money, \*nor did the sheriff convey to him, but he took possession of the land afterwards. That Jesse Bearfield having returned, understood that the land had been sold for taxes; but was afterwards told by James Stevens that he should hold in fee simple. That he intended to sue, but died in December, 1815. That on the 10th March, 1817, complainants commenced their action in the Court of Common Pleas for Colleton district, and James Stevens afterwards had these lands conveyed to him by Mr. Ford, whose office of sheriff had expired in 1813. That the conveyance does not agree with the advertisement; for whereas the advertisement is merely of a plantation, the conveyance with the annexed plat, contains a minute description of the land with its metes and bounds, and is antedated. That the action came on afterwards to be tried, and complainant's witnesses not attending, they were nonsuited. Bill prays that the sheriff's titles may be cancelled, and for general relief.

Defendant's answer denied that the sale was not duly advertised; insists that he was a fair purchaser; says that he did pay down

the money at the time of sale, but admits he took no conveyance at the time. That the conveyance afterwards executed by Mr. Ford was antedated, but denies it was executed after the action at law. Insists that he took possession immediately after the sale, and relies on the Statute of Limitations.

The parties went into evidence.—They proved that they were the next kin of Jesse Bearfield. They proved sheriff Ford's advertisement in the terms of the bill. They produced the original grants to show that there were three several and distinct tracts, and by the original conveyance to defendant by Mr. Ford, showed that the deed referred to a plat of the land made in March, 1813, although the deed bears date in February, 1812. They also proved that the land is worth fifteen hundred dollars.

The defendant proved taking possession of the land in February or March, 1812, and showed by the files of the newspapers that it had been regularly advertised; that many persons attended the sale; that the land included in the three grants had been considered one tract, and that Stevens had taken possession soon after his purchase.

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\*THOMPSON, Ch.—This bill is filed to set aside sheriff Ford's deed of conveyance to James Stevens, the purchaser, at sheriff's sales in 1822, on the grounds of gross inadequacy of price, of irregularity in the sale, and of fraud in the defendant Stevens, in purchasing. The defendant, Stevens, pleads the Statute of Limitations, relying on his adverse possession from that period to the present time; denies the fraud or any instrumentality in procuring the sale; and answers by way of demurrer to the jurisdiction of the Court, because the complainants had adequate remedy at law.

The evidence clearly rebuts the charge of fraud, and manifests that the sheriff's sale was fair, public, and open, and attended by numerous persons who might have become bidders if they chose to do so. The advertisement of the land was made on the court-house door, in the city Gazette of Charleston, on eight different days, and was publicly known in the neighborhood of the land itself; and Stevens appears to have known nothing of the sale until a few days prior to it, when he became the purchaser at a small price. The advertisement did not specify the number of acres sold; but the lands of Bearfield, though held by distinct titles, all adjoined each other; were jointly levied on by the deputy sheriff, and all sold by the sheriff as one body to defendant Stevens. The purchase money was paid down by the purchaser immediately after the sale, and though the sheriff did not execute the titles to him until after he was out of office, he gave the purchaser a special receipt on the day of sale



for the purchase money, with a promise to make him titles whenever called upon.

The defendant's plea of the Statute of Limitations must be sustained in this case; for he appears to have had peaceable and adverse possession of the land from 1812 to the present time, and the complainants have already submitted to a nonsuit at law in an action to try titles against Stevens, in 1818. If the charge of fraud had been clearly made out, I would have been disposed to lend the aid of this Court to assist the complainants in the Court of law, but the defendant's conduct appears to have been fair and unim-

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peachable. The sheriff's levy and \*advertisement, and the general regularity of his proceedings, furnish no ground to impeach the sale; and even if they had been irregular and no fraud proved, the purchaser would have been protected in his fair purchase;<sup>2</sup> for even the Courts of law have decided that it is not the duty of the purchaser to see that the sheriff's duties were properly performed. Public convenience and policy equally forbid that such should be the construction of the Act regulating sheriff's sales. If the owner of the property levied on has been damnified by the sheriff's conduct, he has his remedy against the sheriff, on his bond for the faithful performance of his duties.

The demurrer to the jurisdiction of the Court and the relief sought must also be sustained, for the Court of law can afford an adequate remedy by declaring the sale void (if there be grounds to do so.) and that the sheriff's deed would be a nullity without the interference of this Court.

Upon the subject of inadequacy of price, I am not aware that the rule has ever been applied to public sales under proper authority, to declare them void for mere inadequacy.

It is therefore ordered and decreed, that the bill be dismissed with costs.

From this decree complainants appealed, on the grounds:

1. That the irregularity of the advertisement, and the great inadequacy of price vitiated the contract of sale, by the sheriff to the defendant.

2. That the conveyance being made after the office of Mr. Ford had expired, and antedated, was fraudulent, and ought to have been given up to be cancelled.

3. That the Statute of Limitations was no bar, inasmuch as it was uncertain whether defendant's possession began five years before March 10, 1817, and at most his possession could not avail for more than his actual occupancy.

4. That if his honor did not think the com-

plainants had sufficient equity to entitle them to full relief, he ought to have set aside the sheriff's deed, and allowed the parties to try the right under the Statute of Limitations at law.

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\*For the appellants it was argued that the sheriff's deed was void. That the Act of the Legislature authorizing the successors of sheriffs who have sold lands to convey, incapacitates the sheriff to execute titles after the expiration of his office. That the procuring the deed to be antedated was a fraud, and ought to prevent the defendant's availing himself of the Statute of Limitations. That defendant had no title, but only an executory contract to convey; which ought not to be enforced on account of the inadequacy of price; and that at all events the deed should have been made in conformity with the advertisement, which could only apply to the land included in one of the grants.

Decree affirmed by the whole Court.

Petigru, for appellants. De Saussure, contra.

#### Harp. Eq. 56

JOHN H. WILSON, Adm'r CHARLES  
FREER, and Others ads. WILLIAM  
ROBERTSON.

(Charleston. March Term, 1824.)

[Wills ⇐490.]

Testator by his will, devised his "plantation on John's Island, containing five hundred and forty acres." He had two tracts of land on John's Island, one of cleared land which he planted, containing three hundred and ninety acres, and at the distance of two or three miles, a tract of pine land containing one hundred and forty-seven acres. Parol evidence was received to show that the tract of pine land had always been used with the other and was necessary to it; that the two tracts had always been considered to form one plantation, and that the testator's son and heir-at-law had admitted the right of the devise to both; and these facts were held to establish the intention of testator that both tracts should pass under the devise.<sup>1</sup>

[Ed. Note.—Cited in *Cain v. Maples*, 1 Hill, 308, 26 Am. Dec. 184.

For other cases, see *Wills*, Cent. Dig. § 1047; Dec. Dig. ⇐490.]

Complainant, William Robertson, who married one of the daughters of John Freer, deceased, stated in his bill, that the said John Freer by his will, dated 30th November, 1781, gave to his wife a residence for life on his plantation on John's Island, with liberty to plant it, in common with his children. In case of her death, he directed that his "said plantation on John's Island, containing five hundred and forty acres, more or

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less, should be \*sold," and the moneys arising therefrom, he bequeathed to his daugh-

<sup>2</sup> *Maddox v. Sullivan*, 2 Rich. Eq. 7, 44 Am. Dec. 234, Bail. 324.

<sup>1</sup> *Perry v. Morgan*, 1 Strob. L. 8; *Lawton v. Hunt*, 4 Rich. Eq. 246; Post, 160, 261.

ters. That he died in November, 1787, and Charles Freer, who was his heir at law, qualified on the will as executor. That the testator at the time of his will and death, was possessed of two parcels of land on John's Island, viz.: Of three hundred and ninety-three acres of arable land, and one hundred and forty-seven acres of pine barren, three miles distant from the former. That his country seat was called Edinburg, and was on the three hundred and ninety-three acre tract, and the pine barren furnished wood for Edinburg. That these two were connected in the idea of "John's Island Plantation," and were never regarded as two separate estates. That Mrs. Freer, (the widow,) held both for life, and they were never divided, but were necessary to each other. That Charles Freer, the heir at law, did not possess the pine barren during his life, but often asserted his mother's right to it. That Charles died in 1808, leaving several children, one of whom married defendant J. H. Wilson. That the widow of the testator John, died in 1817, and complainant and the other devisees applied to this Court for a partition of the Edinburg tract. That the Commissioner recommended a sale, and complainant purchased it for twelve thousand five hundred dollars, and the Commissioner conveyed the premises to him July 22, 1820, and on the same day complainant conveyed them to E. Whaley. That little caution was used in the equity proceedings to describe the land accurately, the metes and bounds not being filled up in the petition, &c., but merely the number of acres, five hundred and forty, mentioned; and when complainant afterwards gave the metes to the Commissioner, he never consulted a plat or adverted to the fact that the pine and planting land were two separate tracts. That in selling to Whaley they spoke of the pine and planting land as one plantation, the same that testator had owned, and that Mrs. Freer possessed; but by neglect they suffered the conveyance to be drawn so as not to include both, nor to agree with either parcel of land. That the Commissioner's deed mentions five hundred and forty acres, but in his metes and bounds only three hundred and ninety-three are included, and the pine barren is left out. That complainant is now called upon to compensate Whaley for the one hundred and forty-seven acres deficient, for which Whaley has sued him on his war-

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ranty. That \*defendants, Wilson and others, (representing Charles Freer) claim the said pine land as an undisposed residue of Charles Freer's estate. The bill prayed that Whaley might be enjoined from proceeding at law, and that Wilson and others might be compelled to go to trial with him, to settle the title to the tract of pine land, and that the said deed might be reformed according to the testator's intention, so as to include

said land. The defendant Wilson, admitted that he claimed the pine land as the representative of Charles Freer, who was the heir at law of John Freer the testator, who left that land undisposed of by his will; the same being a separate piece from Edinburg, as stated by complainant, and acquired at different times by different titles. That Edinburg contained three hundred and ninety-seven and a half acres, and the pine land not one hundred and forty-seven as the bill alleges, but one hundred and sixty-three acres, and there are several plantations between them; that the two tracts were never regarded as one, by any of the Freers, or by any body else, until very lately by the complainant; as is proved by his voluntarily sending a short time before the sale of Edinburg tract, to inform defendant that this very pine land was not devised by John Freer, but had descended to Charles, and he advised defendant to look after it for the benefit of the estate. He denied that Whaley spoke of purchasing the pine land from the complainant, for he only lately discovered the deficiency in the number of acres in Edinburg tract, and had before wished to buy this pine land from the defendant. He admitted that Mrs. Freer might have used it, as other persons did, for it was much trespassed on, but the title never was in her;—that testator devised to her and his daughters, only his Edinburg tract, and did not mention the pine land, and that no presumption that he intended it existed, and it could not be raised by parol testimony.

He admits that the conveyance by the Commissioner by metes and bounds excludes the pine tract, but denies there was any mistake in the exclusion, or that it was the intention of any of the parties to include it—that no addition of the pine land can make five hundred and forty acres of cleared land, as advertised by the Commissioner and sold, as

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appears by his deed; which deed estops \*complainant, and he ought not by parol to enlarge or contradict it. He states further, that he had lately contracted to sell said pine land, by permission of this Court, as the property of C. Freer's estate.

Whaley in his answer merely says he bought under the public advertisement, and believed the tract contained five hundred and forty acres in one body, as stated by said advertisement; and he knew nothing of the pine tract being necessary to make up the difference. He lately had the Edinburg tract surveyed, and found it to contain only three hundred and ninety-seven and a half, and complainant offered him the pine tract in dispute, as appendant to the Edinburg tract; and which he agrees to take, if it belongs to it.

On the part of the complainant evidence was offered, showing that the pine tract by John Freer's titles, after allowing for what



he sold, contained one hundred and forty-seven acres, and that according to Vignol's plat, Edinburg contained three hundred and ninety acres. Complainant then offered parol testimony to prove that the devise in the will included both, which was objected to; but the judge overruled the objection, and the testimony of James Legare, Thomas Hunscome and Thomas Legare was then read, in order to prove that Mrs. Freer and Charles Freer regarded the pine land and Edinburg as one tract, and that she had possession of both.

He adduced Mrs. Freer's tax returns for 1808, for five hundred acres in St. John's Parish, and also the same in 1816. He proved that Charles Freer returned six hundred and fifty acres. He also adduced a bill in equity, filed by defendant Wilson, to procure a sale of Charles Freer's property, which did not mention his land. He also proved a conveyance from Charles Freer in 1809, to Thomas Hunscome of six hundred acres on John's Island, and forty-six acres were sold by Wilson, his administrator, (the defendant) as per Vignol's survey, to Stevens. Mr. James Legare being called, testified that John Freer had no lands to witness's knowledge, at the time of his will, except the said two tracts.

Here the case closed, and Messrs. Petigru and King, contended they had proved that the two tracts formed one plantation and were included in the devise. Mr. Prioleau

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on the \*contrary contended that the case was not proved by the testimony of the witnesses, and that it was contrary to common sense to infer that two pieces of land, three miles apart, were one plantation, that it was of no consequence what Mrs. Freer, Charles Freer and others supposed, for Mr. John Freer alone had made the will, and his intention alone was to be proved which was not—that in fact, it was not even proved that his widow or Charles Freer even, regarded them as one. That Mrs. Freer's using it, was probably as executrix of her husband, or by sufferance of her son, who died many years before her. That if the two tracts had been one plantation, as contended for, the family would have known it, and the complainant who married a daughter would not have been so ignorant of it as to have pointed it out as undisposed of, and as forming no part of Edinburg.

Gaillard, Ch.—Mr. John Freer, by his will left to his wife a life estate in his plantation on John's Island, and says "whenever she shall die or remove off my said plantation, as the case may be then and in that case, it is may will that my said plantation on John's Island, containing five hundred and forty acres, more or less, shall be sold for the most money that can be got for it, and the moneys arising from the sale thereof, I give and bequeath to my daughters," &c.

On the death of Mrs. Freer the plantation was sold, and purchased by the complainants for twelve thousand five hundred dollars, who conveyed it on the same day to Edward Whaley. The tract on which Mr. Freer resided was known by the name of Edinburg, and contained about three hundred and ninety acres. He had another tract, a pine land tract, from two to three miles off, which furnished timber for Edinburg, on which there was scarcely any, and on that account was necessary to it. The pine land and Edinburg tracts contain together about five hundred and thirty-seven acres. Whaley's titles do not embrace the pine land tract, but he is willing to take it. It is now claimed by the representative of Charles Freer, who was the heir at law of the testator, and the question is, does this pine land tract pass under the above recited clause of the will? The parol testimony which was objected to, but which is received, shows satisfactorily that the Edinburg and the pine

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land \*tracts were always considered as forming one plantation, and so held and enjoyed. On another point, this evidence is also conclusive, that Mr. Charles Freer, the son, always considered the land as his mother's. I think that when the testator said, "my plantation on John's Island," he intended the Edinburg as well as the pine land tract; the latter furnishing the former with timber necessary for it, and both having been always used and enjoyed together and considered as constituting one plantation. The parol evidence is received to show a fact consistent with the will, not to contradict it; for unless the testator meant by his plantation the pine land tract as well as the Edinburg, then only three hundred and ninety acres would pass, instead of five hundred and forty the quantity it contained. A plantation may consist of several parcels or tracts of land not adjoining each other. Where the word plantation only is used, it may be difficult often to ascertain (if it should consist of several tracts) what quantity of land was intended by the testator; but where, as in the present case, the number of acres is mentioned, the word plantation, may well be deemed sufficient to carry a tract of timber land, necessary to another tract which was cultivated and which had none, and where the two make within three acres, as appears by a recent survey, the quantity mentioned in the will. It is ordered and decreed that the Commissioner do make titles to Mr. Whaley for the pine land tract, and on Mr. Whaley's receiving them, that he be perpetually enjoined from proceeding on his judgment at law against the complainant. The complainant to pay Whaley's costs; the other parties each to pay their own costs.

Defendant, Wilson, appealed upon the following grounds:

1. Because parol testimony was inadmissible to explain the devise.

2. Because if it could be received for that purpose, it ought to be very clear and decisive of testator's meaning, which was not the case with the testimony adduced.

3. Because whether Mrs. Freer, her son Charles, and others, regarded the two tracts as one plantation, or not, was perfectly immaterial, the question arising solely under the will.

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*\*Prioleau, for appellants.* If there is any ambiguity in the will, it is not such a one as parol testimony is admissible to explain. It was merely an error in the quantity of acres, five hundred and forty, instead of three hundred and ninety. If testator had devised his house, having ten rooms, parol evidence could scarcely suffice to show that he meant two houses, one having six, and the other four. If testator intends to give one thing, but in fact gives another, it cannot be corrected. *Cases temp. Talb.* 240, (*Brown v. Selwyn*.) 11 Johns. 200; 3 Taunt. 147, 155; 1 Ves. jun. 258, 9; *Id.* 415.

If such evidence be receivable, however, it ought to be extremely clear; posterior circumstances or expressions used by the testator at the time of making his will, are not admissible. 1 Ves. 475; 2 Ves. & B. 199; 11 Johns. 219; 6 T. R. 671. Some of the witnesses say that the two tracts have been called one plantation; but this appears to have been of a subsequent date, and not to go back to the time of the testator. The opinion of Charles Freer and his mother, of the two tracts forming one, is not made out by the evidence; and if it were, it could not affect the question of the testator's intention, and that alone is to guide. The complainant married a daughter of Charles Freer, yet he advertised the Edinburg tract distinctly, without noticing the other.

*King and Petigru, contra.* There is no ambiguity in the case. The testator gives his plantation containing five hundred and forty acres, and as in every other case of gift or devise, we must resort to extrinsic evidence, to ascertain to what property the description applies. In England, the word plantations means the setting out of trees; here it means farm or estate. Where different parcels of land separated by small distances, are combined and used as one, and contribute differently to make an entire property or estate, it is certainly not straining terms to call the whole a plantation. 19 Ves. 505; *Sugd. Law of Vend.* 220. In the case cited from Taunt., it was conceded that the manor of Ashton comprehends parcels of land not adjoining each other. The witnesses prove clearly that the two tracts were always considered one plantation. The opinion of Charles Freer ought to be conclusive on the subject;

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he was the heir-at-law, entitled to the pine tract, if his father had not disposed of it by will, and he never pretended any claim to it, but expressly recognized his mother's right.

But if there be an ambiguity, it is a latent one, which may be explained by parol. The terms of the will are perfectly clear; the ambiguity is raised by the extrinsic circumstance that no single tract of land is found answering the description—a plantation containing five hundred and forty acres; an extrinsic evidence may be resorted to for the purpose of explaining the doubt which is thus raised. John Freer knew what these tracts contained; for the deed to him of the Edinburg tract describes it as containing three hundred and ninety acres, and deducting from the pine tract, as conveyed to him, the number of acres he had sold from it, will leave one hundred and forty-seven acres. In the case quoted from *Ca. Temp. Talb.*, 11 Johns. and 3 Taunt. the parol evidence was not offered to explain an ambiguity, but to make a new will. The rule is, that the words of the will being satisfied, parol evidence shall not be admitted to show that more was intended. 2 Madd. 52. The words of this will cannot be satisfied without giving both tracts.

Circuit decree affirmed for the reasons therein given.

DE SAUSSURE, GAILLARD, WATIES and JAMES, CC., concurring.

*THOMPSON, Ch., dissenting.*—John Freer, by his will bearing date 30 November, 1781, gave to his wife a residence on his plantation on John's Island, with liberty to plant thereon in common with his children. In case of her death, he directed the same to be sold, and the moneys arising from the sale, he bequeathed to his daughters. He died in November, 1787, and Charles Freer, his son, qualified as his executor. The testator, at the time of his death, was possessed of two tracts of land on John's Island, one of planting land and another of pine barrens, at the distance of three miles apart. His residence was on his arable land, which was supplied with timber from the pine barren tract. Charles Freer never possessed the pine barren tract in his lifetime; he died in 1808, leaving several children, one of whom married John H. Wilson. The widow of John Freer died in 1817, and the complainant and

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other devisees \*applied to the Court of Equity for a partition of the plantation whereon he resided in his lifetime. Upon a reference to the commissioner, he recommended a sale of the premises, which was accordingly ordered; the land was advertised for sale, and in the advertisement, in the handwriting



of complainant himself, it was specified that the tract contained five hundred and forty acres of cleared land; it was purchased by him at the price of twelve thousand five hundred dollars, and conveyed by him to Edward Whaley. This conveyance includes the planting lands only, described by metes and bounds, and by a resurvey is found to contain only three hundred and ninety-three acres, leaving a deficiency of one hundred and forty-seven acres. Whaley instituted his action at law upon the covenant of warranty and obtained a verdict, and this suit is brought to enjoin the proceedings and for other relief.

On the trial in the Circuit Court, a great deal of testimony was introduced to prove that Mrs. Freer and Charles Freer, considered the two tracts as included in one, which the counsel for defendant contended was admissible, and I think correctly. Where a fact done, in its nature is equivocal, parol evidence may be given to show the purpose for which it was done; as in the delivery of the possession of lands, parol evidence may be given to show that it was delivered in the character of a purchaser. But the case of a contract of purchase is very different, because in a purchase the precise terms of the contract are essential to it, and therefore it would be improper to say that the party should be at liberty to enter into parol evidence of the terms of the agreement.

But admitting parol evidence was admissible to prove that Mrs. Freer and Charles Freer regarded the two tracts as one plantation, it was perfectly immaterial, the case arising solely under the will and the deed. It is contended by the counsel for the defendant, that inasmuch as the pine land is useful to the planting land in supplying timber, and had been applied to that purpose by Mrs. Freer, that it passed under the devise of the plantation. Now I take it that the word "plantation," although not a technical term, has a definite meaning, comprehensible and

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understood by every person of common \*understanding. It means lands used for cultivation, as contra-distinguished from pine land, and a devise of the one will no more pass the other, than a devise of arable land will pass pasture. The law requires that every devise should be specific, this is sufficiently so. As far as this case affects the defendant, Whaley, the will of John Freer has nothing to do with it; his claim is derived from the deed of Robertson to him, which explicitly describes the planting lands by metes and bounds, and he is estopped from averring any thing to the contrary. The decree of the Court of Equity, the advertisement, the conveyance, all speak of it as one isolated tract. Moreover, Whaley states in his answer, that he believed the tract contained five hundred and forty acres, as stated in the public advertisement, and that he knew nothing

of the pine tract being necessary to make up the difference; and it would be monstrous to allow complainant to take advantage of his own wrong, by a substitution of worthless pine barrens, in the place of valuable planting lands. It would be in vain to search for a precedent for this case, but I fear it will form one for a thousand others, and inundate this Court with litigation. Every person who possesses two or more tracts of land, and devises one, must express in his will that he does not mean another.

For the reasons above set forth, I am of opinion that the decree of the Circuit Court was erroneous.

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#### Harp. Eq. 65

Ex parte FREDERICK RUTLEDGE, Ex'or  
of Wm. Rutledge.

(Charleston. March Term, 1824.)

[Corporations *§* 155; Gifts *§* 42.]

Donee, to whom the dividends of Bank Stock were given for life, for his maintenance, "to be paid half yearly, as they shall be received from the bank," died a few days before a semi-annual dividend was declared: Decreed that the dividend should be apportioned, and the amount which had accrued at the donee's death should be paid to his executor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. *§* 569; Dec. Dig. *§* 155; Gifts, Cent. Dig. *§* 75; Dec. Dig. *§* 42.]

[Life Estates *§* 5.]

[Where the dividends of bank stock were settled upon a person for life, for maintenance, who died a few days before the time of a periodical dividend, the dividend was apportioned between his estate and the remainder-man.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. *§* 11; Dec. Dig. *§* 5.]

[Life Estates *§* 15.]

[The dividends on bank stock, although payable at regular periods, are a constantly accruing interest, and are, it seems, apportionable between a tenant for life and the remainder-man.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. *§* 34; Dec. Dig. *§* 15.]

This case came before the Court on a petition, setting forth that Mrs. Ann Coslett executed a deed on the 17 April, 1816, by which she assigned to trustees certain shares in the Planters' & Mechanics' Bank, of Charleston,

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"in trust nevertheless to \*receive the dividends on the same, and pay and apply the same half yearly, as they shall be received from the bank, unto the said Ann Grimke Rutledge and her husband, William Rutledge, to and for their joint use, maintenance and support, during their joint lives, free and exonerated from the debts, contracts and engagements of the said William Rutledge, and from and after the decease of either of them, in trust to pay and apply the dividends aforesaid, in manner aforesaid, to the survivor during his or her natural life, and from and after the death of the said survivor, then in

trust to transfer the said bank shares to me, the said Ann Coslett, my executors or administrators, for the alone and sole purpose of securing the same to my son, Charles Grimke Coslett, his heirs, executors, administrators and assigns; or to such persons or person, as he may have bequeathed the same by his will."

William Rutledge having survived his wife, received the dividends on the said stock to the 1st day of January, 1822, and died in the month of June following, only a few days before the semi-annual dividends were declared. The petition alleged that he had no other maintenance than what was derived from these dividends, and that he died greatly indebted to the petitioner, who had made considerable advances to him, relying on a reimbursement from this fund. The petitioner is the executor of William Rutledge, and now prayed that so much of the said dividends as accrued up to the time of his death, should be paid to him. The trustees and attorneys of Mrs. Coslett and her son opposed this application, on the ground that the said dividends are not subject to an apportionment.

**WATIES, Ch.**—I think the claim of the petitioner is a just one, and comes within the general rule adopted by the Court on the subject. An entire interest, which only accrues at particular periods, cannot be apportioned, because it is not susceptible of any intermediate division, and therefore it was necessary in England to provide by a positive statute for the apportionment of rent. But it appears from all the cases which have been referred to, that wherever an interest is daily

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\*accruing, it may be apportioned, as in the case of interest on a bond, which accrues *die in diem*. (*Banner v. Lowe*, 13 Ves. 135) So when the fund is provided for maintenance, which is still more favored. "This (says the Court in *Hay v. Palmer*, 2 P. W. 503) is a stronger case than that of interest, for it is for daily support." The present claim is of that nature, it is expressly declared by the deed of Mrs. Coslett, that the dividends on the stock settled, were intended as maintenance, and there is reason to believe that the advances made by the petitioner to his testator were on the credit of them. They were the only funds on which the testator depended for subsistence and they were daily accruing; for although payable only half yearly, yet they arose out of the daily profits of the bank, which might be ascertained at any intermediate time. It is therefore ordered and decreed, that it be referred to the commissioner to ascertain the amount of the dividends which had accrued at the time of the death of the petitioner's testator, on the stock settled on him for life, and that the same be paid to the petitioner as his executor.

On appeal, Grimke for the appellants argued that there could be no apportionment in such a case, and cited 3 Atk. 503; Amb. 279; 2 Ves. 672.

Decree affirmed by the whole Court.

### Harp. Eq. 67

CHARLES and THOMAS DRAYTON et al.  
v. CHANDLER LOGAN et al.

(Charleston. March Term, 1824.)

[*Mortgages* ⇨480.]

Bill to foreclose a mortgage, executed in 1788. Defendants offered evidence of various payments, some of which were contested, and relied on the presumption of payment from lapse of time. The Circuit Court ordered an issue at law to inquire if anything, and how much was due, which order was affirmed on appeal.<sup>1</sup>

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 33 C. 398, 11 S. E. 1073.

For other cases, see *Mortgages*, Cent. Dig. § S. C. 398, 11 S. E. 1073.

[*Appeal and Error* ⇨87.]

An order directing an issue, is a proper subject of appeal.<sup>2</sup>

[Ed. Note.—Cited in *Ex parte Trustees of Greenville Academies*, 7 Rich. Eq. 476.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 559-569, 577-596; Dec. Dig. ⇨87.]

**GAILLARD, Ch.**—The complainants, as executors of their father, sold a house and lot in Broad street, to Dr. Chandler, and made him titles on the 22 April, 1784, and Mr. Chandler mortgaged it to them in 1788, to secure the sum of four thousand three hundred and forty-seven pounds, ten shillings and nine pence, which was divided into three

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equal parts, and for \*which bonds were given, bearing date with the mortgage, one of them to Charles, another to Thomas, and the third to Glen Drayton. The consideration expressed in the titles is three thousand five hundred and sixty guineas. The bill is brought to foreclose the mortgage. The defendants say that the bonds are paid, and produce receipts for payments, ending in July, 1795, to Charles Drayton of two thousand two hundred and ninety-two pounds nine shillings six pence, to Glen Drayton two thousand and one pounds ten shillings, to Thomas Drayton, one thousand six hundred and thirty-one pounds fifteen shillings, making six thousand three hundred and eighty-one pounds and five pence. Some of these sums were paid between 1784, the date of the titles, and 1788, the date of the mortgage and bonds. Many of the payments are

<sup>1</sup> This statement as to affirmance is apparently an error. See case on appeal published as a note in 3 Strob. Eq. 37.

<sup>2</sup> See *Jaggers v. Estes*, 3 Strob. Eq. 34; 4 Strob. 122; *Ex parte Greenville Academies*, 7 Rich. Eq. 476; *Mayrant v. Guignard*, 3 Strob. Eq. 126.



contested, and it is insisted for the complainants there is still a balance due. The defendants rely as well on these payments as on the presumption of payment arising from length of time, to repel which, a number of facts and circumstances were adduced. These clearly form a subject peculiarly proper for the consideration of a jury. If the defence be sustained, then there will be an end of the claim, if not, it must be ascertained what is due, and how much and on which of the bonds. If any thing be found due, then the other points made in the case will arise and require the consideration of the Court. There being no legal representative of Dr. Chandler against whom to bring suit, the complainants may bring it against the devisees and legatees of Dr. Chandler, or such of them as are in possession of the house and lot, and no objection shall be made to suit being thus brought, unless either of the defendants should before the suit is commenced, administer on Dr. Chandler's estate. It is ordered that an issue be directed to the Court of Common Pleas, to ascertain whether there be any thing due on the bonds of the complainants, and if any thing, how much and on which of them, and that the verdict of the jury be sent to this Court.

From this order complainants appealed, on the ground, amongst others, that the chancellor on circuit had determined incorrectly in sending the cause to a jury; whereas, it was submitted, that it was a fit subject of inquiry before the proper officer of this Court, to whom questions of this kind are usually referred.

<sup>3</sup> Decree affirmed by the whole Court.

<sup>3</sup> This statement as to affirmance is apparently an error. See case on appeal published as a note in 3 Strob. Eq. 37.

#### Harp. Eq. \*69

\*WM. AIKEN, Trustee, v. THOMAS MILLER et al.

(Charleston. March Term, 1824.)

[*Executors and Administrators* ⚡423.]

In 1804, P. one of the defendants, purchased property at the sales of an intestate's estate, for which he gave bond with the other defendant M. as surety. In 1808, the first administrator having died, P. administered *de bonis non*, and the bond came into his possession, and was afterwards lost; *Held*, that the next of kin might sue the administrator and his surety, and set up and recover the bond.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1660; Dec. Dig. ⚡423.]

The bill stated that J. H. Bowler died in 1804, and administration upon his estate was granted to Eliza Varlin and Sophia Hughes. That they sold the personal estate of Bowler, at which sale Berkley Ferguson made purchases to the amount of about eleven or

twelve thousand dollars, for which he gave a bond with the defendant Miller as security. That upon the death of the administratrix, administration *de bonis non* was granted to Ferguson, who thereupon received the bond in question, as a part of the papers of the estate—and the bill charged that the bond was not paid; that Sarah Bowler was the only child of the intestate, and entitled to all his estate: That upon her intermarriage with John Hunter, she conveyed all her estate to the complainant, in trust, for certain uses in a marriage settlement between them. That in this manner the complainant became entitled to recover the amount of the bond from Miller as security. The bill does not pretend that Ferguson was ever called to an account for his administration, or that the bond in question was ever transferred to the complainant.

The answer of Miller, the alleged surety, denied that any such bond ever was executed, and demanded that the genuineness of his signature should be proved. The defendant Miller also demurred to the bill, and pleaded, that if it ever existed, the bond must be presumed paid by lapse of time:—That by statement in the bill, it appeared the bond came into the hands of Ferguson the principal, as administrator, and from that time the surety must be discharged, and the bond considered as assets in the hands of the administrator, who may yet be a creditor of the estate. That the answer denying the existence of the bond, there was no ground of equitable jurisdiction, and the complainant could not go

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into proof upon the subject, \*that the complainant was not entitled to recover, as the bond was given to the administrators, and not assigned or transferred; but on the contrary, was still the property of Ferguson, as administrator.

At the trial the objections stated above were urged. Mr. Samuel Abbot, a witness, stated that he was present at the sale of the estate of Bowler in 1804 or 1805, and that Ferguson became a purchaser to the amount stated in the account of sales; on the margin of the account sales, the name of the defendant was marked as surety. The complainant also produced the receipt of B. Ferguson for the papers of the estate; and among which was his own bond; but the fact of Miller having been the surety was not otherwise proved.

Thompson, Ch.—The existence and loss of the bond mentioned in the bill being satisfactorily proved, it is ordered and decreed that the complainant do recover the amount thereof, together with the interest and cost of suit.

The defendant, Miller, appealed;—Because, the complainant made out no case entitling him to recover this bond. Also, the answer having denied the existence of the bond, the

remedy was at law, and the complainant could not contradict the answer, and did not sufficiently, if he could. Also, that the bond if ever given, came rightfully into the hands of the obligor, and the surety was thereupon discharged, especially after such a lapse of time.

Also, the defendant Ferguson, being the administrator of Bowler, is entitled to all the assets of the estate, until an account and surrender.

Hunt, for appellant, argued that there was no sufficient evidence of the existence of the bond. There is no ground for believing that the bond was ever assigned by Ferguson. In 1808 the bond came into the hands of Ferguson, the only person who was entitled to receive it, or to receive payment of it. This must be considered as having operated a discharge of the bond; it was the duty of the administrator to have passed it to the credit of the estate, and from aught that appears, there having been no account taken, he may

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have done so. The \*surety has a right to have an account taken, before he can be made liable; it may appear that the administrator is a creditor of the estate. Persons who are aggrieved by his administration, should sue Ferguson as administrator, and his surety to the administration bond. At all events, the debt is suspended during Ferguson's administration, and this releases the surety. 1 Atk. 461. It is suspended until the administration is at an end. Ferguson is still living, he is still administrator, he alone is entitled to receive or sue for the debt.

Petigru, contra. We sue in equity, because the suit could not be brought at law; the suit is to establish and recover a lost bond, and the suspension of the right to sue at law is another ground of the equity jurisdiction. In Mitford, it is laid down that where a suit cannot be brought at law, by reason of the forms of pleading, the party may come into equity. It is objected that the next of kin cannot sue a debtor of the estate. Where an executor or administrator combines with the debtor, the next of kin may sue, 2 Madd. Ch. 153. But the administrator must be made a party; he and his surety have a right to show payment. This opportunity has been afforded by the present proceeding. But Ferguson himself says in his answer that the debt has not been paid, and this is conclusive both on him and his surety.

THOMPSON, Ch., delivered the opinion of the Court.

It is ordered and decreed that the decree of the Circuit Court be affirmed. It is further ordered, that should the defendants set up as discount, any payments made on the

aforesaid bond, that it be referred to the commissioner to report thereon.

DE SAUSSURE, GAILLARD, WATIES and JAMES, CC., concurred.

### Harp. Eq. \*72

\*CHRISTOPHER JENKINS et al. v. SARAH CLEMENT and CHARLES D. DEAS.

(Charleston. March Term, 1824.)

[Reported and annotated in 14 Am. Dec. 698.]

[Wills ⇨598.]

A general, unqualified devise of lands, without any words of inheritance or perpetuity, will give a fee.<sup>1</sup>

[Ed. Note.—Cited in Peyton v. Smith, 4 McCord, 477, 17 Am. Dec. 758; Robert v. Ellis, 59 S. C. 157, 37 S. E. 250.]

For other cases, see Wills, Cent. Dig. § 1327; Dec. Dig. ⇨598.]

[Husband and Wife ⇨31.]

A plantation was given to W. C. by the will of his wife's brother, E. W., deceased, and by the same will other lands were devised to W. C. in trust, to sell and divide the proceeds among the testator's nephews and nieces, the complainants. Soon after the testator's death, viz., on the 2d of March, 1801, W. C. settled on his wife the plantation devised to him, together with slaves which he had acquired by his wife in marriage. It appeared that he had little or no other property, and had promised before marriage to settle his wife's fortune. In January, 1802, W. C. sold the lands devised to him in trust; but never paid over the proceeds. He remained in good credit until 1805 or 1806, when he became embarrassed, and died insolvent in 1820. Decreed, that the settlement was not valid as to the complainants, who were entitled to be satisfied their legacies out of the property settled.<sup>2</sup>

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 179; Dec. Dig. ⇨31.]

The bill was filed to obtain the construction of the Court, on a devise in the will of Edward Wilkinson, deceased, the brother of the defendant Mrs. Clement, and to set aside a settlement made by her late husband, William Clement, in trust for her.

The will of Edward Wilkinson was as follows:—"In the name of God, amen. I, Edward Wilkinson, of the Parish of St. Paul, being sick and weak of body, but of sound disposing mind and understanding, do make this my last will and testament. First, it is my will and desire that my just debts be paid out of my personal property. Secondly, I devise my plantation at Willtown, called the Island River Swamp plantation, to my brother-in-law, William Clement. My plantation on Slan's Island, I devise to my cousin William Smith. My plantation on the main

<sup>1</sup> By Act of 1824, 6 Stat. 237, every devise carries the fee, unless such construction be inconsistent with the contract.

<sup>2</sup> Izard v. Middleton, Bail. Eq. 228; *Ib.*, 141, 244, 268; Rich. Eq. Ca. 185; 2 Rich. 356; 3 Rich. 33; Rice. 300; 2 Bail. L. 118; 1 Hill L. 16; 2 Hill Eq. 629; 10 Rich. L. 72.



of Willtown, called the Swamp plantation, and also two tracts of land, one containing seven hundred and fifty acres, situated in Colleton county in the State of Georgia; another, (number of acres unknown) situated near Coosawhatchie, I leave to be sold by my executors and executrix, to be hereafter named, on such terms or credit as they may think most conducive to the interest of those it may concern; and it is my will and pleas-

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ure \*that the moneys arising from the sales of the aforesaid three tracts of land be equally divided, share and share alike, among my nephews and nieces, the issue of my sisters, who are now born or may happen to be born four months from the date of this my will; it is also my will and desire that if any of my said nephews and nieces, either now born or to be born within the four months aforesaid, should die unmarried or without making a will, that in such case or cases, the portions of such so dying, arising out of the sales of the three tracts of land aforesaid, shall be equally divided among the survivors. I will and devise the plantation on which I usually reside at Toogoodoo, to my dearly beloved mother Susannah Wilkinson, Sen., to be disposed of at her death as she may think proper."

"The remainder of my horses and of all my other personal property, I bequeath to my dearly beloved mother, Susannah Wilkinson, Sen."

"And I do hereby constitute and appoint my said dearly beloved mother, Susannah Wilkinson, Sen., executrix, and my brother-in-law, Wm. Clement and Thomas Whaley, executors of this my last will and testament."

The bill charged that the devise of the plantation at Willtown to William Clement gave him but an estate for life.

It appeared that on the second of March, 1801, William Clement conveyed to the defendant, Charles S. Deas, the plantation devised to him by his brother-in-law, Edward Wilkinson, and twenty-five slaves which he had received with his wife on marriage, in trust for his said wife, the other defendant. This conveyance was charged to be fraudulent.

At the time of making this conveyance, William Clement was not in debt; or but to a very trifling amount; and the evidence was that he remained in good credit until 1805 or 1806, when he became involved in his circumstances by becoming an accommodation endorser for one Peyton.

There was testimony that before his marriage, Clement had promised the father and mother of his intended wife that he would settle her fortune upon her. A witness (Col. Cattle,) testified that after Edward Wilkin-

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son's death, he, witness, "told \*Clement that he was sure Edward Wilkinson intended the property for his sister; that he had not nam-

ed Mrs. Clement, because he did not wish to mention one sister to the exclusion of others; (he had objected to the marriage of two of his sisters; Clement said he was sure of it, that he was flattered by the confidence; that he had all along promised Mrs. Wilkinson to make a settlement, and would do so. He could not have been in debt. Witness told him he might with honor make a settlement, as he was entering into life." The testimony of this witness was objected to, but admitted by the Court.

In January, 1802, William Clement sold the plantation on the main at Willtown, which had been devised by Edward Wilkinson to his executors in trust, to be sold for the benefit of his nephews and nieces, (who were the complainants,) for two thousand two hundred and forty pounds: and afterwards the land at Coosawhatchie.

In 1820, William Clement died.

Gaillard, Ch.—The bill has two principal objects. One to set aside the deed of Wm. Clement to the defendant, Mr. Deas, bearing date March 2, 1801, and recorded on the 18th April, conveying to him in trust for Mrs. Sarah Clement, wife of the said Wm. Clement, negroes which came by her in marriage, and a plantation left to him, Clement, by Edward Wilkinson, Mrs. Clement's brother. The other is to obtain the opinion of the Court on the devise of the plantation to Mr. Clement, the complainants contending that he was entitled under it only to a life estate.

Soon after his coming of age in the fall of 1799, Mr. Clement intermarried with the defendant, Sarah Clement, and in the Spring of 1800, a division of personal property, to which they were entitled, was made between Edward Wilkinson, his sister, Mrs. Clement, and their mother, Mrs. Wilkinson. The share which fell to Mr. Clement, in right of his wife, is included in the deed to Mr. Deas, and also the plantation left to Mr. Clement by his brother-in-law, Edward Wilkinson, by his will dated on July 10, 1800. Mr. Clement was indebted at the time the settlement was made; there are judgments against him beginning in 1803, and others subsequent, and

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\*part of the debt, one hundred and seventy dollars, for which there is a judgment, existed prior to the settlement. There is some evidence of a verbal promise on the part of Mr. Clement, to settle on his wife the property he should get by her. I lay this aside; for a settlement made after marriage, though in pursuance of a parol agreement made before, is not valid against creditors. The devise of the Willtown plantation by Mr. Wilkinson is to Mr. Clement, his brother-in-law. Col. Cattle states, that soon after Wilkinson's death, he told Clement he must know Wilkinson did not intend the plantation for him, and that it was through delicacy he had not mentioned his wife, as he was not on speaking terms with his two other sisters, the mar-

riage of one of whom he disliked, and that he advised Clement to settle the property on his wife, as he could then do so honorably, as he did not owe money. The settlement was called a voluntary one, and being made after marriage, must be so considered, notwithstanding the personal property, all of it came by the wife, and there is reason to believe the inducement to the devise of the Willtown lands to Clement, was his being the husband of the testator's sister. The settlement on Mrs. Clement, though voluntary, was made under circumstances entitling it to favorable regard, unless it can be discovered that some fraud on his creditors was intended.

Clement was indebted at the time of making it, but the sum he owed, which, from length of time and no demand made, may fairly be presumed to be satisfied, was too inconsiderable to afford reasonable evidence of a fraudulent intent, and it is a circumstance in favor of the fairness of the act, that Clement's credit continued good a long time after, until 1805, when it began to decline, in consequence, Mr. O'Hara thinks, of his being obliged to take up notes he had endorsed for Peyton. I am of opinion that the settlement is fair and ought to be sustained.

The next question relates to the Willtown plantation. The devise of it is in these words:—"I devise my plantation at Willtown, called the Island River Swamp Plantation, to my brother-in-law, Wm. Clement. The devise is unaccompanied by any words of inheritance or perpetuity. So is the de-

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vises \*of the plantation on Slan's Island to his cousin Wm. Smith; indeed, there are no words of inheritance or perpetuity in any part of the will. He left three tracts of land to be sold by his executors, and the moneys arising from the sale to be divided among his nephews and nieces. The proceeds of the sale, are of lands in fee simple, and as the nephews and nieces have the benefit of a fee simple estate in the lands ordered to be sold, it is argued it should be presumed he intended a fee simple in the devises to his brother-in-law, Clement, and his cousin, Wm. Smith. "The remainder of my horses and of all my personal property, I bequeath to my dearly beloved mother, Susannah Wilkinson, Senior." This is the last bequest in his will, and as it relates only to personal property, it is said it affords an inference that he thought he had disposed of all his real estate. With respect to the devise to Clement of the plantation at Willtown, I should declare that he took under it only a life estate, but for some late cases decided in this Court, to the authority of which I am bound to submit; I think that the case of Whaley and Jenkins, 3 Eq. Rep., governs this, and that the devise carried a fee. It is ordered and decreed accordingly.

From this decree complainants appealed,

and moved to reverse it on both the points involved in the case.

De Saussure, for motion. It is clearly the English rule that a devise of lands, without any words of inheritance or perpetuity, gives only an estate for life. 6 Cruise's Dig. 304; 1 Bridg. Dig. 535. It is contended, however, that the decisions of this Court have established a different rule; but upon examining those decisions it will be found that they are reconcilable with the English cases. In the case of Whaley and Jenkins, the will contained the introductory words, "with respect to my worldly estate;" which the English judges have held to enlarge the subsequent unqualified devise of lands to a fee. Cowp. 352; Id. 659; Doug. 760. The case of Clarke and Mikell, 3 Eq. R. 168, was decided on similar introductory words. And so in Fraser and Hamilton 2 Eq. Rep. 575.

As to the validity of the settlement: William Clement took possession of the property

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devised to him in trust, sold the \*swamp land for ten thousand dollars, and the lands at Coosawhatchie for one thousand five hundred dollars. Could he take possession of the property devised to himself and settle it beyond the reach of his creditors, and at the same time take the property with which he was entrusted for others, sell it and dissipate the proceeds?

William Clement took possession of this property a year before he settled it. He was, at the time of the settlement indebted to the amount of five or six hundred dollars and was executor of Wilkinson. We contend that his debts alone were sufficient to vitiate the settlement as to the creditors of that date; and if void as to them, subsequent creditors may take advantage of it. Reid v. Livingston, 3 Johns. Ch. Ca. 481; Battersbee v. Farrington, 1 Swan. 106; Montacute v. Maxwell, 1 Pr. Wms. 618. 1 Atk. 93; 2 Atk. 600; 12 Ves. 155; 2 Br. Ch. Ca. 147.

But the ground most relied on is, that he was a trustee at the time and could not settle any property so as to shield it from responsibility for his breach of trust. He certainly was accountable for the property which was in his hands; he was a debtor to his cestui que trust to that amount, and while a debtor, he could not, according to every principle and authority, make a valid settlement. The Act of the Legislature of 1785,<sup>3</sup> relates only to antenuptial settlements: post-nuptial settlements are not within it and must be regarded as merely voluntary.

But if we are to regard Clement's debt to the complainants as having accrued subsequently to the settlement, still we are entitled to consider it fraudulent and void. The rule is, that if one make a voluntary conveyance, with the intention of contracting debts afterwards, it will be void. Rob. on

<sup>3</sup> 4 Stat. 653; 6 Stat. 633; Bail. 250, n.



Fraud: Con. 35, 27, 238, 9. But intentions are not the subject of clear and direct evidence; we must ascertain them as well as we can, by referring to subsequent acts; and if these are such as to afford reason for believing that the parties may have acted with fraudulent views, we are warranted in coming to that conclusion.

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\*In this case, William Clement sold the lands of the complainants soon after the execution of his settlement. When he received the proceeds or spent them does not appear. The circumstances certainly afford grounds for concluding that he had these transactions in view when he made his conveyance.

Petigru, Axion, and Hunt, contra. If the devise of the plantation to William Clement is to be governed by the English rules, it may be admitted that a fee would not pass. But the English cases on this head can be no authority here; because they are consistent with themselves and depend on principles which have no application here.

In the construction of these devises, the English judges profess to be governed by two rules: 1, that the testator's intention must be followed where it can be known. 2, that the heir is not to be excluded without express or clear terms of exclusion. *Moor v. Denn*, 2 Bos. & Pul. 250. But it is easy to perceive that these two rules are inconsistent with one another. If the intention of the testator be the real inquiry, the same words that would express his intention in one case, would be equally expressive whether the heir be affected by them or another person, and express words are not more necessary to point out the testator's meaning in giving away land, than in making any other disposition. But in fact the claim of the heir-at-law does not depend on the testator's meaning at all. He claims by the law; not from the bounty of the ancestor, but from same tenure by which the ancestor held. It would be as easy to serve two masters with opposite wills, as to follow at the same time two rules that are at variance with one another.

An examination of the cases will show that the decisions have conformed to neither rule. For if express terms be necessary to exclude the heir, all those cases in which the judges have held the devise to amount to a fee by implication must be abandoned. In *Holdfast v. Martin*, 1 T. R. 411; a devise of "my estate at A." was held to pass a fee, because the word estate may signify all the interest that one has; but surely there were no clear terms of exclusion here. Indeed it

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is highly im\*probable that the testator used the word "estate" in relation to the "status" or idea of property which he held at A. and yet unless he did so, it amounts to no more than if he had said "I give my lands at A."

In *Doe v. Richards*, 3 T. R. 356, it was held that a bequest of "all the rest of all my lands, tenements, hereditaments, goods and chattels, my legacies and funeral expenses being thereout paid," would carry a fee. So the words real effects. *Hogan v. Jackson*, Cow. 299. And even the introductory words of a will, expressing an intention to dispose of his worldly estate have been held sufficient for this purpose. *Loveacre v. Blight*, Cow. 352. It is evident that these cases were determined merely upon the testator's intention, and are inconsistent with the idea that the heir is not to be excluded without clear and express term of exclusion.

But there are other cases, in which the testator's intention has been wholly disappointed, by adhering to the rule in favor of the heir. It is needless to do more than refer to Lord Mansfield's observations on this subject. "I really believe," says his lordship, "that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For common people, and even those who have some knowledge of the law, do not distinguish between a bequest of personalty and a devise of land or real estate. But as they know they give a man a horse, that they give it him for ever, so they think if they give a house or land, it will continue the sole property of the person to whom they had left it." *Loveacre v. Bright*, Cow. 355.

But the cases are not on inconsistent by turns, with either rule; they are also inconsistent with one another.

In *Loveacre v. Bright*, Cow. 352, it was held that the introductory words expressive of a disposition to make a will touching his worldly estate, followed by a general devise of land without words of limitation, would give a fee. But in *Frogmorton v. Wright*, 3 Wils. 414; (and see also, *Denn v. Gaskin*, Doug. 760,) it was ruled otherwise. Again, in the same case of *Frogmorton v. Wright*, the Chief Justice does not doubt that the word "hereditaments" will carry a fee in a

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will. But in *Moor* and *\*Denn*, 2 Bos. & Pul. 250, this very point was under consideration, and it was determined that the word hereditament, gives only an estate for life.

In *Doe v. Richards*, 3 T. R. 356, a bequest of lands and goods, "my debts being thereout paid," was held a fee. But in *Moor* and *Denn*, the words were "all the rest of my lands, tenements and hereditaments, and all my goods and chattels, after payment of my just debts, I give and bequeath to Sisily Carr;" 2 Bos. & Pul. 250; and it was decided that Sisily Carr took only an estate for life. It may be safely said, then, that the English cases furnished no consistent principle of decision, and that the confusion arises from admitting in the construction of wills, two rules that are irreconcilable with each other.

But this embarrassment does not exist in this country. But the Act for abolishing the rights of promogeniture,<sup>4</sup> the condition of the heir is done away. But the only reason in England for not construing devises of land according to the intention of the testator, just like a bequest of personalty, arises from the condition and the rights of the heir-at-law. It is a maxim, cessante ratione, cessat lex, and as the reason of the rule is done away, the rule itself cannot be any longer of force. This is the view of the subject taken by Chief Justice Pendleton; who, in admitting the authority of the English cases, on devises of land before the Revolution, expresses his opinion clearly, that since the alteration of the rules of descent as to real estate in Virginia, those cases will not apply. Every argument from principle, therefore, is in favor of construing devises of this sort according to the real intention. And the Act of Assembly for permitting devises of land is general. "Any person having right or title to any lands, tenements, or hereditaments whatsoever, may dispose thereof by will." P. L. 491, 3 Stat. 708. There is no technical form of words prescribed, there are no rights of the heir-at-law to be protected, and it is only necessary to know what is the intention of the testators.

But this question has already been decided; and it is impossible to distinguish this

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case from *Whaley and Jenkins*, 3 Eq. \*Rep. 80, without introducing all the uncertainty of the English cases.

But if proof of the intention to give a fee is required, there is enough in the will to satisfy every reasonable doubt.

The circumstances of the testator show he meant to give the fee simple. Of his sisters he excluded two, but made provision for their children. Is it to be supposed that he meant to be more liberal to those nephews and nieces than to a favorite sister, whose children would be thereby excluded? If he did not mean a fee, we must suppose him to have intended to give the plantation, after Clement's death, to those sisters whom he has not mentioned. The limitation over, in case of his nephew's dying, shows he did not mean their parents to take, which is further proof that he did not mean to give them the reversion of the plantation devised to Clement. The bequest of residue being confined to personalty, shows that he thought he had given all his real estate.

His honor at the hearing, relied on the circumstances that the devise to complainants contains no words of limitation; and in this particular, his opinion agrees with Justice Buller, in a similar case. "In *Chester v. Paynter*, it appeared that the testator knew how to give a fee, for he gave an estate to his son and his heirs, but where he

wished to give only an estate for life, he omitted the word heirs. Now apply that to the present cases. In another part of the will the testator gave an estate for life in express words, which shows that if he had intended to give only an estate for life to Mrs. Martin, he would have added the same words." 1 T. R. 414. It is said that the direction to sell, showed he intended to give complainants a fee; but that is only an implication of his intent. It explains that devise to complainants, and shows that without any words of limitation he thought that he could give the fee.

The power of disposing by will, which is annexed to his mother's estate, is relied on; but these words are restrictive, not intended to enlarge her estate, but to prevent her from disposing in her lifetime. *Reid v. Shergold*, 10 Ves. 379; *Bradley v. Wescoat*, 13 Ves. 445.

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\*As to the settlement. It is impeached because it was executed after marriage, and Clement was indebted at the time to the amount of about five hundred dollars. But it is good, because made in pursuance of an agreement before marriage. 1 Ves. Jun. 196, and the cases there cited. There is no case to the contrary but a decision of Chancellor Kent. The opinion of the Master of the Rolls in *Farrington v. Battersbee*, 1 Swan. 106, seems to be in favor of such a settlement.

But even considered as a voluntary settlement, it is not void unless it be fraudulent. 9 Ves. 193. It cannot be fraudulent if it be made with honest intentions and in pursuance of an agreement before marriage, for such an agreement is binding in conscience. But it is said that it is fraudulent against the creditors to whom he was then indebted, and if fraudulent as to them, it is void altogether. It may be true that such a settlement would not protect the property from the creditors to whom the settler was indebted at the time, but it does not follow that the settlement is fraudulent. The distinction is between the common law and Statute of 13 Eliz. cap. 5. If a person owing debts makes a voluntary settlement, the creditors are entitled, independent of the Statute of Elizabeth to satisfaction, even out of the estates settled. For the creditor, by the consideration which he has paid, has an equity superior to every volunteer who is subsequent to him. But the mere circumstance of the settler's being indebted at the time, does not bring him within the Statute of Elizabeth, which says not one word of voluntary deeds, nor of deeds by a person indebted. *Lush v. Wilkinson*, 5 Ves. 384. The third section, which punishes the parties to fraudulent deeds with forfeiture and imprisonment, shows the meaning of the statute. P. L. 69, 2 Stat. 496. Ib. 497. It is impossible to say that William Clement, by settling his

<sup>4</sup> 5 Stat. 163.



wife's fortune in pursuance of an agreement made before marriage, and by settling the lands which his brother-in-law had given him for the use of his family, as he understood the gift, committed a criminal act.

The testimony of Col. Cattel is admissible to show the bona fides of Clement. The ar-

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gument founded on the circumstance \*of his being a trustee amounts to this, that all his property was mortgaged for a faithful performance of his trust. The settlement limits the property to the longest liver, discharged of the trust, which he shows that he could not have made it in contemplation of insolvency.

DE SAUSSURE, Ch.—Two very distinct questions occur in this case. The first is on the construction of the will of the late Mr. Edward Wilkinson. The second is as to the validity of the marriage settlement of the late Mr. William Clement. The words of the devise which are to be construed are as follows: "I devise my plantation at Willtown, called the Island River Plantation, to my brother-in-law William Clement." There are no words of inheritance or of perpetuity in this devise. The representatives of Mr. William Clement claim the property as a devise in fee. This is denied by the complainants. The Circuit Court was of opinion, and so decreed, that the decided cases in this Court had settled the doctrine that words of inheritance or of perpetuity were not necessary in last wills and testaments, and that therefore Mr. Clement took a fee under this devise. I have considered this case, and agree in opinion with the Circuit Court, that the decisions heretofore made have settled this doctrine. I allude to the cases of Whaley and Jenkins, 3 Desaus. Eq. Rep. 80; Clark and Mikel, 3 Desaus. Eq. Rep. 168; Waring and Middleton, 3 Desaus. Eq. Rep. 249. It seems scarcely necessary after those cases to examine the subject further. But I will add a few words.

It is well known that many of the judges in England have regretted the rigor of the rule which required words of inheritance or perpetuity to give a fee in devise of real estate. For it is notorious that the rule tended to defeat the intention of the testator in nine cases out of ten at least. But the anxious desire of the law and the Courts to watch over the interest of the heir at law introduced another rule, that the heir at law was never to be disinherited but by express words or plain and necessary implication. That rule produced a perpetual struggle between the two principals, the duty of giving effect to the wills of testators and the desire to favor the heir at law, the main support of the landed aristocracy. Since the aboli-

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tion \*of the rights of primogeniture, which flowed naturally and necessarily from the

nature of our government, we have no such contending principles existing in our system. Equality of rights is equity, politically as well as morally. It is the duty of the Court to endeavor in the construction of wills to ascertain the intention of the testator, and to give effect to that intention, without regard to technical phraseology. In the case before us, the words of the will gave the land unqualifiedly to Mr. Clement, and I have no doubt that the testator intended to give a fee simple. I have no doubt, because in all such cases the testator would limit the estate for life or years, if he so intended. He makes no further disposition of the property, as he would have done if he had not meant to give a fee. Believing then that he meant to give a fee, I feel bound to give effect to that intent, notwithstanding the absence of words of inheritance or perpetuity. And the decided cases warrant our giving effect to that intention.

We come next to consider the question of the effect of the post-nuptial settlement made by Mr. William Clement of his property. He acquired the land under the will of his brother-in-law; the slaves on his marriage with his wife, and he had little or no other property. He made a marriage settlement subsequent to his marriage, including all the property so acquired. He appears to have been in debt at the time of the execution of the said instrument. These debts were, however, small, and very far short of the property settled. It is contended for the complainants that the settlement is void, and that the property should be subjected to the payment of all Mr. Clement's debts. It must be remembered here that though Mr. Clement died deeply in debt, there are no creditors before the Court seeking relief against the settlement, except the complainants, who are legatees of Mr. Edward Wilkinson. He devised certain tracts of land to be sold, and the proceeds to be divided among these nephews and nieces. It appears that Mr. Clement, who qualified as executor on the will, sold these lands and received and spent the pro-

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ceeds, and has died insolvent; so \*that they will lose their legacies, unless the settled property be subjected to the payment.

It is doubtless true that a voluntary settlement, made after marriage, cannot be sustained against prior creditors. They must be paid out of the property so settled. And it is equally true that when a man settles all his property after marriage, and soon after contracts large debts, so as to manifest that the object of the party was to cover his property, and then to incur debts without the means of paying them, the instrument will be void. For this raises a vehement presumption of fraud, and the settlement will not be supported. The circumstances of this case, if they do not actually warrant the conclusion of a fraudulent intent, operate as a legal fraud. The prop-

erty in question came to Mr. Clement wholly from his wife and her brother, and he was under a moral obligation to make provision for his wife and her children, provided he did no injustice to others. His debts were not contracted immediately after the settlement, but gradually and in the lapse of years; and Mr. Clement's failure arose partly from losses on friendly indorsements. I am unwilling, therefore, under these circumstances, to say that the marriage settlement was made expressly with a view to deceive or defraud general and subsequent creditors; and with respect to ordinary debts contracted after the settlement, I am inclined to think that they would not be allowed to defeat the settlement, which was regularly recorded.

But it does appear to me that the facts of this cause make a very strong case for relief to these complainants, which may be given in perfect conformity to the principles above stated. The testator, Mr. Edward Wilkinson, after devising the tract of land at Willtown, called the Island River Swamp Plantation, to Mr. William Clement, devised three other tracts of land to be sold by his executors, on the best terms they could obtain, most conducive to the interest of those concerned; and then directed the moneys arising from the sale of the said three tracts of land to be equally divided, share and share alike, among his (the testator's) nephews and nieces, the issue of his sisters who were born at the time of making the will,

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or might \*be born within four months from the date of the will; with right of survivorship, in case of the death of any of the said nephews and nieces, unmarried or without making a will. Mr. Clement was named an executor, and accepted the devise to himself. He also qualified on the will as an executor, and undertook the trust committed to the executors, to sell the other lands for the benefit of the testator's nephews and nieces. In fact he alone afterwards acted in the sale of the lands, and received the money in trust for them. This money it is admitted he has spent, and is dead, insolvent; so that the nephews and nieces can receive nothing, unless protected from the operation of the post-nuptial settlement. On the maturest deliberation I think they are entitled to that protection. Why are post-nuptial settlements constantly declared void as to antecedent debts? Certainly not because those debts have any liens on the property comprehended in the settlement; for such settlements are declared void as to antecedent debts, whether secured by mortgages or judgments, or whether owing on bonds or notes not yet due. They are avoided then because of the pre-existing engagements of the husband, at the time he makes the post-nuptial settlement; and because of the moral as well as legal obligation to comply with those engagements, before he puts his prop-

erty out of the way of making them good. Now I consider the acceptance by Mr. Clement of the trust under the will of Mr. Wilkinson for the benefit of the nephews and nieces, and his holding the property under said trust, as an existing engagement at the time of executing the post-nuptial settlement, which he was bound to fulfil. He has not done so. He sold the land, received the money, spent it, and left no estate to pay the nephews and nieces, except that comprehended in the post-nuptial settlement. I do not think he had any more right to cover his property by a post-nuptial settlement against this trust, then existing and the property in his hands, than he had to protect it by such an instrument against any other pre-existing engagement, such as a bond or note. The conclusion then is, that the post-nuptial settlement is void against the claims of the complainants.

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\*It is therefore ordered and decreed that the decree of the Circuit Court be affirmed as to the devise, and reversed as to the marriage settlement, and that it be referred to the Commissioner to examine and report what sales of the lands devised to be sold for the benefit of the nephews and nieces, were made by Mr. Clement, and for what sums of money; and that the property comprehended in the post-nuptial settlement be held liable to the payment of the sums which may be found due; and also that the Commissioner do inquire into and report what nephews and nieces or their representatives are in existence, to receive and share the amount so due.

THOMPSON and JAMES, CC., concurred.

GAILLARD, Ch.—I concur in the opinion of the Circuit Court in those parts in which is affirmed, for the reasons assigned in it.

WATIES, Ch.—I concur in affirming the decree of the Circuit Court in this case in the construction of the will of E. Wilkinson, on the grounds taken in the present decree; but I differ from the majority of the Court in the construction of the settlement of W. Clement, for the reasons stated by Judge GAILLARD, in his separate opinion, which I have also signed.

GAILLARD, Ch., dissenting.—It is said that although the settlement be good as to subsequent debts, it is void as to the demands of the complainants, as they are entitled under the will of Mr. Wilkinson to the proceeds of lands, ordered by him to be sold by his executor, and which were sold by Mr. Clement as such and who received and never accounted for them. I do not consider the claim as at all analogous to a debt existing at the time of settlement; it is true the trust then existed, but the breach of trust or fraud, should that be imputed to Mr. Clement, was long subsequent, and until the one



or the other was committed, he incurred no liability. The settlement in no wise affected the interests of the complainants at the time of its execution. It was a fair transaction, and its original character could not be altered by subsequent events. The claim of the complainants can only be sustained by giving to the conduct of Mr. Clement, after the settlement, a retrospective effect, by connect-

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ing his breach of \*trust with its acceptance, and considering the time of the acceptance as that of the existence of their claim; but this cannot be, for the deed being valid when it was executed, rights were instantly acquired under it, and these were entirely beyond the control of Mr. Clement, and no acts of his could prejudice them; nor can the settlement be considered as subject to the trust, since the acceptance of a trust does not give to the cestui que trust an equitable lien on the estate of his trustee. Mr. Clement rendered himself personally liable for any breach of trust he may have committed, but its consequences cannot be visited on the property contained in the settlement.

WATIES, Ch.—I concur in the construction given to the settlement by Judge GAILLARD.

See Judge Nott's remark as to case in text; *Dunlap v. Crawford*, 2 McC. Eq. 181.

The doctrine of this case, that a general and unrestricted devise of lands will carry the fee without words of perpetuity or inheritance, was in direct conflict with the decisions of the Court of Appeals in Law, or Constitutional Court as it was styled; *Hall v. Goodwyn*, 2 N. & McC. 383; S. C. 4 McC. 442; *Boatwright v. Faust*, 4 McC. 439. The conflict on the particular point was settled in favor of the Equity doctrine by the Act of 1824, 6 Stat. 237; but, the conflict on this and other questions between two independent Courts of Appeal, and other reasons, induced the Legislature at the same session to establish a single and separate Court of Appeals, for both law and equity, consisting of three judges; 7 Stat. 325. In 1835, (7 Stat. 335,) the Act of 1824 was repealed, and the law Judges and Chancellors sitting together were constituted a Court of Appeals. In 1836, (7 Stat. 339,) the primary system was re-established by the Legislature, except that the machinery provided by the Act of 1835, was retained as a Court of Errors for the decision of constitutional questions and other questions upon which either of the Courts of Appeal should be divided, or when any two of the judges of either Court of Appeals should require that a cause be further heard by all the judges. This organization of the Courts still remains, (1859.)

EQUITY CASES

DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, APRIL TERM, 1824.

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CHANCELLORS PRESENT.

HON. H. W. DE SAUSSURE,  
" THOMAS WATIES,  
" THEODORE GAILLARD,  
" W. THOMPSON,  
" W. D. JAMES.

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Harp. Eq. \*89

\*GEORGE WASHINGTON et al. v. THOMAS  
WASHINGTON.

(Columbia. April Term, 1824.)

The complainants filed their bill for partition of a tract of land. The defendant set up an adverse claim to the land. The case came on trial, February Term, 1823; and on the trial the defendant produced a deed for the land, dated in 1813, setting up a claim adverse to the complainant's. The Chancellor on circuit made the following order on the docket: "Partition refused, title disputed, parties referred to law without prejudice." At February Term, 1824, the Chancellor then presiding made an order directing an issue to try titles to the land; upon which the defendant appealed, and moved to reverse that order, on the ground: That the order was contrary to the decretal order made by the Chancellor who tried the case.

DE SAUSSURE, Ch.—It appearing to the Court that the decree of the Circuit Court was formed on a misapprehension of a preceding decree, which was very brief, it is ordered that the decree of the Circuit Court be rescinded and reversed.

GAILLARD, THOMPSON and JAMES, CC., concurred.

Irby, for appellant.

Downes, for respondent.

As to the difference in results between an action and an issue, see *Railroad Company v. Toomer*, 9 Rich. Eq. 276.

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Harp. Eq. \*90

\*JENCY BALLARD, Administrator of J. Ballard, v. SAMUEL CASTON.

(Columbia. April Term, 1824.)

[The notes of the Judge who heard the cause being accidentally lost, so that the evidence could not be reported to the Court of Appeals, it was ordered to be reinstated on the Circuit docket, and heard as an original cause.]

[*Appeal and Error* ¶543.]

[Where the notes of the circuit judge, who heard a cause, had been lost, so that the evidence could not be reported to the court of appeals, the cause was reinstated upon the docket of the circuit court, to be heard as an original cause.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2409; Dec. Dig. ¶543.]

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Harp. Eq. 90

ROBERT CUNNINGHAM, Administrator of  
D. S. Bailey, v. PETER SMITH  
and Others.

(Columbia. April Term, 1824.)

Bill by the administrator of an insolvent estate against the creditors, to compel them to establish their demands.



## [Subrogation ⚡30.]

Defendant, who had been surety for the intestate on sealed instruments, which he had been compelled to pay, was held not entitled to set up those instruments, so as to make his demand a specialty debt.<sup>1</sup>

[Ed. Note.—Cited in *Robinson v. Robinson*, 20 S. C. 573.

For other cases, see Subrogation, Cent. Dig. § 69; Dec. Dig. ⚡30.]

## [Bills and Notes ⚡431.]

Intestate being indebted by specialty, gave an order on third persons for the amount, which was accepted but not paid; after a considerable lapse of time, and after the death of intestate, the order was returned to his administrator; *Held*, an extinguishment of the specialty.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1257; Dec. Dig. ⚡431.]

## [Bills and Notes ⚡43; Seals ⚡5.]

[A sealed writing ranks as a specialty, though no mention is made of the seal in the attestation.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 63; Dec. Dig. ⚡43; Seals, Cent. Dig. § 8; Dec. Dig. ⚡5.]

The bill was filed by the administrator of an insolvent estate against the creditors of the estate, to compel them to establish their demands, and to obtain a sale of the lands of the deceased. A reference to the Commissioner was ordered, to report on the nature of the debts.

The Commissioner reported that there was due on judgments five hundred and seventy-five dollars, and on sealed instruments, five thousand five hundred and seventy-three dollars, which amounted to more than the whole estate. Simple contract debts were also reported to the amount of four thousand three hundred and forty-seven dollars.

It appeared before the Commissioner (as stated by the brief of counsel) that the defendant, Peter Smith, had been surety for the intestate, on sealed notes to the amount of one thousand six hundred dollars, which he had been compelled to pay; and it was contended on his behalf, that he was entitled to have this demand considered as a specialty debt. The commissioner, however, reported it as a simple contract debt; and on this ground there was an exception to this report on the part of the defendant, Smith.

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\*It further appeared that the defendants, Moses A. Lock & Co., held a settled note of the intestate, for six hundred and fifty-six dollars. To discharge this, the intestate had, on the 8 March, 1819, given them an order to

that amount on Brummett & Williams. The order was accepted, but not paid, and after intestate's death, was returned to his administrator. The Commissioner reported this demand of Lock & Co. as a specialty debt, and on this ground the complainant excepted to the report.

De Saussure, Ch.—This case has been brought up rather in an imperfect state. The Commissioner's report does not state with sufficient fullness the points in controversy, nor the facts on which they turn; so that the exceptions make a case which does not appear on the face of the report.

The first exception to the report is by the defendant; because the sealed notes, which were paid by the sureties to said notes, are reported as simple contract debts, and because they ought to have been set up in equity, after they were extinguished at law, as specialties.

Now the report to which this exception is made, does not state one word of any payment, by any surety, of any notes, sealed or unsealed, and no question is raised or decided by the Commissioner in the report, on that point. The argument of counsel alone discloses the real points in controversy, and they make very different statements. Taking it for granted, however, that the case was properly stated, I am of opinion that this exception must be overruled. I would go every length in my power to assist sureties who have been obliged to pay debts for their principals; but I cannot alter the law for them, and I apprehend that the decided cases are against the principles contended for by this exception: it must therefore be overruled. The second exception relates to a note which had a seal, without the words "witness my hand and seal," which induced the Commissioner, as it is said, to report "that this was a simple contract debt." If he did so, I think he was in error, and the exception must be sustained.

The complainant's exceptions are as follows: 1. Because the Commissioner has re-

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ported in favor of a note to Moses A. \*Lock & Co., for eight hundred and nine dollars, as a sealed instrument. The facts are not stated on which this objection is made, so no opinion can be formed on it. The second exception is, because the Commissioner has reported in favor of the said note as a subsisting demand, when, in fact, the note has been paid by an order of D. S. Bailey on Williams & Brummett, and accepted by them.<sup>2</sup> It seems this order was not paid, but was, after a considerable lapse of time, to wit, in 1820, after the death of Bailey, (which was in October, 1819,) returned to his administrator. The gross neg-

<sup>2</sup> *McLure v. Askew*, 5 Rich. Eq. 162; *Lownes v. Ladson*, Rich. E. C. 315.

<sup>1</sup> *Sed vide*, *King v. Aughtry*, 3 Strob. Eq. 156; *McNeil v. Morrow*, Rich. Eq. Cas. 172; *Ib.* 385; *Shultz v. Carter*, Speers, Eq. 533; *Ib.* 546; 1 Hill, 344; *Ex parte Ware*, 5 Rich. Eq. 473; *Smith v. Swain*, 7 Rich. Eq. 112; 3 Rich. 139. In *Pride v. Boyce*, Rice, Eq. 283, [33 Am. Dec. 78,] Ch. Harper corrects the report of the case in the text, by stating that the surety paid the sealed notes of the principal in the lifetime of the principal. The case in Rice, is very instructive on the doctrine of subrogation.

ligence in this case made the note not returned in due season the party's own, and it was too late to come back to the original debtor for payment, on the original demand. This exception must be therefore sustained. And it is ordered, that the report be corrected according to these orders, and the accounts made up conformably thereto.

From this decree the defendants, Smith, and Lock & Co., appealed:

1. Because this court will set up bonds which have been paid by a surety, as a specialty debt, in favor of the surety, in the distribution of the assets of an intestate or testator.

2. Because this Court will put the surety, who has been obliged to pay the money for his principal, in the same situation as the original creditor, and give him all the benefits which the principal had.

3. Because the order which Bailey gave to Moses A. Lock & Co. was not a payment of the note which Lock & Co. had on Bailey, but was only a collateral security.

4. Because, if it was first intended as a payment, that intention was defeated by the complainant having received back the order from the defendants, Moses A. Lock & Co.

5. Because the receipt of this order did not destroy the effect of the note, and defendants had a right to insist on the note, when they failed to get their money on the order.

Carter, for the appellants, argued that the order given to Lock & Co. was no payment of their note. That the complainant had received it back from them, and that the order was dated on the same day with the note,

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which shows it to \*have been intended as a collateral security. That the court will always indemnify a surety, by considering a judgment or specialty which he has paid, as assigned to him. Cited, 2 Vern. 480; Id. 608; Atk. 135, 160; 1 Eq. Rep. 214; Id. 409; 4 Eq. Rep. 650; 2 Ves. sen. 371.

Holmes, contra, contended against the right of the surety to have the specialties which he had paid, set up in his favor. His demand against the intestate in his lifetime was certainly on simple contract, and if he had sued him, it must have been by action of assumpsit. The Act of the Legislature, prescribing the order of paying debts in the administration of insolvent estates, postpones simple contracts and is decisive. 3 Eq. Rep. 116.

As to the order given to Lock & Co. there is no evidence that it was ever presented to the drawers; and if it was, there was laches in not sooner returning it. Chit. on Bills, 264.

Decree affirmed. DE SAUSSURE, GAILLARD, WATIES and JAMES, CC., concurring. THOMPSON, dissenting.

Harp. Eq. 93

TOLLISON v. ELISHA WEST.

(Columbia. April Term, 1824.)

[Judgment ¶439.]

Complainant brought his bill to restrain defendant from enforcing a judgment at law. The judgment was obtained on notes, which complainant had given in execution of an agreement, by which he had employed defendant as teacher of a school. Bill charged that defendant had received money for teaching scholars sent to him, which complainant was entitled to set off against the judgment. Bill dismissed, there being adequate remedy at law.<sup>1</sup>

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 834; Dec. Dig. ¶439.]

De Saussure, Ch.—This is a bill to enjoin and restrain the defendant from enforcing a judgment and execution obtained at law, against the present complainant, and to compel the defendant to account for certain moneys alleged to have been collected by the defendant on account of the complainant, which ought to be credited on the judgment.

It seems that the complainant being desirous to have a school established, agreed

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to employ the defendant, and written \*articles were entered into, by which Muse Tollison agreed to pay Mr. West, the defendant, two hundred and twenty dollars per annum and his board, worth one hundred dollars per annum, for his services as a teacher, during the years 1818, 1819 and 1820.

Complainant charges and insists that it was also further agreed, verbally, that the defendant, West, should receive and teach the children of other families besides Mr. Tollison's, and receive and collect the amount of tuition money, and pay over the same to Mr. Tollison, to reimburse him for the salary and board so advanced. Mr. Tollison gave his notes for the salary, and actually boarded Mr. West. Mr. West received other scholars into his school, and received part of the tuition money, which he claims as his own, and also claims what is still due. West brought suit on the notes of Tollison, and recovered a judgment at law. The complainant then filed his bill to enjoin West from enforcing his judgment and to have an account for the tuition money received by West from the scholars out of Tollison's family. The defendant in his answer denies the agreement alleged in the bill, and insists that he was entitled to the whole amount of the tuition money received from the scholars, besides the salary and board.

At the hearing of the case, the written agreements were produced in evidence, which contained an engagement by Tollison to employ said West to teach school, and to pay said West two hundred and twenty dollars per annum and his boarding, washing and lodging, for the years 1818, 1819 and 1820,

<sup>1</sup> Willie v. Price, 5 Rich. Eq. 91.



for his services during the term above mentioned. These agreements did not contain any stipulation that West might receive and teach other scholars than Mr. Tollison's family, nor that he should pay over to Tollison what tuition money he might receive for any extra scholars received into his school. It is admitted that he did receive other scholars into his school, and did receive pay for their tuition. Mr. Tollison claimed all the tuition money so received, and all that might be still due and uncollected. He endeavored to establish by proof, that this was the agreement between them. There is difficulty in this

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\*part of the case; for it is embarrassing to account why the written agreement did not contain this stipulation, that Tollison should receive the tuition money, if such had been really the agreement. And there is great reluctance in the Court to permit such additions to agreement by parol proofs. 'Tis full of dangers. I did however receive the evidence conditionally, and subject to legal exceptions. The evidence of the complainant furnished a pretty strong presumption that such agreement was made, and it is corroborated by the vehement presumption arising out of the circumstances themselves. But the proofs were not so clear and conclusive as to convince the mind absolutely. I would therefore feel great reluctance to decree on that ground, but there is another ground which is safer, and on which I think I may place the case and do justice. It is manifest that the written agreement stipulated for the whole of West's time. The words are:—"that Tollison, on his part, doth agree to pay the said West two hundred and twenty dollars for twelve months service, as a school teacher, (Saturdays, Sundays and Court weeks excepted,) and said Tollison doth also agree to board said West gratis, diet, lodging and washing, in a decent manner." These words, which West acceded to and acted upon, do manifestly exclude the idea that West was to be at liberty to take any other scholars for his own profit. He became the hired agent, or in the old language of the law, servant of Tollison. If therefore he took other scholars than Tollison's children, he was bound to pay over the profits to Tollison.

The agreement does not limit Tollison to put his own children only under the schoolmaster. Having hired the services of West, he could put as many as he pleased, within the usual number of scholars. If this were not so, Tollison, who had but few children to place at school, would have been paying the most enormous price ever heard of in the upper country, and wholly disproportionate to the service. I am of the opinion that the complainant is entitled to all the defendant, West, made from all the scholars, and that the defendant ought to account for the same. It is therefore ordered and decreed that the

defendant do account for all that was made

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in the said school, and \*that the amount be deducted from the judgment obtained by said West against Muse Tollison.

From this decree the defendant appealed, on the grounds:

1. That there was no ground of equity jurisdiction, the complainant having plain and adequate remedy at law.

2. That the decree was erroneous in the construction of the agreement between complainant and defendant.

P. Farrow, for the appellant, as to the ground of jurisdiction, cited 1 Johns. Ch. Ca. 49, 91; Id. 320, 466; 1 Madd. Ch. 77, 107; 2 Eq. Rep. 623.

J. W. Farrow, contra, contended that the complainant was under the necessity of coming into this Court for discovery and account, and that the bill ought to be sustained on that ground.

GAILLARD, Ch.—Two grounds of appeal were made and relied upon in this case.

The second was, that Tollison was not entitled to recover on the merits of the case. If we were at liberty to decide that point, we should not probably differ from that part of the decree of the Circuit Court. But the opinion we have formed on the first ground, precludes the necessity of deciding on the second.

The appellant contends that Tollison might have set up his present demand as a discount against the notes on which the suit at law was brought by West, and could have had plain and adequate remedy at law; and we are of opinion that he could. But if he wanted a discovery to have enabled him to support the discount, he should have filed his bill and obtained the discovery whilst the suit was pending at law. He was aware of the defence he meant to rely upon, and should not have waited till the judgment at law was obtained. No new matter has been discovered since the trial at law. On that ground, we are of opinion and adjudge that the decree be reversed.

THOMPSON and JAMES, CC., concurred.

DE SAUSSURE, Ch., dissenting.—I had intended to concur with the Court of Appeals, but upon further reflection, I find I cannot do so. It appears to me, that as Tollison

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could \*not establish his demand at law, for want of an account of the money received by West for the scholars received into the family school, to the profits of which Tollison was entitled under the hiring agreement of West, he is entitled to come into equity to obtain that account and to establish his demands for hire. The right to an account being certain and not attainable at law, he ought to be relieved here. His not coming sooner and establishing his distinct and inde-

pendent demand, ought not, in my opinion, to preclude him now. I am therefore of opinion, that the decree of the Circuit Court ought to be affirmed.

### Harp. Eq. 97

JOSHUA TEAGUE, Adm'r of William Dendy,  
v. JOHN DUNLAP.

(Columbia. April Term, 1824.)

[*Executors and Administrators* Ⓒ365.]

An administratrix purchased at her own sale, property of the estate to a large amount, at a high price. Her administration was afterwards, at her own instance, revoked, and complainant appointed administrator de bonis non. To him the administratrix surrendered (as having been incapable to purchase on account of her character of administratrix,) all the property, except a negro boy, who had been levied upon by an execution of the defendant, for a debt of the administratrix in her individual capacity. Decreed that the boy should be delivered up.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1500; Dec. Dig. Ⓒ365.]

The bill states that on the ——— day of ——— William Dendy died intestate—that shortly afterwards, Patsy, his widow, and James Young administered on the estate, and by permission of the Ordinary, sold the same; and the said Patsy purchased the whole or the greater part of the said estate—that some time afterwards, the administration of James Young was revoked, and the said Patsy remained sole administratrix. The said Patsy being advised that such sales were by this Court held to be void, petitioned to be removed and complainant to be appointed administrator, which was done; to whom the said Patsy delivered the whole of the property by her at her sale purchased, except the negro woman Fanny and her child, sold to satisfy a debt due by the estate, and the negro boy George, taken under an execution in favor of defendant against Patsy Dendy, for a debt due by the said Patsy in her in-

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dividual capacity: that the \*said George is the property of the estate, and not liable for the individual debts of the said Patsy. Complainant states that he sold all the property of the said estate which came to his knowledge, except the two negroes above mentioned—that he believes defendant will sell said George, unless restrained by this Court, and therefore prays for an injunction, &c.

The answer admits, that the said Patsy and James administered and sold the estate, and that the sale amounted to six thousand and eighty-three dollars, and two and one half cents, as per Ex. A.—also, that at the sale, the said Patsy bid off property to the amount of three thousand eight hundred and forty-four dollars and thirty-three cents; but contends that from that amount the following deductions ought to be made, to wit: six

hundred and fifty-three dollars, the amount bid by her for two children, which were taken the same day at her bid, by John Davis—also eight hundred and one dollars, given for a boy Bob, and eight hundred dollars, the value of Fanny at that time; the said Bob and Fanny being afterwards sold by the sheriff, to satisfy debts due by the estate of said deceased. The answer states that after deducting the sums above mentioned from the amount of her purchases, there will be left the sum of one thousand five hundred and ninety dollars and thirty-three cents; which is not one third of the amount of the sales made by the said Patsy and James. Further, that the said sale was fair and valid, and made at a time when property was selling fifty per cent. higher than it now does—that if the sale is set aside, there will be a loss to the minors, in the amount purchased by the said Patsy alone, of one thousand seven hundred dollars or near it. Admits that the administration of James Young was revoked—also that the administration of the said Patsy was revoked at her own instance, and complainant appointed administrator; but doubts whether the motives which induced her to get rid of the estate are truly stated. Admits that the debts owing to this defendant, was by the said Patsy in her individual capacity, but denies that the boy George belongs properly to the estate, or is liable to be administered on as such by complainant, because the said Patsy became the purchaser of him at an extravagant price, in her individual right, and kept him as her own property from 1817 to 1823. Admits that all the property was

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delivered to complainant but the \*negroes above mentioned. Defendant pleaded to the jurisdiction of the Court.

At the hearing of the case, it was admitted that the property sold at the sale made by the said Patsy and James, brought fifty per cent. more than it did at the subsequent sale made by complainant, and that the first sale was fair and without fraud.

James, Ch.—The bill states that William Dendy died intestate, and his widow, Patsy Dendy, and James Young administered on his estate; that the Ordinary ordered a sale of said estate, and Patsy the administratrix, purchased in the greater part of it; that the letters of administration were afterwards revoked by the Ordinary, and the complainant Joshua Teague was appointed administrator; that said Patsy surrendered to the administrator all the property so purchased, except a negro woman Fann and child, and a negro boy George; the first sold under an execution, and the latter now in the custody of the sheriff and the object of the present suit; that the debt due to the defendant under which George is taken, was not due by the estate, but is one of said Patsy in her individual capacity.



Complainant prays that defendant may be enjoined from proceeding to sell the boy George, and that he may be delivered up to him as administrator.

Defendant by his answer pleads to the jurisdiction of the Court and admits that said Patsy bid off the property to the amount of three thousand eight hundred and forty-four dollars and thirty-three cents; from which certain deductions ought to be made, which will leave a balance of one thousand five hundred and seventy dollars and thirty-three cents. That the sale was fair and property sold for fifty per cent. more than it would at present, and that if the sale be set aside, the estate will sustain a loss of about one thousand seven hundred dollars. He admits that the present debt, on which his execution was issued, was one of the said Patsy in her individual capacity, but that she ought not to be allowed to revoke her administration, to recover the property. He denies that the boy George belongs to the estate, but that he was purchased by the said Patsy at the sale aforesaid, and she exercised acts of ownership over him from the year 1817 until the filing of the bill, and so forth.

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\*It appears from the papers and admissions on both sides, that Patsy, the administratrix, paid for no part of the property purchased by her, and that the estate has lost greatly by sales made by the sheriff, for debts contracted by her in her individual capacity; that said loss will amount at least to two thousand and fifty-two dollars, which is more than the one third she was entitled to out of the estate. And now upon the principle of decided cases, the administratrix must be considered as a trustee purchasing at her own sale.<sup>1</sup> She paid no money and kept possession of the property, and has no right to retain it against the minors. To recover it, complainant was obliged to come into this Court for an injunction, and to set aside the sale, and for a specific delivery of the boy George. The revocation of her administration was made agreeably to law, and her one third has been exhausted. Defendant knew that she purchased at her own sale, as is admitted by the answer. Under these circumstances, he has no right to come in for his debt against the estate. The negro boy George must, therefore, be delivered up to the complainant, with costs.

From this decree the defendant appealed.

1. Because the complainant had sufficient remedy at law.

2. Because his Honor, the presiding judge,

assumed on facts admitted, grounds that were neither admitted by defendant nor contended for by complainant.

3. Because the said Patsy not having purchased beyond her interest, is therefore not a trustee, and if she were, she is not the party who has the right to claim a revision of her contracts, to her own benefit and to the manifest injury of the minors.

4. Because if the purchase is considered as a trust, the said Patsy, to the extent of her interest, is one of the cestui que trusts, and the execution of defendant created a lien on the property purchased by her to the extent of that interest, from the time of its entry, of which in law and equity he ought not to be divested.

Simpson and Dunlap, for appellant, contended that this case did not come within the

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principle of those in which purchases by trustees have been set aside. Such purchases have been set aside in favor of the cestui que trust, and for their benefit. There is no instance of the Court's interfering in favor of the creditors of the trust estate, against the individual creditors of trustee who purchased; but in this case, it does not even appear that creditors of the estate are concerned, or that the estate owes any debts. The application is not on behalf of the minors who are interested in the estate; on the contrary, it is manifest that they will be injured by the decree, as the property sold for fifty per cent. more than can now be obtained for it. There is no pretence that Mrs. Dendy is insolvent, so that the debt may not be recovered of her, or of the sureties to her administration bond. It seems plain that the only person to be benefitted is Mrs. Dendy herself, who takes this method of getting rid of a hard bargain and defeating her creditor. It was at her instance that her administration was revoked, and the complainant appointed, and the rest of the property given up. She retained this property from the time of her purchase in 1817, until 1823. It is difficult not to come to the conclusion that she is the real complainant in this case. It appears from the case of Perry and Dixon, decided by this Court, that an administrator may purchase to the extent of his interest in the estate. After the proper deductions, her purchase will be found not to exceed her share; or at all events, after giving up the rest of the property, the boy George did not exceed it, and upon him the lien of defendant's execution attached.

O'Neill, contra. Mrs. Dendy purchased to an amount far exceeding her share of the estate, and this vitiates it altogether. You cannot say that the purchase is good in part and bad in part. The Court would have held the property to stand as a security for her purchase. Upon being advised that her purchase might be avoided, she very properly gave it up. Her contract, in fact, was rescinded with

<sup>1</sup> Zimmerman v. Harmon, 4 Rich. Eq. 165; Ex parte Wiggins, 1 Hill Eq. 353; Sollee v. Croft, 7 Rich. Eq. 34. Denied in Stallings v. Foreman, 2 Hill, Eq. 401, that the doctrine applies to sales by executors and administrators. See A. A. 1839, 11 Stat. 62; Hill, 434. Johnson v. Lewis, Rice Eq. 40 [33 Am. Dec. 74]; Smith v. Carrere, 1 Rich. Eq. 123; Villard v. Robert, 1 Strob. Eq. 393.

the administrator, who had authority to make such an arrangement with her, and this divested her title.

The decree of the Circuit Court is affirmed, for the reasons contained therein.

JAMES, DE SAUSSURE, WATIES and THOMPSON, CC., concurring.

The doctrine that a purchase by a trustee at his own sale is void at the option of the beneficiaries is well settled; but that the trustee can avoid his own sale, or his successor in office, do so, without complaint of the beneficiary, is singular; McClure v. Miller, Bail. Eq. 110 [21 Am. Dec. 522]; Ib. 296; Price v. Nesbit, 1 Hill. Eq. 461-2.

### Harp. Eq. \*102

\*M. COHEN v. BENJAMIN DUBOSE, Administrator.

(Columbia. April Term, 1824.)

[Evidence ⇨ 386; Judgment ⇨ 427.]

Complainant had brought a suit at law on a promissory note, on which a considerable amount of interest was due. The jury gave a verdict for the principal of the note, omitting the interest. *Held*, that parol evidence of a juror was admissible, to show that the jury had omitted the interest by mistake; and such mistake being satisfactorily established, the defendant was decreed to pay the interest.<sup>1</sup>

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 815; Evidence, Dec. Dig. ⇨ 386; Judgment, Cent. Dig. § 806; Dec. Dig. ⇨ 427.]

The bill stated that the complainant brought an action against the defendant on a promissory note for two hundred and forty-four dollars, bearing interest from 1810; that the jury before whom it was tried, found a verdict for the plaintiff for the principal, omitting the interest by mistake. The prayer of the bill was, that the mistake might be corrected, and the defendant decreed to pay the interest so omitted.

The defendant by his answer admitted that the action was brought on the note as stated, and that the verdict was for the principal sum of the note; but did not admit that the omission was by mistake, as the jury might not have intended to allow interest; and

submitted that the complainant had a plain and adequate remedy at law, by application to the Constitutional Court for a new trial.<sup>2</sup>

At the hearing, it appeared that there was a verdict written on the back of the declaration for two hundred and four dollars, and interest from 1810, which was stricken out and a new one written and signed, for two hundred and forty-four dollars, without adding any thing respecting interest. The unsigned verdict was in the handwriting of Josiah J. Evans, who said he had written it to facilitate the business of the jury, and supposed they had not signed it because the word "forty" was omitted; and he presumed, but did not know, that the interest was omitted by mistake. The foreman of the jury swore that the jury intended to allow interest, but it was omitted by mistake. The defendant's solicitor contended that the complainant ought to have applied to the Constitutional Court. If he did not, equity could not relieve him; for that Court had no power to correct a mistake in a verdict.

Waties, Ch.—It would be a great reproach to the administration of justice if there was no relief for such a case. But I am satisfied that this Court is not only competent to give

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\*relief, but is authorized to do it on parol evidence of the mistake. The general authority of a Court of Equity in cases of mistake has ever been doubted. In Langley v. Brown, 2 Atk. 203, Lord Hardwicke says, "mistakes and misapprehensions in the drawers of deeds, contrary to the design of the parties, are as much ahead of relief as fraud." And in Henkle v. The Royal Exchange Assurance Company, 1 Ves. 317, he again says, "there is no doubt the Court has jurisdiction to relieve in respect of a plain mistake." See also, 1 Ves. & Beams. 168. It is contended, however, that it has no right to interfere with a verdict. I can find no authority for such an exception, and I can see no reason for it. The ground for relief in any case of mistake is that injustice will be done if the mistake be not rectified, and it is immaterial whether it has occurred in a verdict or in a deed. In The Countess of Gainsborough v. Gifford, 2 P. W. 425, the Master of the Rolls says, "there are cases in which equity will relieve after verdict, in a matter where the defendant at law might have defended himself; as where after a plaintiff has recovered a debt at law, the defendant finds a receipt for the money in question: so if the plaintiff's own book appears to be crossed and the money paid before the action." Lord Hardwicke declares the same thing in Williams v. Lee, 3 Atk. 224. The relief in those cases might indeed have been given on the ground of fraud, for it may be presumed that the plaintiff knew that he had

<sup>1</sup> Sed vide, Manigault v. Deas, Bail. E. 293; Maxwell v. Connor, 1 Hill. Eq. 14; Farrow v. Dial, 1 McM. 292 [36 Am. Dec. 267]; Kirk v. Richbourg, 2 Hill 352; 4 Strob. 27; Davis v. Murphy, 2 Rich. 560 [45 Am. Dec. 749]; Upson v. Horn, 3 Strob. 108 [49 Am. Dec. 633]; Longstreet v. Lafitte, 2 Speers 664; Smith v. Culbertson, 9 Rich. 106; Winslow v. Ancrum, 1 McC., Eq. 105; Pettus v. Smith, 4 Rich. Eq.

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197; Leonard v. McCool, 3 Strob. 44; 1 \*Rich. 414; Ib. 530. On these cases it is doubtful at least whether this judgment can be maintained on the points: that the judgment in the Court of Common Pleas did not carry interest, that the Law Court could not correct its own judgment, and that a juror is competent to prove, subsequently, the mistake of the jury, and the judgment at law is not conclusive until vacated or corrected there.

<sup>2</sup>Or by audita querela.



been paid; but it cannot be doubted that relief would also be given on the ground of mistake; as where the verdict was obtained by an executor, who would not be obnoxious to the presumption of fraud. There would be the same reason for the interposition of equity in both cases, for the prevention of injustice, which is the governing principle, would apply to both. This appears to be a good ground for relief against a decree. In the case of the East India Company v. Boddman, 13 Ves. 42, application was made for a rehearing of a decree given by the Master of the Rolls, which had been affirmed afterwards by the Chancellor. Lord Eldon refused the application, because the error imputed to the decree had been before brought fully be-

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fore the Court, and the judgment \*ought on that account to be final. But he added, "this rule, like all others, is open to an exception, which scarcely ought to be called an exception, as it does not clash with the principle of the rule. I mean where there is a manifest mistake."

But it is further objected, that the mistake here has been proved by parol evidence, and that this is not admissible to alter the verdict. The rule of evidence on this subject is certainly a wise one; a written instrument cannot be added to or varied in any way by parol evidence; but it would be subversive of justice if this rule were so inflexible as to exclude the only mode of proving, generally, a fraud or mistake in a written instrument. Such evidence, however, has been received with great caution in cases of mistake. "This," says Lord Thurlow, in *Irnham v. Child*, (1 Bro. C. C. 93,) "ought to be proved as much to the satisfaction of the Court as if it were admitted." But he says in *Shelburne v. Inchiquin*, Id. 341, "it is impossible to refuse as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties." He adds, "to be sure it must be strong, irrefragable evidence; but I do not think I can reject it as incompetent." And Chancellor Kent, who has thoroughly examined the subject, in the case of *Gillespie v. Moon*, 2 John. C. C. 596, has thus expressed the result of his examination. "I have looked into most, if not all, the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had on any deed founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defence."

But the admission of parol evidence by this Court in the case of a mistake, is not considered as any deviation from the rule of law; it is not used to contradict or vary the sense of the written instrument, but to prove a distinct and collateral matter, which fur-

nished an equity dehors the instrument; and this is the ground taken in all the cases. Lord Thurlow, in *Shelburne v. Inchiquin*, says, "it must be an essential ingredient to

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any re\*lief under this head, that it should be on an accident perfectly distinct from the sense of the instrument." And in *Irnham v. Child*, he was of opinion that in rectifying a mistake, "the Court would not overturn the rule of evidence by varying the deed; but that it would be an equity dehors the deed." The present case is evidently one of that nature; it is not attempted to contradict or vary the sense of it in any way; the ground of complaint is, that the jury have by mistake omitted to provide for a part of plaintiff's demand which they could not intend to exclude, as it was a legal right, not disputed by the defendant. This is a distinct fact, perfectly consistent with the verdict, which has not been denied by the answer, although it has not been admitted; and has besides (in the emphatic language of Lord Thurlow) been proved "as much to the satisfaction of the Court as if it were admitted."

The last ground insisted on for the defendant, is that the complainant had a complete remedy at law. I think it very probable that he might have had a new trial on the evidence of Mr. Evans; but this is by no means certain, and as the subject is more properly cognizable by this Court, and the remedy here more certain than at law, I feel bound to entertain the bill and give the relief prayed for. It is therefore ordered and decreed, that the commissioner do take an account of the interest due on the promissory note on which the complainant recovered the principal by verdict at law, and that the defendant do pay the amount of the said interest to the complainant.

From this decree the defendant appealed on the grounds, that the Court could not correct such mistake in a verdict; and that if it has power to do so, parol evidence was inadmissible to show what the jury intended.

Evans, for the appellant, contended that the jury had been guilty of an error, in giving the plaintiff at law less damages than he was entitled to, but that this did not come within the idea of a mistake such as is relievable in equity; that the proceedings in Courts of law are matters within their own control, and that it does pertain to the jurisdiction of this Court to correct their errors: that it would be dangerous to admit

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the testi\*mony of jurors to show what they intended by their verdict, as they may have differed in their views, and that in fact it is undertaking to render a verdict for them, such as the Court thinks they ought to have given, when it is very possible that their intention may have been different. Cited 1 Madd. 41; 1 Bridg. Dig. 375; 2 Vern. 3.

Miller, *contra*, relied on the authorities quoted in the circuit decree, and contended that the case evidently came within the general principles on which the Court grants relief: that there was a palpable mistake, an accidental omission contrary to the intention of the jury: that this was clear from the circumstances of the case, as well as from the testimony of the juror, which was neither doubted nor contradicted.

WATIES, Ch.—On a full examination of this case, we are of opinion that the decree of the Circuit Court should be affirmed. In further support of the authority relied on, may be the case of *Græmes v. Stritho*, 2 Dickens, 469, in which relief was given on a mistake in a verdict; and it also appears that the mistake here was not discovered until it was too late for the complainant, by the rules of the Constitutional Court, to apply for a new trial.

It is further ordered and adjudged, that the decree of the Circuit Court be affirmed.

DE SAUSSURE and JAMES, CC., concurred.

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**Harp. Eq. 106**

JAMES P. MARTIN et al. v. WILLIAM SMITH et al.

(Columbia. April Term, 1824.)

[*Partition* ⌘17.]

Bill for partition; defendant in possession claiming adversely, the bill was dismissed.<sup>1</sup>

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 64; Dec. Dig. ⌘17.]

The bill was filed for partition of a tract of land among the heirs of John Martin, deceased. The land had been sold by virtue of an execution against the administrator of the deceased and purchased by the defendant, William Smith, which sale was charged to be fraudulent. The bill prayed that the title deed might be delivered up and for an account of rents and profits. The answer denied the fraud. The complainants at the hearing offered some evidence to show that the price given was a low one, and that there were personal assets of the estate sufficient to have satisfied the demand, but failed in establishing the charge of fraud.

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The complainants at the hearing offered some evidence to show that the price given was a low one, and that there were personal assets of the estate sufficient to have satisfied the demand, but failed in establishing the charge of fraud.

GAILLARD, Ch.—The defendant in his answer denies the allegations in the bill on which it is presumed the complainants relied to give this Court jurisdiction, and the answer is uncontradicted; the case therefore is stripped of its equity, and the question to

<sup>1</sup> Commonly, where defendant to a bill for partition claims the land adversely, the suit is retained and an issue at law ordered; *Dorn v. Beasley*, 7 Rich. Eq. 85; *Fox v. Ford*, 5 Rich. Eq. 350.

be decided is one of mere law: whether the title of the defendant derived from the sheriff is good or not? He holds adversely and the right to the land must be determined before partition can be made or he can be held to account for the rents and profits. The complainants had complete and adequate remedy at law.

The bill is dismissed, with costs.

From this decree the complainants appealed, and it was contended that the Court had jurisdiction in partition, and that if there was an adverse claim, which must be tried at law, the Court should have retained the bill and directed an issue. That complainant could not have sued at law for want of the title deeds. 2 Johns. Ch. Ca. 269.

Decree affirmed by the whole Court.

A. W. Thompson and Rogers, for appellants.

Williams, *contra*.

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**Harp. Eq. 107**

Ex parte CHARNER DE GRAFFENREID.

(Columbia. April Term, 1824.)

[*Guardian and Ward* ⌘25.]

This was the petition of an infant, about the age of fourteen, for the removal of a guardian whom the Court had appointed for him while under the age of choice, and the appointment of the petitioner's brother in his stead. It was stated that the guardian had, by letter, offered the petitioner's mother to relinquish his guardianship, if she desired and the Court would permit, and she now applied along with the infant for the appointment of her other son, instead of the present guardian. The Chancellor on circuit rejected the petition, and on appeal his decree was confirmed by the whole Court.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 78; Dec. Dig. ⌘25.]

Johnson, for appellant.

Williams, *contra*.

This case has been followed ever since, and it is now the settled procedure of the Court not to substitute a guardian merely on account of the predilection of the ward. Proof of advantage from the change must be given.

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**Harp. Eq. \*108**

\*ROBERT M'DANIEL et al. v. JAMES MOORMAN and Wife.

(Columbia. April Term, 1824.)

[*Frauds, Statute of* ⌘68.]

In 1785, C. S. conveyed to his grandson C. M., half of a tract of land, and in 1791, conveyed to T. M., the father of C. M., the whole tract; who remained in possession of it until his death in 1801.

By his will, which was not executed so as to pass the real estate, T. M. devised the tract



of land in question to complainant, and other lands to his two other sons, with bequests of personal property to his sons and daughters. Soon after the death of his father, C. M., who was one of his executors, applied to the widow of testator, and obtained her written agreement to acquiesce in the will and carry its provisions into effect, as if it had been duly executed. This was done accordingly; each of the sons taking possession of the land assigned him, which possession had been kept ever since. *Held*, that the agreement thus acted upon and acquiesced in was binding, and complainant's title confirmed to the land possessed by him.<sup>1</sup>

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 110; Dec. Dig. ¶68.]

[*Deeds* ¶71.]

Defendants, (the heirs of C. M. who was dead,) applied to complainant, and representing their claim under the before-mentioned deed of C. S., he made a verbal surrender of the said half of the tract of land, and delivered possession of it to them. *Held*, that complainant was not bound by this surrender and delivery, and defendants decreed to redeliver possession to him.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 187; Dec. Dig. ¶71.]

De Saussure, Ch.—This is a case of an uncommon complication of circumstances and perplexity in the points brought into discussion. The facts are of great extent. In substance they make the following case:

Charles Sims, being in possession of a considerable estate, real and personal, but much embarrassed with debt, which he apprehended might sweep away a great part of his estate, made and executed a voluntary deed of conveyance of one half of a tract of land called the Tinker Bottom tract, supposed to contain about three hundred and sixty acres (but since found to contain three hundred and eighty acres) to his grandson, Charles M'Daniel, then an infant, on the 3d day of September, in the year 1785; but he remained in possession of the land. This deed was not then put on record. It was found among Charles M'Daniel's papers at his death in the year 1801, and was put on record in 1819. On the 3 September, 1791, Charles Sims sold and conveyed the whole of the tract of land, called the Tinker Bottom tract, to Thomas M'Daniel, the father

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of Charles for the consideration of three hundred and fifty pounds sterling, and he took possession and enjoyed the land till his death in the year 1801.

The said Thomas M'Daniel made and executed his last will and testament on the 4 August, 1800, which was good and valid as to personal estate; but not having been executed in the presence of three witnesses, was inoperative, as to the real estate. By that instrument he devised to his wife Frances, (now Mrs. Dugan) the plantation on which the testator then lived, and at her death to his son Robert, the complainant, and his heirs; with permission for his

daughters to live on it till his son Robert should attain twenty-one years of age. He also devised to his sons Charles and Thomas M'Daniel and their heirs, two tracts of land, situate in Chester and Union districts, (one of which was purchased from John M'Cool, and the other from William Pearson) to be equally divided between them. There were bequests of personal property to six daughters and to his sons. The executors were Charles M'Daniel, Richard Fair and Robert Crenshaw, who qualified on the will after the death of the testator.

Charles M'Daniel, one of the executors, represented to the widow that all the children were satisfied with the will, and requested her concurrence therein; and she expressed in writing her concurrence in the provisions of the will. And the said widow, in consequence of the said understanding, never claimed her third part of the real estate of the deceased husband, to which she was entitled in fee simple, in case of his intestacy as to real estate. And the sons held and enjoyed the real estate conformably to the said imperfect will, as if the same had been duly executed. The lands devised to Charles more particularly, were held by him in his lifetime, and are now held by his daughter (Mrs. Moorman) the defendant. Charles M'Daniel lived to be twenty-four years of age, and never during his life claimed the land which was contained in the deed to him of the 3 September, 1785, by Charles Sims. Charles M'Daniel died in the year 1801, leaving a widow pregnant, who afterwards had a daughter, and she hath since intermarried with James Moorman, the defendant.

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\*Upon this state of facts, there can be no doubt that the will, not having been duly executed according to the statute to pass real estate, the same was inoperative as a will. The defendant contended that no parol proof could be received to establish the same as a will. This is most certainly true. But it was further contended that no parol proof could be received to establish that the parties had agreed to abide by the will, and to set up any rights under or conformable thereto. If this had rested in mere parol agreement, there would have been an end of the question; such parol agreement could neither be admitted to proof nor established by it; but a more serious and difficult question arises. Where parties have acted under such an agreement, when the widow has given up all her legal rights, when the devisees have received the real estate devised to them, and have held and enjoyed the same for twenty years, are they not bound thereby? And ought not the proof to be received to show on what ground all these actual and important transactions took place, in which Charles took so large a part and derived such sub-

<sup>1</sup> *Bossard v. White*, 9 Rich. Eq. 498.

stantial benefits? In my mind it would have been a fraud to have received these benefits, and then to have denied others similar benefits. On full consideration of the facts of the case, I am of opinion that they are bound, and that such evidence should be received. It would be most mischievous if they were not. The widow's right to a third part of the real estate would be revived; the daughters might come in for their share of the real estate; and a ruinous contention arise as to the rents and profits of the real estate held by the devisees under the family settlement thus made.

It is true that the minority of the younger children would prevent their being bound by the acts of the mother and the elder children. But they make no objection to the family arrangement; the objection is made by the defendant, though Charles M'Daniel, the father of Mrs. Moorman, was the most urgent with the widow and others to adhere to the arrangement of the will, and he took and his daughter now actually holds and enjoys the real estate designated for the said Charles M'Daniel, under the said imperfect will. If

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this were not \*allowed to be proved and the real transactions discovered, what would be the situation of the other parties? The persons named in the said imperfect will have held the land intended for them upwards of twenty years, claiming them as their own, and the Statute of Limitations would give them a title. Now could it be endured that the daughter of Charles M'Daniel, one of the devisees claiming and holding the lands under the parol agreement to abide by the provisions of the imperfect will, should hold her land by possession under said agreement, and be permitted to set up her minority under the same agreement. The whole must be carried into effect, or the whole be declared void in order to reinstate the parties in their original rights as if no such express will had been made and no possession had been held under the same. Indeed under such circumstances as have been stated, the courts of justice, both of law and equity would, after twenty years possession, presume agreements and even grants, to support the title of the parties. The Statute of Limitations in support of a possession in this case, began to run in the lifetime of Charles M'Daniel, and even if it were more settled than it is, that intermediate disabilities stopped the operation of statute, it would not be permitted to the parties claiming the operation of that statute to the prejudice of others, to derive a benefit from the law when situated precisely as those others were. The result is, that I consider the acts of the parties, the long acquiescence and the actual possession for such a length of time, as establishing their respective rights to the lands in question.

We now come to the consideration of a very important question in this case. It is as

follows:—Is the complainant, Robert M'Daniel, bound by the deed which he executed on July 21, 1819, by which he conveyed a moiety of Tinker Bottom tract to Col. James Moorman, and also ten acres, part of the tract of one hundred and sixty acres of the said tract reserved to the said Robert M'Daniel. This question depends chiefly on the fairness of that transaction. It is insisted upon for the complainant, Robert M'Daniel, that he was induced to execute that deed by misrepresenta-

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tion, and by ignorance and misapprehension of his rights, and by threats of being sued and made responsible for heavy arrears of rent and damages; and that the secret and voluntary deed of 1785, (never recorded till 1819,) was not valid against Thos. M'Daniel, a purchaser for valuable consideration, in 1791, who held the land till his death; at which time Charles M'Daniel, the grantee, was of age, and acquiesced in the disposition of it made by his father, and took and held other lands in lieu thereof, given him by his father; and therefore such deed formed no just foundation to claim from Robert M'Daniel a surrender of his rights in the land.

The case made by the evidence appeared to be, that the defendant, James Moorman, after his marriage with Miss M'Daniel, daughter of Charles M'Daniel, coming into possession of the papers of the estate, found the deed of Charles Sims to said Charles M'Daniel, dated on the 3 September, 1785, by which he conveyed to him the upper half of the Tinker Bottom tract of land and ten acres of the other moiety; and supposing his wife entitled, as sole heiress of Charles M'Daniel, he applied to Robert M'Daniel, who was then and had been many years in possession of the whole of said tract, (held conformably to the family arrangement under the imperfect will of the testator, Thos. M'Daniel,) and he (Moorman) required a surrender of half said tract. It appears that he urged his claim strongly, and threatened a suit if it were not given up and conveyed to him. But it does not appear that he was so urgent as to preclude inquiry by Robert M'Daniel.

This young man was then recently of age and was not experienced in business, and he appears to have been alarmed at the idea of a suit. He is not, however, stated to be imbecile, and had experienced friends who were well acquainted with all the facts. His mother, Mrs. Dugan, was living, as well as her husband; and he (the complainant) consulted a legal adviser on the subject, who informed him that he thought the voluntary deed of 1785, from Charles Sims to Charles M'Daniel, was valid and would prevail; and he was also advised by a friend to act upon the counsel. This he accordingly did, and made a conveyance of rather more than a moiety

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of the Tinker \*Bottom tract to said James



Moorman: according to a plat on which the two divisions were laid down, and divided by a surveyor employed by the parties; and also the ten acres in question. All this indicates examination and deliberation. Nor is it proved that the defendant, Moorman, practiced any fraud; but merely claimed his alleged rights under the deed, and threatened a suit if his rights were not submitted to. So far it would not appear that the conveyance by Robert M'Daniel to Moorman could be objected to. It is then reduced to the simple question, whether the claim of Moorman was so plainly unfounded, under all the circumstances stated, that it formed no just right which should have led to the surrender made by Robert M'Daniel, and whether such surrender so deliberately made ought not to be disturbed; especially as Moorman gave up his claim for twenty years arrears for rent, which he might have recovered, if his title to the half of the Tinker Bottom tract had been established; so that Robert M'Daniel might be said to be buying his peace; I confess I have paused long on this part of the case; and I still have great difficulty in coming to a conclusion entirely satisfactory to my own mind. Upon the whole, however, I have made up my mind that the conveyance so deliberately made by Robert M'Daniel to the defendant ought not to be disturbed, even though his right to claim the land under the deed of 1785 was very doubtful, and though he had so long acquiesced in the disposition made by his father. But I confess I find it very difficult to reconcile my mind to the idea that the defendant, Moorman, should be allowed to keep the advantages he has thus gained, by obtaining the said conveyance from Robert M'Daniel, on the ground of right founded on the voluntary deed of 1785, and also to keep the land which his wife's father obtained and held under the dispositions of the imperfect will of Thos. M'Daniel, in consequence of his perfect acquiescence in the dispositions of the said will. It seems to me that it would be most unjust to permit this. I am therefore disposed to say, that if Mr. and Mrs. Moorman insist on one right, they are bound to surrender the other. With respect to the ten acre tract, carved out of

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the part of the Tinker Bottom tract reserved for Robert M'Daniel, it seems that the conveyance of that was as regular as the others and stands on the same footing.

It is therefore ordered and decreed, that if the defendants insist upon their right to that part of the Tinker Bottom tract allotted to them in the division made on the plat by the surveyor, founded on the conveyance from Charles Sims to Charles M'Daniel, and the conveyance from Robert M'Daniel, that they shall and may retain the same, as well as the ten acre tract, part of the other moiety. But in that case, Moorman and his wife shall convey to said Robert M'Daniel the lands which

they held under the family arrangement, made to give effect voluntarily to the dispositions of the imperfect will of Thos. M'Daniel. If, however, they should decline to insist on their rights under these conditions, then each party shall hold the lands acquired under the family arrangement, and which they have held for twenty years. The costs to be divided.

From this decree the complainant appealed, on the grounds, that the option given to defendants, of taking the half of the Tinker Bottom tract of land upon surrendering the lands which they held according to the provisions of the imperfect will of Thomas M'Daniel, should not have been allowed; that the defendants were bound by the arrangement which had been entered into at the instance of Charles M'Daniel, which had been reduced to writing and signed by the widow of the testator, which had been carried into execution by all the parties interested, and sanctioned by an acquiescence of twenty years; that complainant had acquired a title by the Statute of Limitations, and that the Chancellor who heard the cause was mistaken in supposing the fact to be that complainant had conveyed to defendant the half of Tinker Bottom; his conveyance having only been of the ten acres of land mentioned, with a verbal agreement to give up the Tinker Bottom land, and delivery of possession.

The defendants also appealed on the grounds, that if the complainant had any rights they were legal ones, and there was no ground for the jurisdiction of this Court;

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that it was a question of adverse titles to land, which ought to be tried at law; that the alleged agreement was without consideration, and not of such a nature as that the Court could compel a specific performance of it; that the agreement was void under the statute of frauds, and that the evidence relating to it was incompetent, and should have been rejected; that the defendant's title was good to both tracts of land; and that in fact there was no agreement established, by the parties competent to make it; that the daughters of Thomas M'Daniel are still entitled to their shares of the land devised by the will, and that the operation of the Statute of Limitations against them is prevented by the minority of some of them.

The decree of the Court was delivered by

DE SAUSSURE, Ch.—This case was of great extent and perplexity; but we do not think, when thoroughly understood, the justice of the case is at all doubtful.

The facts of the case are so fully stated in the Circuit Court decree, that it is unnecessary to recapitulate them; especially as that statement is essentially correct, except in one particular; which, when corrected, is more favorable to the complaint, M'Daniel, and re-

moves one of the principal objections which embarrassed the case and made it difficult to do him justice: we mean the alleged fact, that when Moorman urged M'Daniel, as soon as he had come of age, to surrender his claims to the lands in question, he, M'Daniel, had executed a deed, by which he conveyed the land to Moorman and his wife. It is now agreed on all hands that this was a misapprehension, and that no such deed was executed as to the large tract in question, but merely as to the small tract of ten acres. So that M'Daniel did nothing more than merely make a verbal surrender of his claims, which did not bind him and could not weaken them; but left them in full force and virtue.

Those claims are founded on family arrangements, made at the urgent solicitation of that member of the family under whom Moorman and wife now claim, and were carried fully into effect many years ago. Moorman and his wife have the full benefit of those arrangements and of the property ex-

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changed \*under them; and it would be monstrous that the complainant should be deprived of the benefits of that arrangement, which was the consideration for the advantage given to Mrs. Moorman's father. Without imputing misrepresentation or fraud to Moorman, in procuring Robert M'Daniel, when barely of age, to make a verbal surrender of his rights to the large tract of land in dispute, it is impossible not to see that M'Daniel acted under a misapprehension of his rights, and without any sort of valuable consideration leading to that surrender.

Under these circumstances, we cannot consider him bound, and the division made under such verbal surrender is void. The decree of the Circuit Court must therefore be affirmed. But as that gave Moorman and wife an option to which they are not entitled, the decree must be new modeled.

It is ordered and adjudged, that the decree of the Circuit Court be so far affirmed as it establishes the right of the complainant to relief; and it is further ordered and adjudged, that the surrender of the moiety of the Tinker Bottom tract of land, to Moorman and his wife, be declared null and void, the complainant being entitled to the same; and it is hereby ordered, that the defendants do deliver up the possession of the said moiety of the Tinker Bottom tract mentioned in the pleadings, to the complainant, and that the defendants do pay all costs of suit.

GAILLARD, WATIES and JAMES, CC., concurred.

W. THOMPSON, Ch.—I do not concur in this decree.

O'Neill and Clendenin, for appellants. Williams, contra.

## Harp. Eq. \*117

\*JAMES HAYNESWORTH, and Wife and Others v. JOHN COX.

(Columbia. April Term, 1824.)

[Wills  $\hookrightarrow$  785.]

Testator, by his will, gives his niece four slaves, "or in lieu thereof one thousand dollars, as my brother John" (his executor) "might think best." *Held*, that the election was given for the benefit of the legatee; and it being shown that the slaves were of more value than the one thousand dollars, she had a right to take them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2007; Dec. Dig.  $\hookrightarrow$  785.]

[Wills  $\hookrightarrow$  587.]

The will provides "my household furniture, and whatever proportion may come to me on the settlement of my mother's estate, to be disposed of as to my executor should seem fit, in regard to the settlement of my just debts; and the over-plus, if any there should be, I give to my brother." *Held*, not a residuary bequest of testator's whole estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1291; Dec. Dig.  $\hookrightarrow$  587.]

[Wills  $\hookrightarrow$  573.]

The bequest to his niece is of a female slave and her three children, who are named; *Held*, that a child born after the making of the will, passed with the mother to the legatee.<sup>1</sup>

[Ed. Note.—Cited in Tidyman v. Rose, Rich. Eq. Cas. 294, 297.

For other cases, see Wills, Cent. Dig. § 1248; Dec. Dig.  $\hookrightarrow$  573.]

The complainants were the next of kin and heirs at law of Joseph D. Cox, deceased, and the questions in controversy arose out of his will. The will was as follows: "I give to my brother John Cox, my half lot of land and buildings thereon, in Meeting street, No. 127; also, my proportion of a tract of land in Sumter district, High Hills of Santee, containing one hundred and fifty acres, and the following negroes, Abel, &c. To my niece, Susan Cox Porter, I give and bequeath the four following negroes, Barbara and her three children, &c., or in lieu thereof one thousand dollars, as my brother John might think best; my household furniture, and whatever proportion may come to me on a settlement of my mother's estate, to be disposed of as to my executors should seem fit in regard to the settlement of my just debts, and the overplus, if any there should be, I give to my brother John Cox;" and he appoints his brother John Cox his executor.

After the execution of his will, the testator sold the lot and buildings and the tract of land devised to his brother. After the making of the will and before the death of the testator, the woman Barbara, devised to his niece Susan Cox Porter, had a child born. The principal questions made, related to the bequest to his niece, now the wife of the complainant, James Haynesworth, and the concluding bequest to his brother.

<sup>1</sup> Contra, Seibels v. Whatly, 2 Hill, Eq. 609; Tidyman v. Rose, Rich. Eq. Cas. 294; also see Donald v. Dendy, 2 McM. L. 123, (in court of Errors.)



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\*De Saussure, Ch.—The first question which was made was, what effect the sale of the real estate, by the testator in his lifetime, had on the devise thereof to his brother John; on this subject there can be no controversy. It has been solemnly settled that a sale of land, after a devise and before the death of the testator, is a revocation of the devise; and the money due on the sale thereof becomes personal estate, and is distributed or passes under the residuary clause, according to the facts of the case. See 3 Desaus. Eq. Rep. 346, Cogdell's case. This point was candidly given up by the counsel for defendant.

The second question is, whether a negro child, born after the making the will and before the death of the testator, would pass with the mother to the legatee. This point has been decided on solemn argument. See the case of Gayle, and others, v. Cunningham, and others, decided in the Court of Appeals at Columbia, December, 1819 [see subsequent decision, Harp. Eq. 124], as well as the preceding case of Ellis & Shell, 4 Desaus. Eq. Rep. 611. By these cases it is established that the issue of female slaves bequeathed, born after making the will and before the death of the testator, do pass with their mothers to the legatees, unless there be evidence apparent on the face of the will, of a contrary intention. There is no evidence of such intention in this case. The testator seems to desire that the children should go with their mother.

The third question relates to the election in the case stated in the will, which is in these words: "to my niece, Susannah Cox Porter, I give and bequeath the four following negroes, Barbara and her three children, Jacob, Andrew, and Solomon; or in lieu thereof one thousand dollars, as my brother might think best."

It is contended for the brother of the testator, who was sole executor, that he has an absolute right to make an election between the slaves and the money, and to pay the legatee the one thousand dollars, instead of the slaves. But the legatee claims the slaves.

This is a nice and delicate question. The authority to deliver the slaves, or to pay a thousand dollars, seems to give the election wholly to the executor. But the expression is, "as he might think best." Now the ques-

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tion arises "best," for \*whom? It must be best for some person, and the only person in the contemplation of the bounty of the testator in this clause is the female legatee, his niece. For the testator does not, on the election either of the slaves or money, give the other article to his brother the executor. The money is not to be paid by the executor out of his own pocket, but out of the estate; for it is a legacy from the testator, and to come out of his estate. It can hardly be

supposed that the testator meant, by the expression, "as his brother and executor might think best," that the election should be made as might be most profitable or beneficial to his estate, for he was in the act of giving that away.

It does appear to me therefore, to be the reasonable construction, that the testator meant that the executor should exercise this power of electing as might be most beneficial to the legatee. For it was possible that a part or all of the slaves might die before him, and he meant at all events to secure a benefit to the legatee to at least the amount of a thousand dollars.

This view of the case is strengthened by the fact that it is not an implied bounty to the legatee, made by the will to be almost as dependent on the will of the executor as on the testator. But the gift of the slaves is, in the first place, absolute; then follows a qualification. Now reason and the decided cases say, that express bequests are not to be controlled or too much altered by inference from subsequent clauses or provisions, 1 Ves. jun. 269; 8 Ves. 42.

This reasonable construction seems also to be in accordance with a rule of equity, which has long prevailed and is of considerable extent and application. It is, that where the power of electing is given to a trustee, as to the rights of a third person, the trustee is bound to exercise that power most beneficially for the cestui que use. Now an executor invested with such a power, is a trustee for the legatee, and is bound to follow this rule of equity; and he shall not exercise it illusorily.<sup>2</sup>

<sup>2</sup> The doctrine of illusory execution of a power of appointment seems to have been always a subject of difficulty and embarrassment. The rule at law is, that if one has the power of appointing a fund among several, it is sufficient if he give each a share, however small. The rule of equity as laid down in several of the cases quoted, is that if one have such power, he shall give each a substantial share—a share not illusory. The idea seems to be, that as the donor intended a benefit to all the individuals among whom he directed distribution to be made, it shall appear that the person exercising the power gave each an actual, beneficial interest, and did not evasively exclude some, by giving only a nominal share. If the execution of the power appears to have been illusory, the Court will distribute the fund equally. What shall be considered this actual, substantial share has never been defined, and some notion can be formed on the subject, only by reference to the adjudged cases. Several judges have expressed themselves dissatisfied with the rule, and inclined to get rid of it altogether. In the case of Butcher v. Butcher, 9 Ves. 381, as also in Bax v. Whitbread, 10 Ves. 31, the master of the rolls, after speaking of the difficulty arising from the indefiniteness of the rule, says he will go so far as the adjudged cases have gone and no further. He does not explain, however, whether in following the decided cases, he will regard the positive amount given, or the proportion of the fund. On appeal, Lord Eldon acknowledges the difficulty, but says that as the rule is perfectly well established, the Court must determine as well

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\*This principle is illustrated by many decided cases which are, familiar. See 5 Ves. 848. *Kemp v. Kemp*; 16 Ves. 15. *Bax v.*

as it can, according to the circumstances of every case.

In the case of *Spencer v. Spencer*, 5 Ves. 362; there was a power to appoint a fund of about one thousand five hundred pounds among six; the power was executed by giving six pounds to one, eight pounds to another, and ten pounds to a third; the residue equally divided between the three remaining appointees. This was held illusory.

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\*In *Kemp v. Kemp*, 5 Ves. 848, the giving ten pounds to one, fifty pounds to another, and the residue to a third, of a fund of one thousand nine hundred pounds, was held to be illusory.

In *Vandreeze v. Aclom*, 4 Ves. 771, a mother having power to appoint a fund of two thousand four hundred and ninety-one pounds, among her five children, gave one ten pounds, and this was declared illusory.

In *Mocado v. Lonsada*, 12 Ves. 123, one hundred pounds was appointed to be divided between three daughters, and the residue of a fund of two thousand five hundred pounds, to two sons. Held not illusory.

In *Dyke v. Sylvester*, 12 Ves. 126, five thousand five hundred pounds was given to one, one thousand one hundred pounds to another, and five hundred pounds to a third. Not illusory.

In *Bax v. Whitbread*, the Master of the Rolls decided that the giving of one hundred pounds to one son and two thousand, four hundred pounds to another was not an illusory execution of a power of appointment by a mother. The Chancellor on appeal, (10 Ves. 15,) affirmed the decree; but on the ground that the son to whom the one hundred pounds was given had been otherwise provided for by his mother.

There seems some difficulty in bringing the case in the text within the principle of these decisions. The power was to appoint one of two funds, which the testator seems to have regarded as of about equal value; and it seems as if the giving of either was conferring a substantial benefit, and hardly to be called an illusory execution of the power. If the choice was with the executor, it appears difficult to say that it was fraudulent for him to exercise his discretion in a way which the testator intended to authorize. The Court seems to have regarded the bequest as if the words had been "as may be best for her" or "whichever may be more valuable," excluding any choice or discretion of the executor.

If the power of appointment be "to one or more," or "to child or children," the appointment of the whole to one is good. *Wollen v. Tanner*, 5 Ves. 218; *Kemp v. Kemp*, 5 Ves. 848.

In *McQueen v. Farquhar*, 11 Ves. 479, an estate was settled on the husband and wife for life; remainder to such one or more of their children as they should appoint, and in default of appointment to all their children as tenants in common. The father being desirous of selling the estate and having contracted to do so, executed an appointment in favor of his eldest son, (having five other children.) The deed of appointment recited that it was made in consequence of a promise and agreement by the father to and with his said son. The father, mother and son joined in selling. It was argued that from the recital of the promise and agreement, there was ground to believe that the father had derived an advantage to himself from the execution of the power, which would vitiate the appointment. The Lord Chancellor said that a party could not execute a power for his

*Whitbread*, 11 Ves. 479, *McQueen v. Farquhar*.<sup>3</sup>

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\*Upon the whole, I am of opinion that the executor, in making the election under this will, is bound to exercise it for the best interests of the legatee, and as the negroes are of more value than the money, he must choose the negroes for the legatee and deliver them to her.

The next question relates to the right of the executor to the one thousand dollars, bequeathed to the niece in the alternative with the slaves. This claim was faintly stated, and perhaps not intended to be seriously urged. There are no words in the clause which indicate any intention that when the executor should exercise the power of electing for the legatee, the other property should become his own, and I cannot supply such words.

We come now to the consideration of the residuary clause of the will. It is in these words: "my household furniture, and whatever property may come to me on the settlement of my mother's estate, to be disposed of as my executor should seem fit, in regard to the settlement of my just debts, and the overplus if any there should be, I give to my brother John Cox."

The defendant insists that this clause is a complete disposition of all the residuary estate of the testator, as well that not disposed of, as of that disposed of, but lapsing into

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the residuum; \*and that it comprehends the proceeds of the sale of the real estate, made by the testator in his lifetime, and also the negroes or the one thousand dollars given in lieu thereof. On a careful examination of the clause in question, I am of a different opinion. The testator says, my household furniture and what may come to me on the settlement of my mother's estate, to be disposed of as my executor thinks fit, in regard to payment of his debts, and the overplus, if any, I give to my brother John Cox. What overplus? surely the overplus of the property he had just been speaking of.

If the testator intended to make a general residuary bequest to this brother, why not say more simply and in the usual way, "I give all the rest and residue of my estate to my brother John Cox." I think it quite clear that the testator meant to give a specified and limited, and not a general residuum to his brother. If he meant to do more, he has not expressed his intention.<sup>4</sup>

own benefit, but he could not set aside the appointment on a suspicion that such might have been the case.

<sup>3</sup> *Fronty v. Fronty*, Bail. Eq. 517; *Seibels v. Whatly*, 2 Hill, Eq. 607.

<sup>4</sup> *Swinton v. Egleston*, 3 Rich. Eq. 204; *Peay & Pickall v. Barber*, 1 Hill, Eq. 97; *Glover v. Harris*, 4 Rich. Eq. 25; *Eulst v. Dawes*, 3 Rich. Eq. 292, 293; *Stuckey v. Stuckey*, 1 Hill, Eq. 309.



It is therefore ordered and decreed that the defendant do immediately deliver up to the complainants the negroes in question, and the issue of the females, and also do account for their hire and labor from the death of the testator, and that he do account and pay over to complainants their distributive share of the undisposed estate of the testator, including the sales of the land sold by the testator, which has or may hereafter come into the hands of the defendant to be administered.

The defendant appealed on the grounds:

1. That the defendant had the right to elect whether he should deliver the complainant the negroes or the thousand dollars:

2. That by the just construction of the will, he was the residuary legatee of the whole estate:

3. That the child of the woman Barbara, born after the making of the will, ought not to pass to the legatee.

Miller, for appellant. The first question is whether there is a general residuary bequest to the defendant. The presumption is, that he who makes a will intends to dispose of his whole estate. The bequest of the overplus does not relate necessarily to the immediate antecedent, the household furniture; but by a construction quite as natural, may

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be taken to refer to \*the testator's whole estate; and so it ought to be taken, if we are to presume that he intended to dispose of the whole. The testator's personal property was then small, though it afterwards became considerable by the sale of his real estate. The enumeration of minute particulars, descending to household furniture, strengthens the conclusion. In the case of *Ervin v. Ervin*, decided in this Court (Record Book, 237, 241,) the Court inferred an intention to dispose of the whole estate, from the enumeration of the particulars.

The decision of this point will bear on that which respects the right of election. For if the brother was the principal object of testator's bounty, it affords a reason why the right of election should be given to him; he might take the negroes upon paying one thousand dollars. If the alternative had not been intended for the executor's benefit, the natural form of expression would have been "as may be best for her." This is merely a question of intention, and has nothing to do with the doctrine of illusory appointment. If indeed it be taken for granted, that the testator intended the right of election for the benefit of the legatee, there may be ground for arguing that the Court will compel the executor to exercise it in good faith. But if it was intended that he should exercise it for his own benefit, there can be no ground for the interference of the Court.

This case differs from that of *Gayle v. Cunningham*, deciding that the issue of a

female slave born after the making of the will, pass by a devise of the mother. In this case particular children are enumerated which shall pass, and this excludes the implication that any others were intended.

Haynesworth, contra. (Confined by the Court to the question of election.) Every legacy implies a benefit to the legatee, and the alternative must be taken as intended for a benefit unless the contrary appears—unless the testator seems to have intended to benefit another by the qualification of his bequest. The words giving the election to the executor are not "as he may choose," but "as may seem best," and the question recurs, best for whom? and the only answer is, for the object of his bounty. There is

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an obvious reason why the election \*was given to the executor. The legatee was a minor and incapable of choice. Suppose all the negroes had died before the testator, could the executor elect to give nothing. It may have been on account of the chance of this, that testator made the provision, intending to secure her one thousand dollars, at all events. In the first instance, there is a direct bequest of the slaves, the alternative follows: can it be doubted that if the executor had died before making an election, the slaves would have gone to the legatee? The election was a trust incapable of transfer. A trustee is bound to execute his trust in good faith, and not for his own benefit, but that of his cestui que trust, if he appoints to his own benefit, the Court will set it aside as illusory. 5 Ves. 504; 11 Ves. 479; 2 Eq. Rep. 431.

It was ordered and adjudged that the decree of the Circuit Court be affirmed, and that a writ of partition do issue to carry the same into effect.

WATIES, DE SAUSSURE and JAMES, CC., concurred.

GAILLARD and THOMPSON, CC., concurred with the Circuit Court decree, upon all the points in the above case except that of election, on which they disagreed.

[As the case of *Gayle and Cunningham*, which is referred to in the foregoing case, deciding that the issue of a female slave born after the making of the will, pass under a bequest of the mother to the legatee, is of considerable importance and has never been published—it is thought proper to annex it here. The reporter is indebted to T. Bee, Esq., of Charleston, for the subjoined report of that case with the remarks on it.†]

† This case is overruled or greatly limited by the cases of *Seibels v. Whatly*, 2 Hill, 609; *Tidyman v. Rose*, Rich. E. Ca. 294; 2 McM. L. 123.

## Harp. Eq. 124

## GAYLE v. CUNNINGHAM.

(Columbia. April Term, 1824.)

[Wills.  $\hookrightarrow$  573.]

[Cited in *Tidyman v. Rose*, Rich. Eq. Cas. 297, 300, to the point that the issue of a female slave, given by a will, born after the execution of the will, passes, with the mother, to the legatee, unless a different intention appears upon the face of the will.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1248; Dec. Dig.  $\hookrightarrow$  573.]

[This case is stated in *Seibels v. Whatley*, 2 Hill, Eq. 609, to have been overruled.]

DE SAUSSURE, Ch.—The only question in this case is, whether the issue of a female slave, born after the execution of the will, and before the death of testator, should go with the mother to the legatee of said slave, or sink into the residuum and be distributable. There is no expression in the will as to the issue of this slave, nor any ground for inference. The Circuit Judge (De Saussure) decreed that the said issue

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should go \*(with the mother) to the legatee of the mother. His decision is the subject of this appeal. It is a case of difficulty, and the judges of this Court are divided in opinion. The law-judges have been consulted, but recollect no similar case. Several lawyers unconnected with the cause, entertain different opinions. The majority of this Court concur in the following decree:

The maxim of the civil law, *Partus sequitur ventrem*, has been adopted into the A. A. 1740, for the government of slaves. P. L. 163, 7 Stat. 397. That Act provides that the issue of female slaves shall follow the condition of the mother, and shall be chattels personal to all intents and purposes. This principle settles their status, and fixes a rule of property. A slave mother makes the issue slaves of her owner, though the father be free, or though he belong to another master. As far, then, as that statute applies in the present case, the issue of a female slave bequeathed, would go with the mother, to the legatee. An owner may dispose of a slave so as to prevent this consequence; but his intention must be clearly manifested. No case exactly in point has been decided in this State. *Milledge and Lamar* settled the point of the issue, as between tenant for life and persons in remainder. (4 Desaus. Eq. Rep., 641.) The Court were, in that case, unanimously of opinion that the issue went to the persons in remainder, to the exclusion of tenant for life or years. That case however, relates to issue born after testator's death; this, to children born during his life, though after the making of his will; in which issue are not named. It was insisted that, as the bequest is not perfected till the testator's death, children born before that period form-

ed no part of the legacy, do not pass under it, and must be distributable.

In the absence of any decided case, and if the A. A. be not conclusive, the Court must resort to principles and analogies. In *Ambler*, 280, Lord Hardwicke says: the general rule as to wills is, that the time of the testament, not the testator's death, is to be regarded; but that this rule admits of many distinctions and exceptions. One general exception is, where a legacy is of all my goods because of the fluctuation of personal property; but a specific legacy is no

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exception, unless it be in its own \*nature subject to increase and diminution, as a legacy of a flock of sheep. In *Ambler*, 641, Lord Camden decided that after purchased pictures would pass under a bequest of all pictures, because personal estate fluctuates. Now, a bequest of slaves is manifestly comprehended in the distinction made by Lord Hardwicke as to a specific legacy of a flock of sheep. Both are alike subject to increase and diminish, and of course fluctuate. In the case of a bond bequeathed, if testator has never received the interest, it passes with the principal. But it may be objected that when testator takes a note for the interest that has accrued between the making of the will and his death, it amounts to such a separation of the interest from principal as will prevent the interest from passing. So, in case of a child born, it is contended that there is a separation from the mother, and the child does not pass any more than the note taken for interest. But as this reasoning has no force in the case of flocks or herds bequeathed, where a similar separation of the increase takes place, it can have no force here. There is an important difference between such increase of the issue of slaves, younglings of a flock, &c., and the interest of a bond. When a testator takes a note for the interest due, he manifests by a positive act an intention that such interest shall not pass as part of the bond. In fact, interest is no longer due. The note is a new principal which can be no longer recovered by suit on the bond.

There is a distinction with which lawyers are familiar, between real and personal property, in many respects, particularly in cases of devise, which affects only such real property as testator possessed at the making of his will; not subsequent acquisitions.<sup>1</sup> But a general bequest of personal property, will carry all acquisitions, however made, between the date of the legacy and the death of testator. This old law was altered by a statute that placed real and personal property on the same footing as to devise; but the inconvenience was soon felt, and the Act repealed. It may be reasonably inferred

<sup>1</sup> Changed by Act of Assembly, 1858, 12 Stat. 700.



from this, that our law inclines to give the increase of personal property bequeathed to the legatee. I have examined the civil law upon this point, and have received informa-

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tion from others, among whom there is some difference; but I think the weight of authority, reason and humanity, are in favor of my own former decision and present opinion, that the issue should go with their mother, to the legatee.

The general and broad expression of the civil law maxim, *Partus sequitur ventrem*, (so explicitly adopted by our A. A. 1740,) appears to apply (literally) to the case; and there is nothing peculiar to take it out of the operation of the words. Another important maxim, both of civil and common law, is that *accessorium sequitur principale suum*. The civil law<sup>2</sup> seems clear, that the increment and accession to a specific legacy (*quovis modo auctum fuerit* as Vinnius says) belongs to the legatee. Thus, if a man devised lands, and afterwards built upon them, the buildings passed, though of much greater value. Dig. de Legat. 39, 44; Cooper's Just. 528. So, if a house was devised, after which expensive pillars or marble was added, they passed as accessories. Dig. 2, 20, 19. Vinnius on the Inst. 2, 20, 17; (and see Cooper, 162,) throws great light on the subject, and even extends the doctrine. He says, "In this paragraph and the three following, we are taught what the law is, if the thing bequeathed be increased or diminished, during the testator's life. If there be a diminution, it does not annul the legacy, unless the part taken away was the principal, and the remainder merely accessory;<sup>3</sup> and in case of diminution, the heir is not bound to deliver more than what remains. This is illustrated by four examples: 1, Legacy of a female slave, with the offspring; 2, Ordinary slaves with those called vicarial; 3, increase of flocks and herds; 4, a slave, with peculium. But, after diminution, the legatee can only take what remains, provided it be given as making part of the principal; not merely as accessory to the part lost or taken away; for, whenever the principal is destroyed, the accessory is destroyed with it. If there be any increase, the best opinion is that it goes to the legatee in the following

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cases: 1, In case of legacy of a flock or herd; 2, Of a building to which marble or other columns are added; 3, of the peculium of a slave. "But this head, Vinnius adds, is very comprehensive; (late patet) for to this are referred fruit of land, interest of money, rents of land, the issue of female

slaves, *partus*; the increase of flocks and herds, *foetus*; alluvial land, and others." 2 Domat, 162. The commentary of Vinnius is quite general, and goes beyond the text of the civil law.

There are other considerations of great weight which apply to the issue of slaves bequeathed, and show the propriety of permitting the children to go with the mother. Vinnius lays down the rule broadly, that if the legatee is liable to any loss, he is entitled to the chance of gain. Now the legatee of a female slave risks every consequence of breeding and child-birth, and should therefore be entitled to the issue. The original foundation of property was derived from labor bestowed on it, whereby its value was created or augmented. The issue of a female slave would often be valueless but for her exertions and sufferings, all of which are at the risk of her master or owner. Equality is equity. Those who incur the risk are reasonably entitled to the gain. This principle is familiar to jurists, and forms the foundation of several branches of legal learning. If it be said that inequality might thus be produced among the testator's family, it is answered that chances are equal, and the testator may, at pleasure, alter his will, as circumstances require. In a question of property, there seems to be no distinction between the *partus ancillarum* and the *foetus gregis*, which latter, it is admitted, goes to the legatee; and I apprehend it is not questioned that a general bequest of all a man's slaves, or those on a particular plantation, would carry the issue born after the making of the will, and before testator's death. Why then should there be a difference in cases of specific bequest of one or more females.

There are indeed passages in the civil law which have been considered by some as furnishing a different rule from that we have relied on.<sup>4</sup> It is a conflict of authorities and

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\*reasonings; but I consider the weight of authorities favorable to this opinion, and if they were more equally balanced than they are, humanity would preponderate; for humanity is a principle familiar to all legislation, as well as to all judicial decisions depending on principle, and not on positive provisions of law. The following passage is a proof of this: A question arose whether, in a legacy of a farm stocked and furnished, the tradesmen, (fullers, spinners, &c.) should pass. The opinion was that they should. Then follows this addition: "*Uxores quoque et infantes eorum qui supra enumerati sunt, credendum est, in eadem villa agentes, voluisse testatorem legato contineri; neque enim durum separationem injunxisse credendus est;*" 3, Pothier ad Pandect, 48. This French civilian, so praised by Sir William Jones for learning and wisdom, gives several rules for

<sup>2</sup> The civil law may be consulted in explanation of our law but not as authority, Fable v. Brown, 2 Hill, Eq. 390.

<sup>3</sup> "*Si quis ancillas cum suis natis legaverit, etiamsi ancillæ mortuæ fuerint, partus legato cedunt.*" Vin. 2, 20, 17, and see 3 Poth. 115, (because they are a sort of principal.)

<sup>4</sup> Quere—Which are they? And have they been justly interpreted? T. B.

the interpretation of wills of doubtful expression, which apply here. He says: "In re dubia, benigniorem sententiam sequi, non minus justum est quam tutius: semper in dubiis, benigniora preferenda sunt." If then this case were more doubtful than it is, humanity obviously dictates that the children should follow their mothers; a contrary decision would separate even sucking infants; for in most cases of legacies, the children would be young. (For, if grown up, the testator would specify them. T. B.) Such a separation would be revolting; we cannot therefore be called upon in a doubtful case, to decide in such a way. Sound policy, as well as humanity, requires that everything should be done to reconcile these unhappy beings to their lot, by keeping mothers and children together. By cherishing their domestic ties, you have an additional and powerful hold on their feelings and security for their good conduct. As a question of property, it is unimportant how the rule is settled, for it will operate alike on all. Since then, our statute of 1740 established the general principle that the issue of female slaves shall follow the condition of the mother; that principle should govern every case where, as in the present, there is nothing to constitute a lawful or reasonable exception. The weight of the civil law is, as we have seen, in favor of a union of the mother and her children; and all the analogies of the common law, con-

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\*firm the civil law. Finally, humanity and policy combine to recommend the principle upon which I decree, of *partus sequitur ventrem*. I think therefore that the decree of the Circuit Court should be affirmed, and that the issue of the female slaves in question, should go with their mother.

WATIES, and THOMPSON, CC., concurred.

GAILLARD, Ch., dissented.—There is but one question in this case, viz.: Whether, under a bequest of a female slave by name, her issue, born between the making of the will and the death of the testator, passed to the legatee.

An inquiry into the civil law upon this subject appears to me wholly unnecessary, as our own law furnishes a rule of decision, and where our law speaks the civil law is silent. A testator may by will, dispose of property acquired subsequently to the making of it; but the property remains in him, and does not till his death, vest in the legatee. Here a female slave, designated by name, is given, nothing is said of the issue, therefore no inference arises from the will that the issue should pass with the mother, or it may be, with the grandmother; for if the issue of the mother pass, the issue of her issue will also pass, and a bequest of one slave may carry forty or fifty. [An extreme case, leading to false conclusions *ut semper*.—T. B.]

The maxim, *partus sequitur ventrem*, does not apply. The children of a female slave are slaves, and belong to the owner of the mother, as the increase of any other female animal belongs to him who owns her. As the testator owned the female slave, the children she had after he made his will were his, and he might have disposed of them to whom he pleased; he might have given them to any other person than the legatee to whom he bequeathed the mother; our law does not forbid it. (Nor does our law enjoin it. The present and every similar question arises from the silence of the testator and of the law.—T. B.) The argument derived from the inhumanity of separation, may make us wish that the law were otherwise; but what the law is and what it ought to be, are very different considerations; the former of which only belong to this Court. Under the code noir, husbands cannot be sold separately

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from their wives, nor \*children of tender age from their parents, not so under our law. In the bequest of the mother, the issue are not necessarily comprehended, and if the testator intended they should go with the mother, he has not used words sufficient to pass them; if they do pass, it can only be as accessories. The interest of a bond, accrued between the making of a will and the death of the testator, passes, it is said, with the bond. It does so, but the interest is as much part of the bond as the principal. So a child in *ventre sa mere*, will pass with the mother. But if a testator has taken a note for the amount of interest on the bond bequeathed, that note does not pass to the legatee of the bond, it is separated from the bond, as is the child of which a female slave has been delivered. (What! when still at the breast?—T. B.) According to Domat, an accessory of a thing bequeathed, which not being a part of the thing itself, has, nevertheless, a connection with it, will pass with the thing. The shoes of a horse will pass with the horse, and the frame of a picture with the picture; it is in relation to their use,<sup>5</sup> that accessories are connected with principal things bequeathed. In this respect, children are not connected with the mother. (Quere—For if a new born infant is suddenly separated from the mother, the life of the latter would be endangered, at least by an overflow of milk. T. B.) The point now before us has been decided in North Carolina, and I concur in that decision. I am of opinion that the issue do not pass under a bequest of the mother.

JAMES, Wm. D., Ch., concurred.

It is singular that Judge Gaillard should have referred solely to the common law of England for analogies relative to female

<sup>5</sup> "The circumstances and usages of the place may help us to judge what ought to be considered as accessories." 2 Domat, 161; Lib. iv., Tit. 2; 2 Const. Dec. 25.



slaves. That law is of force among us, only so far as accords with our situation and circumstances. "We must, says a writer in the North American Review, (October, 1720, p. 409,) borrow from the civil law, the rules on a subject with which this part of the na-

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tion (Massachusetts) has no connection, \*but which in which in another part (the slave holding States) is but of too great importance, to wit, involuntary servitude."

As to the estimation in which the civil law is held in England and America, see Sir Wm. Jones on Bailments. 1 Tuck. Blacks. part 1; App'x. 439; 1 Fonb. 855; 3 Binn. 507; post.

"Suppose a female slave is bequeathed, and she has afterwards a son, who grows up to man's estate, and then testator dies; does the bequest of the mother pass the son? or if a mare be bequeathed, which afterwards has a foal that grows up to a horse, and then testator dies; does the gift of the mare pass also the horse? Surely not." Dictum of Sir Samuel Romilly, in 2 Maddock's Rep. 277.

The express mention of manhood in case of the slave, and full maturity (horsehood) in case of the foal, show what would have been Sir S. R.'s opinion as to children and foals. "In a case of doubt the law of humanity ought to turn the scale," By Roane, Just. 4, H. & M., 291. "In re dubia, sententia benignior sequenda est." 3 Poth. ad. Pand.

In both these cases, the issue of slaves are the subject under discussion, by the Virginia Judges and by Pothier. Sir Wm. Jones says, the whole civil law must be considered as one system, and taken together. In this way the two following clauses must be construed: *Ancilla cum natis legata, dum homo in hominis accessione non est, adeo duo legata separata sunt.* Issue not mere accessories. Dig. Lib. 3, Tit. 8: 3 Pothier, ad. Pand.

That is, they are so distinct that, though the ancilla die, the nati may pass under the bequest; for (say the institutes) "*Si quis ancillas, cum suis natis, legaverit, etiamsi ancillæ mortuæ fuerint, partus legato cedunt.*" (Issue not mere accessories.) Vinn. 2, 20, 17.

"*Causa significat et fœtum et partum et partus partum—omnem denique rei utilitatem.*" Calv. Lexic. Jurid. Causa.

See the case of Ellis v. Shell, 4 Desaus. 611, decided before Milledge & Lamar, (Ibid 642,) but wholly overlooked both in that case and in this.

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\*In [McDonald's Ex'rs v. McMullen] 2 Mill Const. Rep. 95, Cheves, J., notices the case of Ellis and Shell (very defectively presented to him) and says (inter alia,) "The claim of plaintiffs is for the issue of the female slaves, which in general is to be considered as identified with the parents. From the nature of this property, this principle is generally necessary to the perpetuation of the property,

particularly in cases like the present &c."—(case of infants.)

Mr. Cheves (delivering the opinion of the Court) seems to have been duly impressed with the want of analogy between cases of slaves, their issue, &c., &c., and cases arising under the common law of England, where no such property exists. Cases of personal property are, in England, decided in Chancery, or in the Ecclesiastical Courts, both of which make frequent reference to the civil law. How highly that law is esteemed there, and in the United States also, will be seen from the following authorities. Judge Galliard must have overlooked them. "The civil law, as a system of jurisprudence, framed by wise men and approved by the experience of ages, must, in every country and in every age, furnish principles which, modified and applied as circumstances may require, will greatly contribute to the real interests and welfare of society." 1 Fonb. 255.

The lawyers and the people of England have always shown a jealousy both of the principles and practice of the civil law. But by degrees, in cases where the civil law is clearly right, jealousy gives way to good sense and justice." By Tilghman, C. J., 3 Binney, 507.

"Our probate and testamentary laws are confessedly no part of the Common Law, which did not admit of devises.—North Am. Rev., Oct. 1820.

"The civil law is the repository of all the principles by which national intercourse is regulated."—Ibid.

"The civil law is the origin of the law, mercantile and maritime. It is copious on the subject of contracts, covenants, and other obligations, which are topics of frequent discussion in the commercial world."—Ibid.

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\*"In questions of rational law, no cause can be assigned why we should not shorten our own labor, by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age, must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in Italy and in England, in the minds of a Papinian and of a Blackstone." Sir Wm. Jones, Law of Bailments Works, vol. 6, p. 604.

"Justinian's great work (the Corpus Juris Civilis) bears marks unquestionably of great precipitation; but with all its imperfections, it is a most valuable mine of judicial knowledge. It gives law at this day to the greatest part of Europe, [he might have added the French and Spanish settlements throughout the western world], and though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws that are not of feudal origin." By Sir Wm. Jones. See his Life, by Lord Teignmouth, p. 308, 4to ed.

"Nous admirons, tous les siècles admireront la théorie sur les choses et sur les contrats, que se trouvent dans les recueils de Justinien." Code civil, de France, v. 428.

"The same may be said of the civil law as of the common law in the Courts of the United States, (i. e. the Federal Courts); the rule of proceeding in which, whenever the written law is silent, are to be observed in cases of equity, and of admiralty jurisdiction." Tucker's Black, vol. i., p. 1, Appendix.

Having thus shown how far the civil law is entitled to weight both in the Federal and State Courts of our Republic, it cannot be unnecessary to subjoin the extracts contained in that law, relative to the point settled by the Court of Equity in the case wherein the judges delivered the opinions herein reported.

It must be recollected that the whole body of civil law (digests, code, novels, institutes, &c.) are to be taken as one system, as Sir Wm. Jones has above stated. By due attention to his recommendation, we shall have no difficulty in reconciling the following passages, the first of which is from the Pandects; the last from the Institutes. Taken

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together, they show \*that the civil law distinguishes, with exact regard to good sense and the fitness of things, cases wherein the issue of female slaves shall be considered as accessories, or as non-accessories.

"Ancilla cum natis legata, dum homo in hominis accessione non est, adeo duo legata separata sunt." Dig. cited 3 Pothier ad. Pand. 315.

The above passage was relied on by Mr. King, when consulted by the chancellors upon the applicability of the civil law in the case of Gayle and Cunningham, as there was no mention in that case of the issue, and as in this extract they are expressly mentioned, it is singular that any stress should have been laid upon this extract. It only says, that "if a female slave, with her issue, be bequeathed, the issue, though the mother die, shall go to the legatee. In a predicament where the maxim *partus sequitur ventrem*, would have caused the children to be buried alive, common sense at once refused to consider them as accessories. The doctrine on this head is more fully and intelligibly laid down by the Institutes, and by Vinnius, the commentator on them.

"Si quis ancillas cum suis natis legaverit, etiamsi, ancillæ mortuæ fuerint, partus legato cedunt." Vin. 2, 17, 20.

Commentarius.—Hoc paragrapho et tribus sequentibus docetur quid juris sit, si rei legatæ (vivo testatore) vel decesserit aliquid, vel accesserit. Si aliquid decesserit, ita jus est ut neque legatum extinguatur nisi quod decessit sit principale, reliquum accessorium; neque heres teneatur supplere quod decessit, set præstatione ejus quod superest, liberatur. Hæc res quatuor exemplis declaratur—1 Le-

gati ancillæ cum suis natis (the case above stated from the digest;) 2 Servorum ordinariarum cum vicariis: 3 Legati gregis: 4 Legati peculii. Cæterum, ut dixi, ita quod superest legato cedit, si id quoque principaliter legatum sit; non sicut accessio ejus quod decessit; nam, perempta re principali, etiam legatum accessionis extinguitur: quod ostenditur hoc § (paragrapho) exemplo legati servi, cum peculo; item fundi, cum instrumento, legati. Si quid accesserit, placet etiam illud legato cedere: ejus rei tria exempla proferentur—legati gregis, cui postea adjecta plura

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capita; legati ædium, quibus \*adjectæ columnæ et marmora; legati peculii cui deinde aliquid accessit. Lati autem hic locus patet. Nam huc etiam pertinent fructus, usuræ, pensiones prædiorum, partus, fœtus, alluvio, insula in confinio nata, et plura alia quæ hic non tangit Justinianus.

(The doctrine of alluvion, and of an island in confinio nata, is sufficiently known even to English common lawyers; so as to the fœtus pecoris. In the above passage, the *partus ancillarum* is classed with them, and will be governed by the maxim—*noscitur a sociis*.)

"There is no other general rule, in doubts concerning what ought to go along with the thing bequeathed, as its accessory, than first, the intention of the testator; next, the circumstances and usages of the place, if there be any—may help us to judge what ought to be accounted accessory, and what ought not. 2 Domat, 161, (Lib. iv. Tit. 2) 2 Const. Rep. 95.

"In infinitum, quibusque primis proxima copulata procedunt (are accessory.) Optimum ergo esse ait Pedius, non propriam verborum significationem scrutari, sed, in primis, quid testator demonstrare voluerit; deinde, in qua præsumptione sunt, qui in quaque regione commorantur."—Cited, Domat ut supra.

"Nimirum sic in universum jus est, ut cum quaeritur quantum sit in legato, id tempus inspicitur quo dies legati cedit; id est, cum res legata deberi incipit. Proinde, si ante diem legati cedentem, quovis modo auctum fuerit legatum, etiam augmentum illud legatario debetur."—Vinnius, p. 415, 4to ed.

"An instrumenti instrumentum, legato instrumento, continetur, quoritur, hæc enim quæ, rusticorum causa parantur, lanificæ, et fullones, et tonsores, et focariæ, non agri sunt instrumentum, sed instrumenti (sc. servorum.) Puto igitur contineri quæ supra enumerata sunt. Uxores quoque et infantes eorum credendum est, eadem villa agentes, voluisse testatorem legato contineri. Neque enim duram separationem injunxisse credendus est." See Pothier ad. Pand. vol. 3, p. 48.

"Non partus fructuario, aut bonæ fidei possessori acquiri debeat. In cæteris partibus juris, in fructu, sive redditu, aut causa etiam, partus computantur." Vinnius, ii. l. 37, p. 167.



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\*We have already seen that, according to Vinnius, the *partus ancillarum* was considered as an accession, due (*legatario*.) to the legatee.

"*Exemplum affert Scaevola. Concubinæ, inter cætera, his verbis legaverat.*" Fundum in Appia (via) cum villico suo et contubernali ejus et filiis, dari volo. Quæsitum est an et nepotes quoque villici et contubernalis ejus testator ad concubinam pertinere voluit. Respondit Scaevola nihil proponi cur non deberentur. There was no reason why they also (the grandchildren—nepotes) should not go. 3 Poth. ad. Pand. 48.

"Pothier adds in a note:"—Hæc interpretatio vocis "filiis" obtinet ad declinandum odium separationis liberorum a matre sua. Regularitur autem filiorum appellatio ad nepotes non porrigitur." Thus the same motive of humanity that prevented the tenant for life, or other bona fide tenant for years, from taking the issue, interfered to prevent the barbarous separation of child and mother, in the case of a legatee of the former, without any mention of the latter. The comprehensive meaning of the word *causa*, has been shown from Calvin's Lexicon. It means, says he, *omnem rei utilitatem*; and though it shall not be extended to the *fructuarius*, &c., shall, in *cæteris juris partibus*, have full effect; and Vinnius uses the word *causa* in that part of his commentary wherein he is considering how much a legacy shall comprehend.

As to the passage cited by Domat—In qua presumptione sunt qui in quaque regione commorantur," that is, the received notions and circumstances of the place, &c. See Judge Cheves' opinion, already quoted in 2 Const. Rep. 96, which is also that of the Court—"The issue of female slaves is in general to be considered as identified with the parents. From the nature of the property, this principle (of identification) is generally necessary to the perpetuation of the property; particularly in cases like the present."

The words "general" and "generally" amount to the *præsumptio* of the civil law, as cited by Domat. They serve also to let in Sir Samuel Romilly's exception, when the issue was become a man; in which case nei-

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ther the necessary preservation \*of the property, nor the humanity (which Pothier relies upon, and which our law as well as equity Courts will always consult) is at all concerned.

It is, not without diffidence, presumed that the case of Gayle and Cunningham was properly decided upon the foregoing principles of the civil law, and that the analogies derivable from the common law are weak and unsatisfactory.

It seems clear also, from the authority of Sir Wm. Jones, of Chief Justice Tilghman, of Judge Tucker, and of the able writer in the

North American Review, (Professor Everett) that the common law Courts of England are much indebted to the civil law; and that their admiralty and ecclesiastical tribunals are still more so. In the various questions necessarily arising out of a state of slavery, as it exists in several of these United States, the common law furnishes very little light. The Code Noir of the French and Spanish islands and settlements in the West Indies and in South America, is derived almost wholly from the civil law. Domat, who is so frequently appealed to in all our Courts, has extracted from the *Corpus Juris Civilis* as much as was necessary for his European countrymen; and he would have left nothing unsaid upon the subject of slaves, considered as property, if slavery had existed in France. As it is, many cases relative to it have been decided by reference to what he has collected as to the increase of animals; a deeper research into the materials from whence he formed his volumes, would have shown that the ancients abhorred the idea of confounding the human species with the brute creation. Humanity, which from Tribonian to Pothier, constitutes so distinguishing a feature of their slave-law, could hardly be expected to occupy them on the subject of herds and flocks. In short, it is matter of infinite regret that no American Domat has as yet presented in our language, the provisions of a system that leaves to the zealous and acute inquirer little necessity for search in any other quarter. The present President of the Charleston College has given ample proof of his talents in this department of knowledge; and we may hope that the Legislature of this State will, before it be too late, provide

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such inducement to call forth \*his industry and abilities, as may satisfy the profession of the law and the community who depend so much upon them.

When the question arose a century ago, in Maryland, between the tenant for life of slaves, and the remainderman, Domat alone was consulted. As he does not touch the subject of slaves, the Maryland lawyers suffered themselves to be governed by what is laid down in Domat, upon the subject of the increase of flocks and herds, which the civil law, as before observed, most carefully distinguishes from the *partus ancillarum*—the issue of female slaves. The error became *communis*, and therefore *fecit jus*; so that when Mr. Dulaney, a man well read in the civil law, decided a similar case, after an interval of seventy years, he felt himself bound "*stare decisis*," rather than to unsettle what was become, in Maryland, a rule of slave property. He did not, however, fail to comment on the blunder that had crept into the original decision; 1 Harris & M'Henry, 160, (Maryland Reports.) The North Carolina case referred to by Judge Gaillard, is in Cameron & Norwood, 310. See, too, Hen. & Munf.

290; Va. Rep. In addition to the testimonia in favor of the civil law, it cannot be amiss to add the following remarks of Mr. Duponceau, of the Philadelphia bar, whose intimate knowledge of that system has been shown in his various publications respecting it.

"The common lawyer (in England) looks down upon the civil law with a mixed feeling of contempt and dislike; while the civilian, proud of the superior elegance of Justinian's collection, smiles at what he calls the barbarous jargon of Westminster Hall. Yet those two systems, though different in many respects, assimilate more than is generally believed; at any rate they are both, as they respectively apply, constituent parts of the general jurisprudence of the land. We have, in this respect, an immense advantage over the English nation; the administration of the civil and common law is committed to the same judges, and the same body of jurists is called upon to practice both. Hence it becomes necessary to our practitioner to become acquainted with the two codes; by which means the law will become, in their hands, a more expanded and more

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liberal science. The fruits of the study of the civil law, which has lately become fashionable among us, are already become perceptible in erudite works of jurisprudence, and in the able decisions of Federal and State Judges, who have shown by their examples, what advantages may be derived from an acquaintance with that beautiful system of moral philosophy applied to human affairs."

As to the dislike of English common lawyers, to the civil law, Mr. Duponceau makes the following just remark:

"The source of that dislike lies deep in the history of their country. The efforts made in former times to introduce the civil law into England, were with a view to destroy the liberties of that nation. The attachment of the (Roman Catholic) clergy, to the civil code, was not so much on account of its admirable theory of contracts, as of the Imperial texts in favor of the unlimited authority of church and king, and the administration of justice without a jury; which plainly showed what would have been the judicial organization of the kingdom, if their doctrines had prevailed. Nor can we blame the English nation for entertaining the same jealousy at the present day, when we consider the tendency of monarchical governments to arbitrary power. In this republican country, no such danger is to be dreaded; and our common lawyers may profit by a knowledge of the civil law, without fearing the introduction of monarchical principles, or of any preference of the torture to the trial by jury."—Duponceau's Address to the Law Academy of Philadelphia, 1 Journal of Jurisprudence, 217.

Judge De Saussure has, in the foregoing

decree, relied upon the following article of the Code Noir, by which the French islands were governed, and which was derived almost wholly from the civil law, where that law could apply:

"Ne pourront etre saisis et vendus separement, le mari et la femme et leurs enfans impuberes, s'ils sont tous sous la puissance du meme maitre: declarons nulle les saisies et ventes qui en seront faites; ce que nous voulons avoir lieu dans les alienations volontaires, sous peine contre les alienateurs d'etre, prives de celui ou de ceux qu'ils au-

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ront gardis, qui seront adjuges aux acquireurs; sans qu'ils soient tenus de faire aucun supplement du prix.—Code Noir des Isles Francoises, Art. 47. Code Noir pour La Louisiane, Art. 23.

The expression, *impuberes*, shows with what propriety Sir Samuel Romilly, in the dictum already cited, distinguished between the slave when grown to manhood.

Both the above cases provide that the issue and increase born, during a tenancy for life or other temporary estate, shall go to the proprietor or remainderman.

For the benefit of such members of the bar as may not be familiar with French and Latin, the subjoined translations of what has been cited from those languages, are added:

*Ancilla cum natis, &c.*

"If a female slave, with her issue, be bequeathed, (inasmuch as the doctrine of accession does not apply to the human species,) the legacies are separate."—Dig. cited, 3 Poth. ad. Pand. 315.

*Si quis ancillas, &c.*

If female slaves, with their issue, be bequeathed, the issue will pass, though the mothers be dead.—Inst. 2, 20, 17.

Vinnius' Commentary.

"In this, and the three following paragraphs, we learn what is the law if, during the life of the testator, the thing bequeathed be diminished or augmented. If it be diminished, the law is that the legacy is not thereby extinguished, unless that which has been taken away constitutes the principal, the remainder being merely accessory. Nor is the heir bound to supply the loss; he is only to deliver what remains. This is shown by four examples: 1. The legacy of a female slave, with her issue, (the case above stated from the digest.) 2. The case of ordinary and vicarial servants. 3. The legacy of a flock or herd. 4. The legacy of the peculium of a slave. But, as I have already said, the remainder, (*id quod superest*) passes under the bequest, provided it be in its nature principal and not merely accessory to the part lost; for if the lost part be principal, the accessory is extinguished with it. This is evident from the example set forth in this

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paragraph, of the legacy of a slave with his peculium; or of a farm, with its furniture,



utensils, &c. In case of augmentation, that increase goes also to the legatee; of which three examples are adduced: 1. The legacy of a flock or herd, to which many heads are added. 2. Of a house to which columns and tablets of marble have been affixed. 3. Of a peculium which has subsequently become larger. But this class is very comprehensive, (*hic locus late patet*;) for herein are included fruits, interest of money (*usuræ*), hire of farms, (*pensiones prædiorum*), the issue of slaves, (*partus*;) the increase of flocks and herds (*fætus*;) alluvion; an island suddenly appearing on the boundry of land (*in confinio nata*;) and many other instances, of which Justinian has not in this part of his code (*hic*) treated."—Vinn. *ut Supra*.

"In infinitum, quisbusque primis, &c., 28.—See 2 Domat, 161.

"Nimirum, sic in universum jus est."

"Doubtless, the general law is, that when a question arises as to the amount of a legacy, (*quantum sit in legato*;) we regard the time when the legacy becomes due. Accordingly, if before that time, the thing bequeathed has received any increase, (*quovis modo auctum fuerit legatum*;) even that increase shall pass, (*augmentum illud legatorio debetur*.)

"An instrumenti instrumentum, &c."

"Where the furniture, stock, and other appendages of a farm, &c., have been bequeathed, it is asked whether the appendages of those appendages (*instrumenti instrumentum*) are included. For the things provided for the comfort and accommodation of servants on a farm, (*rusticorum*) to wit, spinners, fullers, barbers, scullions, (*focariæ*) are not the appendages of the land, (*agri instrumentum*;) but the appendages of those appendages, that is, of the slaves who cultivate it.

My opinion is that all these pass, and with them, their wives and children, who, being employed on the settlement, must be supposed to have been included by the testator in his legacy of that settlement, (*eadem villa*.) For he ought not to be supposed capable of willing a cruel separation of such objects.

"Non partus fructuaria, &c."

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\*The issue ought not to go to the tenant for life, or other limited term (*bonæ fidei possessori*—mortgagee, &c.) But in other parts of the law, it is provided that the issue shall be considered as accessorial (*in fructu, sive, redditu, aut causa*.)

"Exemplum affert Scævola, &c."

Scævola states the following case: A legacy to a concubine was in the following words: "I give her my farm in the Apian Road, with the former, his wife and children." A question was made whether grandchildren passed. Scævola answered that nothing prevented their passing with the rest.

Pothier adds, "This construction of the word children arises from a desire to avoid

the odious separation of children from mothers regularly, the term children was not extended to grandchildren."

"Ne pourront etra saisis et vendus," &c.

"There shall be no seizure and sale, under execution of husband, wife, and children not grown up, (*impuberes*) separately. All such sales shall be void, as well as sales by private contract, under the penalty of forfeiture on the part of the seller, of such parts of a family as he may retain; which shall become the property of him who purchases the others, without his being liable to pay any additional price."

The subjoined clause from the Code Noir completes the view derivable from that system (derived from the civil law) on this interesting subject.

"Enjoignons aux gardiens, usufruitiers, amodiateurs, et autres jouissans des fonds auxquels sont attaches des esclaves qui y travaillent, de gouverner les dits esclaves comme bons peres de familles; sans qu'ils soient tenus, apres leur administration, de rendre le prix de ceux qui seront decedes, ou diminuees par maladie viellesse, ou autrement, sans leur faute; et sans qu'ils puissent aussi retenir, comme fruits a leur profit, les enfans nes des dits esclaves, durant leur administration; lesquels nous voulons etre conservez et rendus a ceux qui en seront les maitres et proprietaires, Art. 54, du Code Noir des Isles, 81; 49. du Code Noir de la Louisiane, 125.

#### Harp. Eq. \*144

\*NANCY BOYD, per pro. am. v. JOHN BOYD.

(Columbia. April Term, 1824.)

[*Husband and Wife* ⇐283.]

When a wife applies to this Court for alimony, her own conduct must not be impeachable with such violence or *sevitia* as might provoke the husband to retaliate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⇐283.]

The testimony which may be necessary to the understanding of this case is sufficiently referred to in the decree of the presiding Chancellor.

James, Ch.—The complainant has placed her claim to alimony upon two grounds: 1, violence committed on her person by the husband; 2, adultery on his part. In the last she has failed, having adduced only a few suspicious circumstances. The first ground depends principally upon the testimony offered by the first witness, her daughter. She did not see the blow given, but only heard the quarrel, and saw the defendant have a piece of board in his hand, and saw a cut or bruise on complainant's head—other witnesses saw the same cut. Defendant in his answer, denies that he struck her, and says that he pushed her and she fell into her chair, and her head struck the corner of a table, but that she had struck him the day before and

called him a liar at that time. The answer is not controverted, and it is plain from the whole evidence that complainant has been much to blame. The defendant is a poor wagoner it seems, of rude manners and given to intoxication, but I do not think his conduct evinces so much continued cruelty as to entitle complainant to alimony. A decree for alimony, I find from experience, amounts commonly to a separation for life, and if allowed it must come out of defendant's daily labor, and the wife appears to be as able to work as the husband. It is true, the defendant, besides the implements of his trade, has some land, but that is of trifling value. Let complainant seek to make her peace with him, and let him be bound if necessary, to keep the peace towards her. The bill must be dismissed; each to pay his and her own costs.

On appeal the opinion of the Court was delivered by

JAMES, Ch.—The complainant brought her bill into the Circuit Court for alimony; which was refused, on the ground that her own conduct was impeachable, and that the vio-

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lence offered by the husband \*had been provoked by her, and had not been proved as great as was alleged. And now it becomes necessary to lay down as a general rule, that in all cases where a wife applies for alimony in this Court, her own conduct must not be impeachable with such violence or savitia as might provoke the husband to retaliate. The present case will afford an instance to elucidate the rule; the day before the violence alleged against the husband was offered, the wife had struck him, and at the time it was offered she called him a liar. These are considered sufficient reasons for refusing the complainant alimony. Therefore the decree of the Circuit Court is affirmed.

DE SAUSSURE, GAILLARD, and THOMPSON, CC., concurred.

#### Harp. Eq. 145

GEORGE MILLER, by His Agent W. Blocker,  
v. MUSE TOLLISON and Others.

(Columbia. April Term, 1824.)

[*Discovery* ⚭27.]

The bill was brought by a creditor, to set aside the sales of property of one of the defendants, charging that they were fraudulent, and the purchases made with the funds of said defendant. *Held*, that it was not merely a bill for discovery, and that proof might be received to contradict the answer of defendant, denying the fraud.<sup>1</sup>

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 40; Dec. Dig. ⚭27.]

<sup>1</sup> See *Stacy v. Pearson*, 3 Rich. Eq. 148.

[*Husband and Wife* ⚭94.]

A husband may lawfully, by deed, constitute his wife a sole trader, under the recognition of the practice, by the A. A. 1744; but

[Ed. Note.—Cited in *McDaniel v. Cornwell*, 1 Hill, 430.

For other cases, see *Husband and Wife*, Cent. Dig. § 370; Dec. Dig. ⚭94.]

[*Fraudulent Conveyances* ⚭104.]

Having been made a sole trader when her husband's affairs were embarrassed, having soon after purchased his property to a considerable amount, and having pursued no separate business, by which she might have acquired separate property, she was bound to show from what source she derived funds to make the purchases; and in default of such showing, her purchases declared fraudulent.

[Ed. Note.—Cited in *Ewart v. Nagel*, 1 McM. 52.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. ⚭104.]

[*Fraudulent Conveyances* ⚭183.]

A house and lands conveyed, absolutely on the face of the deed, to secure a debt actually due, at a nominally high price, and of value far beyond the amount of the debt; but further intended to cover the property from creditors; the conveyance was declared fraudulent and void, and not allowed to stand as a security for what was actually due.<sup>2</sup>

[Ed. Note.—Cited in *McMeekin v. Edmonds*, 1 Hill, Eq. 295; *Fryer v. Bryan*, 2 Hill, Eq. 59, 60; *Parker v. Holmes, Id.*, 96; *Bowie v. Free*, 3 Rich. Eq. 411.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 582; Dec. Dig. ⚭183.]

[*Fraudulent Conveyances* ⚭165.]

[A conveyance fraudulent in fact will be set aside in favor of creditors, whether the grantee participated in the fraud or not.]

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 494; Dec. Dig. ⚭165.]

De Saussure, Ch.—The bill in this case was filed by a creditor of Muse Tollison, to set

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aside the sale and \*purchases of certain slaves, furniture, lands and dwelling house of said Tollison, on the allegation that they were made covinously, and with a view to deceive and defraud his just creditors.

The answers generally denied the frauds. But Muse Tollison, who is the principal defendant, and upon whom the imputation of fraud chiefly lay, has been positively proved, by several respectable witnesses, not to be entitled to any credit; so we are compelled to come to the conclusion that no reliance can be placed on this defendant's answer in a Court of justice.

<sup>2</sup> See *Ante* 72, and *post*, 261, 292. Also *Parker v. Holmes*, 2 Hill, Eq. 95. *Miller v. Furse*, Bail. Eq. 187, 14, 137, 227, 636. *Brown v. McDonald*, 1 Hill, Eq. 297. *Gracey v. Davis*, 3 Strob. Eq. 55 [51 Am. Dec. 663]. *Fryer v. Bryan*, 2 Hill, Eq. 56, 31. *Bowie v. Free*, 3 Rich. Eq. 411, 4 Rich. 402. *Johnston v. Bank*, 3 Strob. Eq. 342. *Anderson v. Fuller*, McM. Eq. 33 [36 Am. Dec. 290]. *Fulmore & Morgan v. Burrows*, 2 Rich. Eq. 95. *McMeekin v. Edmonds*, 1 Hill, Eq. 288 [26 Am. Dec. 203]. *Ib.* 119, 143. *Bail.* 138. *Rich. Eq. Ca.* 135, 185.



It was objected, however, that it was not proper to receive any evidence to prove the want of credibility of the defendant, Tollison, because the complainant, by putting him to his oath, gave him credit, which he was not at liberty to attack or deny. This objection, by going too far, defeats itself. It would be absurd and mischievous to admit it—and it is not the rule of the Court.<sup>3</sup>

Discrediting, then, the answer of Muse Tollison, we are obliged to resort to other testimony, and to form our judgment on the weight of the evidence. But it was further objected by some of the counsel, that this was a bill of discovery, which gave jurisdiction to the Court; and no discovery being obtained, and the answer denying the allegations of the bill, the Court was not at liberty to receive evidence to contradict the answers, and to decide on that evidence. This is surely not the doctrine of the Court. Here is a bill filed, charging gross fraud to defeat creditors. All bills in equity may be considered in some degree as bills of discovery, for they all allege facts, and interrogate the defendants as to their truth. If the answers of the defendants, admitting or denying the charges alleged, were conclusive, there never would be any necessity for the adduction of evidence. But we know that in practice, evidence is constantly produced to contradict the answers, or to establish the facts which are not admitted by the defendants. There is a plain rule on the subject, which is, that the defendant's answer, if he is not proved to be utterly unworthy of credit, shall have so much weight attached to it that it shall be considered as establishing the truth to what

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it states, in answer to the \*allegations of the bill, unless contradicted by two witnesses, or by one witness and strong circumstances. The very existence and continual application of this rule is decisive against the assumption, that because bills in equity demand information from the defendants on their oaths, their answers are therefore to be considered as conclusive, and exclusive of all other testimony. I have made these remarks, because it appears that there has been a misconception on this subject, which ought to be rectified.

In the case we are considering, the answer of the defendant, Muse Tollison, must therefore be put out of the case, because witnesses of indisputable credit, have attested to his entire want of credibility. The answers of the other defendants will have their due weight. The mass of evidence was so great, that it would be tedious, and it is unnecessary to state it fully in detail.

It is sufficient to state, that at the hearing of the case, the complainant after the production of the evidence, gave up his liens

and claims as a creditor, on the slaves purchased by M'Bride, named Dan, Walter and Joe, and indeed to all the property sold as the property of Muse Tollison, except the following:

The slaves, Ben, Sarah and her child, Cooper, and Chloe and her child, and to the furniture, and to the house in the village of Spartanburgh, and the lands in the country:—Also, as to a store of goods said to be sold to Holder. These then form the only subjects of litigation, requiring the judgment of the Court.

Upon a careful examination of the evidence, it appears to me that these slaves must be decided to be the property of Muse Tollison, and subject to his debts. Those to whom they were knocked down at the sales were not always participators, or even conscious of the frauds intended;<sup>4</sup> but as they were induced to become purchasers and to convey the property back to Mr. Holder, a man of no property, who does not pretend to claim them, or to the children of Muse Tollison, who furnished the money himself

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for the payment, (as appears by \*the weight of the testimony) I am bound to consider these transactions as fraudulent and void as to the creditors; more especially, as the slaves remained in possession of said Tollison, or at his disposal.

This opinion has been formed notwithstanding the attempts to prove that the slaves in question were purchased for the children of Muse Tollison, and paid for by funds and money, not the property of said Tollison, but derived from other sources. The great weight of testimony is, that the money applied to the payment of these slaves was Muse Tollison's. The presumptions attempted to be set up, of a sufficient fund for the children of Muse Tollison, being applicable to and actually applied to these purchases, are not supported by sufficient evidence to establish that. Thomas Dare testifies that he never paid any money on his bond to the children of Muse Tollison, and there is no evidence of any other fund.

We come now to the consideration of the furniture: most of these articles were purchased and paid for by Mrs. Tollison, in her own name, or by her daughter, Missouri, or by Miss Chandler for her, or by others. The only question is from what source the payments were derived? If Mrs. Tollison had separate funds, bona fide her own, or was supplied by friends with them, to pay for those articles of furniture, then she may be protected in the enjoyment of them; if not, they must be considered the property of her husband and liable to his debts. It was contended on her behalf that she was created a sole dealer, by deed, on the 1 May,

<sup>3</sup> Evidence of defendant's general bad character, for invalidating his answer is incompetent. *Clark v. Bailey*, 2 Strob. Eq. 143.

<sup>4</sup> *Belcher v. McKelvey*, MS. Columbia, May, 1859 [11 Rich. Eq. 9].

1823, and that her purchase of furniture at sheriff's sales were made subsequent thereto, and that she had separate funds from her husband, which she had applied to pay for the articles she had purchased.

The right of the husband to appoint his wife a sole trader and dealer was questioned by the counsel for the complainant, and it was also insisted that there was no proof of her having earned any separate estate which she could apply to this purpose.

The Statute of 1744, (being the 10th section of the Attachment Act,) See Grimke's

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Pub. Law, p. 190, 2 Stat. 593, is the only \*provision made by our laws respecting wives being made sole traders. That statute does not create or give a right to husbands to make their wives sole traders, but it recognizes such a right as then existing and in use, and make provision against the abuse; and the usage thus recognized and guarded has continued ever since. It cannot therefore be denied that Muse Tollison had a legal right to constitute his wife a sole trader, and his doing so by deed on the 1 May, 1823, is not vicious. If not a regular creation of her, it is a sufficient recognition of her in that character. Her acts are however open to examination, and she shall not be made the instrument by which her husband may commit frauds on other persons. He shall not be permitted to pour his private funds into her purse, and protect them from his debts by calling them her separate estate. She must show, when called upon, how she has acquired a separate estate. In the case we are considering, Mrs. Tollison was not made a sole trader till her husband's affairs were deeply embarrassed, and only a few months before the total breaking up of his affairs. It is not shown that she pursued any separate business or trade, by which she could acquire a separate estate. It is therefore the highest presumption that she had no separate funds of her own, as a separate estate.<sup>5</sup>

But it is said there was a separate fund due to Missouri Tollison, the daughter, applicable to this purpose, which was so applied. This consisted of a bond of Thomas Dare and John Tollison, to their granddaughter, Missouri Tollison, for five hundred dollars, when she should attain the age of twelve years. But Dare swears that he has never paid any money on the bond, and Mr. Benson swears that John Tollison told him he had signed the bond to draw in old Dare to sign it, but that he was not to pay it, and that he had a counter bond from Muse Tollison.

It was also urged that John Holder and Miss Chandler had made some of the purchases and paid for them for Mrs. Tollison, and also John Kirby, but John Kirby swears that Mrs. Tollison paid him the money, and

it was distinctly proved that neither Holder nor Miss Chandler were in funds of their own, or capable of paying for these arti-

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cles. The result is, that we \*are reluctantly compelled to come to the conclusion that all the funds which were applied to make these payments were Muse Tollison's, consequently the articles purchased were his and liable to his debts. I come reluctantly and painfully to this conclusion, as I should be glad that this unfortunate family had some plank on which to swim; and it would be an act of kindness in the creditors to allow the innocent members of the family some of the articles which are indispensable to their comfort and subsistence.

We come now to the consideration of the land and houses, conveyed by Muse Tollison to Berryman Holder and his heirs, by deed bearing date the 1 March, 1822, in consideration, as stated on the face of the deed of twenty thousand dollars. The deed, upon its face purports to be an absolute conveyance in fee; but Holder admits that it was intended merely as a mortgage, to secure him the payment of sundry sums of money which he alleges to be due him, among which were two security debts; one to Mr. Weyman and the other to M'Millan. The land has been sold under a judgment of Weyman against Muse Tollison, and bought for Mr. Weyman. Holder claims the payment of the money arising from the sales, or that the sales should be set aside.

It was insisted for the complainant that as the absolute conveyance by Tollison to Holder, was a fraud to cover the property of Tollison from his creditors, that the conveyance should be considered null and void, and the property subjected to the debts of Tollison, leaving Holder to his remedy against him for any just demands that he may really have. It appears to me that this would be going too far. Prior to judgment, Tollison had a right to secure Holder for all that was justly due to him, and the deed ought to be considered a security to that amount. What that is, cannot be decided without a reference to the commissioner to examine and report upon all the various claims of Holder against Tollison, either for services rendered, or as security for Tollison, for sums paid by him or for which he is liable, taking care to examine and report on the payments and discounts.

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\*Some question was made about the execution of the deed, the regularity or fairness of which was questioned. The circumstances were obscure and raised some doubt, but upon the whole, I am satisfied that the deed was duly executed, and intended to be a security to Holder. Another question arose as to the sale of a store of goods by Muse Tollison to Holder. The evidence appears to establish that this sale was fictitious, and

<sup>5</sup> Raines v. Woodward, 4 Rich. Eq. 402, 404.



intended as a cover to protect the goods for Tollison.

The last question regards the costs. With respect to Muse Tollison, Holder, and those who combined with him to defraud his creditors, undoubtedly costs should be decreed. There are defendants however who do not appear to have been blamed worthy in these transactions, and the suspicions of the complainant, though colorable, would not justify giving costs against them.

The decree was that the property which appeared to have been purchased with Tollison's funds should be made liable for his debts; that Holder should be charged with twenty-four thousand dollars, on account of the creditors of Tollison (having received debts and goods of Tollison to that amount) and that the conveyance to him should stand only as a security for his claims on Tollison, of date previous to complainant's execution.

From this decree the defendants appealed on the various grounds involved in the case.

The case was argued by Irby, J. W. Farrow, A. W. Thompson and Clendenin, for the several appellants, and by W. Thompson, for the respondent. The argument related chiefly to the evidence.

GAILLARD, Ch.—We have considered this case, and are satisfied that the transactions of Tollison and his coadjutors were tainted, generally, with fraud; and the decree must be supported, as far as it decides against the defendants; but we are of opinion that the decree did not go far enough. It orders that the deed made by Tollison, conveying his lands to Holder, for the nominal consideration of twenty thousand dollars, should stand as a security for such balance as might be found to be bona fide, due by Tollison to Holder.

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\*The Court is of opinion, that although there might be something due by Tollison to Holder, the latter is not entitled to the benefit of the conveyance as a security for what may be found due, because the deed, making an absolute conveyance of the land by Tollison, for a large nominal price, was intended as a fraud, to cover his property from his creditors, and as Holder lent his name to this fraud, he ought not to derive any benefit from it. That deed must therefore be considered void, and Holder must be left to pursue his remedy against Tollison, if there be anything due to him; which is at least doubtful. Should he choose to pursue his remedy, he may be at liberty to go into the proof of the actual value of the store of goods purchased by him from Tollison, and of the debts due.

It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed, except so far as the same orders the absolute deed from Tollison to Holder of the land, to

stand as a security for what might be found due by Tollison to Holder; which is hereby reversed, and the said deed declared fraudulent and void.

It is also ordered, that if Holder chose to pursue his claim against Tollison, that he shall be at liberty to go into proof of the real value of the store purchased by him from Tollison, and of the amount of debts due to said store, and assigned to him.

THOMPSON and JAMES, CC., concurred.

I concur with the decree of the Court, except with respect to the deed by which Tollison conveyed his land to Holder absolutely. It appears to me that the decree of the Circuit Court, ordering that instrument to stand as a security for what might be ascertained to be justly due by Tollison to Holder, was correct. If it had been a mere naked fraud, I should concur in the opinion that the deed ought to be wholly set aside. But Holder really had claims on Tollison, and as he did not claim the land under the absolute deed, but declared openly that he held it merely as a security, and would relinquish and reconvey the land whenever his just demands should be ascertained and satisfied, I think he is entitled to the benefit of this convey-

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ance, \*as a security for his just demand; so far however as was consistent with the prior liens of other creditors. It strikes me that this case comes within the distinction made by Chancellor Kent, in the case of *Boyd v. Dunlap*, 1 Johns. C. C. 478, between deeds wholly voluntary and fraudulent, and those which are founded on some consideration, though very inadequate. There are, however, I admit, some decisions which go further, and perhaps justify the Court in setting the deed aside altogether.

HENRY W. DE SAUSSURE.

#### Harp. Eq. 153

JAMES BERRY, Adm'r of John Quinn, Dec'd,  
v. SAUNDERS GLOVER and JOHN  
VINYARD.

(Columbia. April Term, 1824.)

[*Chattel Mortgages* ⚡6.]

Complainant's intestate being indebted to defendants on a judgment, executed to defendants a bill of sale for a slave. Defendants at the same time executed an instrument promising to "account for the amount in three years, without being accountable for wages;" if the slave should die in the meantime, the intestate to be the loser. *Held*, that the transaction was in the nature of a mortgage; the slave ordered to be sold for satisfaction of the judgment, and defendants to account for his hire.<sup>1</sup>

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 24; Dec. Dig. ⚡6.]

<sup>1</sup> See ante 21. *Mosely v. Crocket*, 9 Rich. Eq. 339.

The bill in this case stated that some time in 1817, the complainant's intestate, having confessed a judgment to the defendants, to the amount of four hundred and twenty-eight dollars, executed to them a bill of sale, absolute in its terms, for a very valuable slave, a carpenter, whose hire was worth one dollar per day. That at the time of executing the bill of sale, the defendants executed an instrument of writing in the following words:—"We have this day received from John Quinn a bill of sale for his negro fellow, Simon. We promise to account to him for the amount thereof in three years from this date, or return the fellow, without being accountable for wages, and if the fellow should die in the meantime, Quinn is to be the loser by the said death, and this obligation to be void, 15 April, 1817." The bill stated circumstances of the intemperance of intestate, of his having been in the employment of defendants, and of his being embarrassed by their judg-

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ment, \*apparently intended to set up a charge of fraud, and prays that the agreement may be cancelled, the negro delivered up, and defendants compelled to account for his hire.

The defendants in their answer denied the charges mentioned, tending to show fraud. They stated that Quinn, being desirous of making some provision for his family, proposed to sell the negro in question to defendants, at the price of eight hundred dollars; part of which should be paid out in payment of his said debt, and the remainder be laid out in the purchase of cattle for the benefit of his children; on condition, however, that Quinn should have the right at any time within three years, to rescind the contract, by paying the amount of the said judgment, interest and costs. The defendant, Vinyard, stated that he agreed to this proposition and the bill of sale and instrument above set forth were executed; that the contract was a contract of purchase, though the intestate had a right to repurchase within three years. The answer further stated circumstances to show that Quinn considered the negro as the property of defendants; that eight hundred dollars was a high price for him, and that they had generally employed him as a common laborer.

The cause was heard on bill and answer.

THOMPSON, Ch.—The bill in this case states, that John Quinn executed a bill of sale to the defendants for a valuable negro fellow named Simon; that afterwards, to wit, on the 15 April, 1815, they entered into an instrument in writing in the following words:—"We have this day received from John Quinn, a bill of sale for his negro fellow Simon; we promise to account to him for the amount

thereof in three years from this date or return the fellow, without being accountable for any wages, and if the fellow should die in this time, Mr. Quinn is to be the loser by the said death, and this obligation to be void." The counsel for complainant contends that this instrument is in the nature of a mortgage, and the negro subject to be redeemed, and the Court is of the same opinion.

It is therefore ordered and decreed that the Commissioner do sell the said negro at public sale, at Orangeburgh Court house, at some suitable and convenient time, and out of the

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\*proceeds to pay to Vinyard and Glover whatever may be due to them on their judgment at law, after deducting therefrom the hire of the negro, and should the hire of the negro exceed the amount of the judgment and interest, then the defendants to pay to the complainant the surplus.

It is further ordered, that all matters and things be referred to the Commissioner to report on.

The defendants appealed on the grounds:

1. That the contract of the parties should not have been set aside, without some evidence of fraud in the procurement of it; and there was no such evidence.

2. Because whether considered as a mortgage or otherwise, the contract was express, that no hire should be paid.

Stark, for appellant, argued that the transaction was a sale; that the property was defendants, who could not consequently be liable for hire. There was not the slightest evidence of fraud, the cause was heard on bill and answer and the answer denies fraud. The consideration, eight hundred and fifty dollars, was an adequate one. But at all events the contract was plain that defendants should not pay hire. The only hardship on the intestate was that he gave credit three years for part of the purchase money; and the contract was a benefit to him, for he would probably have been compelled to make a greater sacrifice if the judgment had been enforced at once.

Felder, contra. This transaction is in the nature of a mortgage. 2 Eq. Rep. 570; 1 Johns. C. R. 128. Though the defendants have denied fraud in general, yet the Court may see plainly that an unconscientious advantage has been taken. The defendants may be satisfied with what we propose—to receive the amount of the judgment and interest, and give up the slave and pay the hire.

Decree affirmed.

DE SAUSSURE, THOMPSON, and JAMES, CC., concurring.



## Harp. Eq. \*156

\*HOPKINS HOWELL v. JOSEPH HOWELL, Jun., et als., Representatives of Wolfe.

(Columbia. April Term, 1824.)

[*Frauds. Statute of* ⚭74.]

Bill to enforce performance of a parol agreement, alleged to have been made with defendant's testator in 1815, and performed on the part of complainant, that testator should bid off the land of complainant at sheriff's sale and re-convey a part. Bill dismissed; the agreement being insufficiently proved, being within the Statute of Frauds, and the presumption being against complainant from the lapse of time.<sup>1</sup>

[Ed. Note.—Cited in *Lamar v. Wright*, 31 S. C. 75, 9 S. E. 736.

For other cases, see *Frauds. Statute of*, Cent. Dig. § 122; Dec. Dig. ⚭74.]

The bill states that the complainant, on or about the 6 day of March, 1815, was seized in fee of a tract of land, containing about seven hundred and twenty-three acres, lying in Barnwell district, on Edisto river, whereon the complainant then did and still does reside, and was indebted by two separate judgments, to David Crum and Jacob Ott, in about seven hundred and seventy dollars, including interest and cost, on which judgments executions had issued and were levied on the said premises. That complainant finding he could not pay off those judgments without selling a part or the whole of his land, and thinking he could support his family upon two hundred and twenty-three acres, part of his land, including his dwelling house, plantation and improvements, offered the remaining five hundred acres for sale, in order to raise money to pay off the executions. That John Wolfe offered to purchase, and finally agreed for the purchase of the said five hundred acres at the price of two dollars per acre, being less than the real value, and it was agreed by complainant and John Wolfe, that as the land was then under levy, it should be sold at sheriff's sale, at which sale John Wolfe should become the purchaser, whatever the price might be, receive sheriff's titles for the whole tract, pay off the executions, and pay the balance of the price agreed on for the five hundred acres to the complainant; and would also convey to the complainant, or to such person or persons as he might appoint, the two hundred and twenty-three acres aforesaid, including the plantation and other improvements.

That pursuant to this agreement, the whole premises were sold by the sheriff of Barnwell district; that persons disposed to bid, being apprised of the agreement, declined doing so, and the complainant relying on the agreement and being perfectly indifferent as to the sale, left the same entirely to the management of John Wolfe, so that he was enabled to become

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the \*purchaser without competition, at the

nominal price of five hundred and ten dollars, and received sheriff's titles accordingly. That John Wolfe soon after died, having first executed his will, whereby he gave the whole of his estate to the defendants, his children, &c.

The bill prays for a specific performance of this agreement.

The children of John Wolfe were minors, and answered by guardian, denying any knowledge of the agreement; alleging as their belief that no such agreement was made; insisting on the lapse of time, and that no memorandum of the agreement was made in writing.

The complainant called witnesses.

F. Trotti was sheriff at the time the land was sold, and sold it as sheriff. Wolfe bought it. At the sale, witness told Wolfe, "you have made a great bargain." Wolfe said, "no, I am to re-convey all except five hundred acres to Mr. Howell's children; this is the agreement between us." Wolfe was the owner of the executions under which the land was sold. It appeared to witness as if it was of no consequence to Howell or Wolfe what the land sold for, because they were to abide by their agreement. Wolfe paid no money but the costs.

Crum. Wolfe told the witness that he was to have Howell's land sold and buy it in; that all except five hundred acres he was to convey back to Howell's children; that if he got more for the five hundred acres than he gave for it, he was to give the balance back to Howell. Wolfe paid the money to witness, who was plaintiff in one of the executions, about six months after the sale.

Antley heard Wolfe speak of selling the land, and understood him to speak of the five hundred acres only; witness heard Wolfe say that he intended to give the other part of the land to Howell's children, but did not recollect that he said anything about an agreement.

L. E. Cooner. Wolfe offered the five hundred acres to witness at two dollars per acre, and Wolfe said he was to make titles to Howell's children for the balance. Witness understood, from what Wolfe said, that there was a contract between him and Howell, that he (Wolfe) was to have but five hundred acres.

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Witness heard \*Wolfe offer the five hundred acres to one Cox, and thinks he asked three hundred dollars for it.

THOMPSON, Ch.—The bill in this case is filed to compel a specific performance of a pretended parol agreement, specified therein.

From the testimony adduced to the Court, it does not appear that the contract relied on has ever been entered into. The amount of the evidence is to this effect, that after John Wolf had become the purchaser of the land at sheriff's sale, he told several persons

<sup>1</sup> Johnston v. LaMotte, 6 Rich. Eq. 347.

that he thought he could indemnify himself out of the sale of five hundred acres of the land, and after doing so, he intended to give the surplus two hundred and twenty-three acres, to the children of complainant. The proof is entirely deficient to establish a specific contract, and had it done so the defendant interposes the Statute of Frauds, which must prevail.

It will be further observed that John Wolfe lived five or six years, after the purchase, and the complainant never once suggested an idea of the claim set forth in the bill.

The defendants in this case come into Court and tell the complainant, pay back the money with the interest, and we will immediately reconvey the land to you; but no, says the complainant, the value of the land is not now as great by fifty per cent. as it was when the purchase was made, and therefore I insist on having the amount of the purchase money, and the excess of the land under the pretended parol gift.

This pretention is so unjust, that admitting the Statute of Frauds was not in the way, the Court would not sanction it.

It is ordered and decreed that the bill be dismissed with costs.

The complainant moved the Court of Appeals to reverse the decree of the Circuit Court, on the ground that the contract was clearly proved, and not within the Statute of Frauds.

1. Because there was an entire performance of the contract on the part of the complainant.

2. Because the refusal to comply with the contract is a fraud on the complainants, and the Statute was intended to prevent and not protect fraud.

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\*3. Because the title, as to the 223 acres, having been transferred to Wolfe without any consideration, a trust results in favor of complainant.

Patterson, for the motion, contended that the contract was sufficiently proved. That the Statute of Frauds does not apply to such a case, where one of the parties has performed fully, and is bound. Sugden Law of Vend. 83. The facts show clearly that there will be a fraud on complainant, if the agreement is not enforced. The lapse of time can have no effect against the complainant, but is rather favorable to his claim. The complainant has remained in possession ever since the sale. The defendants can have acquired no title by the Statute of Limitations, and the lapse of time can only be considered as evidence of acquiescence. But it is the defendants and their intestate who have acquiesced in the possession of the complainant; by forbearing to enforce their claims on the land they have recognized his rights, and afforded additional presumptive evidence of the agree-

ment. 1 Bridg. Dig. 60; Rob. on Frauds, 148; Sugden, 93.

Felder, contra. The complainant comes, after a lapse of eight years, to enforce a parol contract respecting lands, after the death of the person with whom the contract is alleged to have been made. The evidence by which the agreement is sought to be established is loose and uncertain, and consists altogether of declarations made after the sale. If established, it is within the Statute of Frauds; which can operate no fraud or injury to complainant. It is in his power to put himself in the same situation that he was before the agreement, as the defendants offer to reconvey, upon being repaid the money advanced and interest. No acquiescence can be imputed to defendants; who are minors; but the presumption is of force against the complainant, who has so long rested contented, knowing the legal title to be in them.

Decree affirmed.

DE SAUSSURE, GAILLARD, THOMPSON and JAMES, CC., concurring.

# Harp. Eq. \*160

\*EDWARD SMITH and Others v. JOHN SMITH and Others.

(Columbia. April Term, 1824.)

[Wills ⚡561.]

Testator devised to his daughter "the lands whereon she now lives," and after her death, to her children. She then lived, with her husband, on land of the testator, in North Carolina. Testator had another parcel of land adjoining the above, in South Carolina, which was considered to form one with it, and both were occupied together by the daughter and her husband. *Held*, that the land in South Carolina passed under the devise.<sup>1</sup>

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1221-1224; Dec. Dig. ⚡561.]

[Landlord and Tenant ⚡61.]

Testator claimed the land in South Carolina, under a lease from the Catawba Indians, for ninety-nine years, renewable forever. Defendant (testator's son-in-law) while residing on the land as his tenant, apprehending testator's lease to be defective, procured a new lease to himself from the Indians, according to the provisions of the Act of 1808. *Held*, that the lease thus procured enured to the uses of testator's will.<sup>2</sup>

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 193; Dec. Dig. ⚡61.]

[Evidence ⚡347.]

[Where a will has been proved in one state, an attested copy is sufficient evidence of the will in another state.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1376; Dec. Dig. ⚡347.]

<sup>1</sup> Ante, 56.

<sup>2</sup> Poag v. Sandifer, 5 Rich. Eq. 170, as to tenure of these Indian lands.



[Wills ⚡433.]

[Where a will has been proved in one state, an attested copy is sufficient evidence of the will in another state.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 930; Dec. Dig. ⚡433.]

John Dinkins, deceased, by his will, executed in May, 1810, devised as follows:—"I lend to my daughter, Mary Smith, one negro man, named Nathan, and all that tract of land she now lives on, together with the tract of land lying in the Indian boundary, whereon William Rice now lives, during her natural life, and after her death, the whole to be divided among her children for their use forever." Dinkins, the testator, died in 1811.

It appeared that at the execution of the will, and for a considerable time previously, Mary Smith, the daughter of testator, together with her husband, John Smith, resided on a tract of land belonging to testator, in North Carolina, adjoining the State line. Another parcel of land adjoined the above, but lay in the State of South Carolina, which the testator claimed under a lease from the Catawba Indians, for ninety-nine years, renewable forever. Smith and his wife had been put into possession of the land in North Carolina by Dinkins, and, at the same time, of the Indian land, as constituting one tract or plantation; and lands on both sides of the line were cultivated indifferently by Smith.

In 1808, an Act of Legislature was passed prescribing certain forms to be observed in obtaining leases from the Indians, and it appeared that Smith, apprehending that there was some defect in the lease or title of his father-in-law, Dinkins, procured a lease of the land from the Indians to himself, for ninety-nine, renewable forever.

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\*The complainants were the children of Mary Smith, who was dead; and the questions were, whether the Indian land in South Carolina passed under the testator's devise to his daughter of "the land she now lives on;" and whether Smith, while occupying the land as the tenant at will of his father-in-law, could lawfully procure a lease to be granted to himself, and whether the lease obtained by him, even if it were valid and the better legal title, did not enure to the uses of Dinkins' will.

The will of Dinkins was proved in North Carolina, and a copy duly attested was offered in evidence, without further proof. This was objected to, but the objection was overruled.

GAILLARD, Ch. The lands which the complainants claim were in the possession of John Dinkins and John Smith, his son-in-law, many years previous to Dinkins' death. Dinkins derived his title from James F. Gordon,

by an instrument in writing executed on the 5th of February, 1804, and Smith held under him, as tenant at will, the land which lies in North Carolina, and the Indian leased land lying in this State. By his will executed in May, 1810, he devised in the following manner: "Sixthly, I lend to my daughter Mary Smith one negro man, named Nathan, and all that tract of land she now lives on, together with a tract of land lying in the Indian boundary, whereon Mr. Rice now lives, during her natural life, and after death, the whole to be equally divided among her children for their use forever." He died in 1811, and his son and executor, James Dinkins, gave up all the papers which he supposed related to the lands, and which were such, he says, as his father held them by, to John Smith, and took his receipt, dated 16th December, 1811, for that tract of land whereon he (Smith) then lived, deeded and Indian land, agreeably to the will of the testator. Mrs. Smith died in 1813, and after her death, John Smith conveyed, for valuable consideration, part of the leased land to Thomas B. Smith, and another part to Harris; having previously obtained a new lease in his own name. Smith cannot make use of this lease hostilely to the rights of his children, and whether so he intended or not, it must enure to their benefit. He told Dinkins he had got a new lease, and on Din-

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kins \*saying to him, "Sure, you don't mean to wrong the children," he replied, he would not for his right hand, and that he did it to keep his children in order, and that they might not be refractory. Admitting it to be so, it can avail nothing to Smith, for it was his duty to protect the claims of his children under it; others might, but neither he nor those claiming under him, can, with a knowledge of the existing transactions, take advantage of its defects.

The defendants, Thomas B. Smith and Harris, say they were innocent purchasers without notice. The evidence carries notice to both of them. Thomas B. Smith had children by a daughter of the testator to whom legacies were left, and before he made his purchase, in a conversation with Dinkins, he said he would rely on the new lease, and believed he would risk it any how, if he had the money; and Harris, in his answer, admits he knew of John Dinkins' will, and it is probable, from what he says in another part of the answer, that he acted on the belief that the Indian leased land did not pass under the demise to Mrs. Smith.

On the other point, I am also with the complainant, that the devise carries the Indian leased land in South Carolina, as well as the deeded land in North Carolina. The tract devised was one tract (though composed of parcels lying in two States). It was under one fence, occupied and cultivated; and con-

sidered by the drawer of the will, and he says by the testator, one plantation, and was so considered by others; and the words of the devise are sufficient to effect the testator's intention. It is ordered and decreed, that the defendants, Thomas B. Smith and Harris, do assign their leases to the complainants, or surrender them to be cancelled, and that they do account for the rents and profits of the lands from the time of their respective purchases; that John Smith do account for the rents and profits from the death of his wife until he sold them, and that a writ of partition do issue to divide the lands according to the prayer of the bill, and that the costs of suit be paid by the defendants.

The defendants appealed on the several grounds.

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\*That the Indian land in South Carolina did not pass under the devise of Dinkins' will.

That Dinkins had no title, and that of the defendants was good.

That the defendants were purchasers for valuable consideration without notice, and

That the attested copy of Dinkins' will was inadmissible in evidence, without further proof.

Williams, for appellants, referred to the Act of the Legislature of 1739, (P. Laws, 160, 3 Stat. 517,) it forbidding white persons to acquire titles from the Indians, to show that Dinkins had no legal title.

In 1808, the Legislature passed an Act to authorize the holders of old and defective leases from the Indians to take out new and valid ones. This Dinkins neglected to do, and certainly it was lawful for Smith to prevent the loss of the land by taking a title to himself.

This aids in the construction of the will. The testator is to be presumed to have intended to dispose of that which he had a right to dispose, and not of property to which he had no title.

If Dinkins had the legal title, there was no ground for the complainants to come into this Court; they might have recovered at law.

With respect to the copy of Dinkins' will, the rule is, that on a trial relating to lands devised, the will must be proved by the witnesses in Court—the probate is not sufficient. If it was impossible to produce the original, the next best evidence would have been to examine the witnesses, to prove its execution and the truth of the copy.

Clendenin, contra. If there is any ambiguity, it arises dehors the will and may be explained by extrinsic testimony—the doubt is, what land answers the description of the devise. It has been explained by the evidence that the two parcels of land constituted one tract, and were occupied as one by Smith and

his wife. This is confirmed by the acts and admissions of Smith himself. By his receipt

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to the executor of Dinkins he \*recognizes this construction and accepts the land under the terms of the will.

After so long a possession by Dinkins, the Court will presume that it had a legal origin; but at all events, Smith, who held under Dinkins, will not be permitted to dispute it. A tenant shall not dispute the title of his landlord or lessor. *Devoue v. Fanning*, 2 Johns. C. R. 252. His accepting the land on the terms of the will, prevents his setting up any claim in opposition to it.

Decree affirmed by the whole Court.

## Harp. Eq. 164

CHARLES FOWLER and JOSEPH ADAIR  
v. ALLEN BARKSDALE, Sheriff.

(Columbia, April Term, 1824.)

[*Marshaling Assets and Securities* ⇐4.]

E. A. had mortgaged a slave to complainant. There were in the hands of the defendant, a sheriff, an execution senior to complainant's mortgage, and others, junior. The mortgaged slave was, by direction of the plaintiff, sold under the senior execution, and all the other property of E. A. sold under the junior executions. Decreed that the senior execution should be satisfied out of the other property sold, and that the proceeds of the slave should be applied to the satisfaction of the mortgage.<sup>1</sup>

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 4; Dec. Dig. ⇐4.]

[*Marshaling Assets and Securities* ⇐3.]

[Cited in *Gist v. Pressley*, 2 Hill, Eq. 324; *Walker v. Covar*, 2 S. C. 20; *Clark v. Wright*, 24 S. C. 534, to the point that the senior creditor is not bound to resort to a fund which may involve him in litigation, when there is incumbered property, notwithstanding claim of junior creditor may be defeated.]

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. §§ 2, 3; Dec. Dig. ⇐3.]

The bill in this case was filed to compel the sheriff so to marshal the funds arising from the sale of the property of Elihu Adair, as to satisfy a mortgage given to Charles Fowler by said E. Adair, to secure a debt of said E. Adair, for which the complainant, Joseph Adair, was surety. The property mortgaged was a negro man, Morris. The mortgage was subsequent to the judgment and execution of Dunlap, but senior to the other executions in the hands of defendant. It appeared in evidence that all the other property of E. Adair had been given or conveyed by him to his children, who forbade the sheriff to levy upon the same. Dunlap refused to indemnify the sheriff in selling the other property, and directed him to levy upon and sell the negro

<sup>1</sup> *Gadberry v. McClure*, 4 Strob. Eq. 175.



man, Morris; which he accordingly did. The junior judgment creditors indemnified the sheriff in selling the other property.

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\*THOMPSON, Ch.—There is no rule of law better settled, than that where a preferred creditor has a lien on two funds, and another creditor has a junior lien on one of them, the creditor who has the preference shall resort to that which will operate the least injuriously to the junior creditor; but this rule is not so inflexible as to admit of no exceptions. For the senior creditor is not bound to resort to a dubious fund, or one which may involve him in litigation, when there is unincumbered property, notwithstanding the claim of the junior creditor may be defeated thereby.

In this case there was a sufficiency of unincumbered property of Col. Adair, to satisfy all previous liens to the mortgage, and it was the duty of the sheriff to have applied the amount raised by the sale thereof to the extinguishment of those liens, before he could resort to the mortgaged property. There was no act of the junior judgment creditors which could entitle them to a preference over the mortgagee. It is therefore ordered and decreed, that after the previous liens are satisfied, so much of the money arising out of the sale of property of Col. Adair, be applied in discharge of the mortgage and the interest arising thereon, as will be sufficient to satisfy the same, and that the defendant do pay the costs of suit.

From this decree the defendant appealed, on the grounds:

1. That the matter was not within the jurisdiction of the Court.
2. That the proper parties were not made by the bill; that the sheriff had no interest, and that the judgment creditors should have been parties.
3. That the mortgage having been defeated by the legal operation of the senior judgment, could have no preference over junior judgments, with respect to property on which it had no lien; especially as the junior judgment creditors had indemnified the sheriff in selling the property, and the senior judgment creditors had refused to do so.

Decree affirmed by the whole Court.  
O'Neill, for appellant.  
Thompson and Irby, contra.

## Harp. Eq. \*166

\*JAMES WRIGHT v. WOODSON LIGON.  
(Columbia. April Term, 1824.)

[Attorney and Client ⇐110.]

Defendant had recovered a judgment at law against complainant, an attorney, for having

failed to sue and recover a promissory note placed in his hands. It appears that the drawers of the note were insolvent; that the agent of defendant, who placed the note in complainant's hands, and told him to "do the best he could with it;" that he exchanged the note with one of the drawers, who fraudulently gave him a note which did not belong to him, but which was made by solvent parties. *Held*, that complainant was entitled to relief, and perpetual injunction granted.<sup>1</sup>

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 223; Dec. Dig. ⇐110.]

The defendant, Woodson Ligon, obtained a judgment at law, April, 1822, against the complainant, James Wright, for the sum of ———; on the ground, that Wright, an attorney at law, having received from Ligon a note of hand, drawn by North & Hogg, partners, for collection, exchanged it for other notes, and failed to make collection.

Wright, the complainant, shortly afterwards filed the present bill, alleging that William Ligon, who brought him the note from Woodson Ligon, was Woodson's agent, and that before he made the exchange of notes, he consulted said William, who advised and authorized him to make any trade or exchange in order to secure the money. That he could not have made collection of the original note, if he had tried, and throughout the whole transaction he did nothing but what he at the time believed would promote Ligon's interest. That he was prevented from having the full benefit of his defence at law by the removal of one of his witnesses, together with his own absence, having gone to the State of Virginia and being detained there until after the trial by unforeseen circumstances. The bill prayed a perpetual injunction against the judgment at law.

The defendant, Woodson Ligon, in his answer, admits that he deposited said note in the hands of his brother, William Ligon, but merely for the purpose of being forwarded to Wright for collection, and denies that he ever authorized any exchange, and says that it was made entirely without his privity or consent.

Thompson, Ch.—It is clear law, that if an attorney neglects his client's suit, or does any other act which impairs his interest, he is liable to an action.

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\*The inquiry in this case therefore is, whether the complainant has discharged his duties in the manner he ought to have done. At the time William Ligon, the agent Woodson Ligon, placed the note in his hand, Hogg was notoriously insolvent, and North was dead, and his estate ultimately proved so. It appears from the evidence that this fact was known to William Ligon, and he told Wright to do the best he could with it. He must have inferred from this, that his powers were not

<sup>1</sup>Hunt v. Coachman, 6 Rich. Eq. 286. Kibler v. Cureton, Rich. E. C. 143. Barnes v. Milne, Rich. Eq. Ca. 459 [24 Am. Dec. 422].

merely confined to the bringing suit and obtaining judgment, but if he saw any other mode by which the debt could be secured, he was to exercise his discretion in the adoption of it. He accordingly went to Hogg's, to endeavor to make some contract or compromise which might prove beneficial to his client's interest, and exchanged Hogg and North's note for one of the Cook's, who were men in responsible circumstances. The agent himself declares he considered it an advantageous bargain, and so it would have turned out, had it not been for the fraud committed by Hogg; for it appears he had no interest whatever in the note, it having been placed in his hands by — Motes, the payee, for collection, Wright, as the holder of the note for Ligon's benefit, instituted an action in the name of Motes, who caused it to be discontinued. He then instituted an action against Hogg, recovered judgment, and issued an execution, but has never been able to recover a cent. He could not have sued North's administrator for a copartnership debt, admitting his estate to have been solvent, and the reason of his having made the exchange of the notes, was to save Ligon from the expense of an unprofitable law-suit. It appears therefore to the Court, that Wright has done nothing but what was intended for and did contribute to Ligon's benefit, and it would be establishing a bad precedent to make an attorney responsible for a note of an insolvent person, for an unintentional departure from the strict rule, particularly when his motives were pure and intended to benefit his client.

It is ordered and decreed that the injunction be made perpetual, and that the defendant do pay the costs of the suit, and also the costs of the suit at law.

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\*The complainant appealed on the grounds:

1. That there were no circumstances in the case entitling the party to relief after the trial at law.
2. That the evidence did not establish the facts on which the relief was founded.
3. That at all events, the defendant should not have been made liable for the costs of the suit at law.

THOMPSON, Ch., delivered the decree of the Court.

The fact of the insolvency of North & Hogg, was well known to the appellant at the time the note was placed in the hands of Wright, and the authority vested in him to do the best he could with it, discharged him from the strict duties of an attorney, and constituted him a general agent accountable only for culpable neglect. Any attempt therefore, on the part of Ligon to make him responsible was inequitable and fraudulent and gave this Court original jurisdiction of the case. It is therefore, ordered and decreed that the decree of the Circuit Judge be affirmed.

DE SAUSSURE, GAILLARD, WATIES and THOMPSON, CC., concurred.

Porter, for appellant.

O'Neill and Irby, for respondent.

Harp. Eq. 168

M. G. RICHBOURG et al. v. H. & C. RICHBOURG.

(Columbia. April Term, 1824.)

[Set-Off and Counterclaim — 46.]

Defendants, administrators, were held not entitled to set off against a balance found, on accounting, to be due by them to a distributee of the estate, a debt due to one of them individually, by the distributee.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 104; Dec. Dig. — 46.]

The complainants were distributees of the estate of David Richbourg, deceased, of which the defendants were administrators, and the bill was filed for an account and to compel the defendants to pay over the balance in their hands.

On reference of the accounts to the commissioner, he reported a balance due to the complainants, of which Mary G. Richbourg (now Dunlap, having since the commencement of

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the \*suit married H. S. Dunlap) was entitled to one third. He further reported that H. S. Dunlap, the husband of the complainant, was indebted to C. Richbourg, one of the defendants, by a note; the amount of which the commissioner recommended to be deducted from the balance due by the administrators to Dunlap and wife. The case came before Court on exceptions to the commissioner's report.

DE SAUSSURE, Ch.—In this case the commissioner reports that the sum of one hundred and thirty-nine dollars, forty-one cents, is due by the administrators to the complainant. But that the sum of one hundred and two dollars, seventy-two cents, must be deducted, being the amount due on the note of H. S. Dunlap, the husband of M. G. Richbourg. The plaintiffs except to the report, on the ground that the debt of one hundred and two dollars, seventy-two cents, is due by Dunlap to one of the administrators in his private capacity, and not as administrator of the estate. If the debt had been due to the estate in the hands of the administrator in his private capacity, it cannot be supported. It is therefore ordered and decreed that the exception be sustained, and that the report be amended accordingly.<sup>1</sup>

From this decree the defendants appealed, and contended that although it should be conceded, that the Act of the Legislature on the

<sup>1</sup>See *Falconer v. Powe*, Bail. Eq. 159. *Kerr v. Webb*, 9 Rich. Eq. 309.



subject does not authorize the setting off of individual claims against representative responsibilities, and the contrary, yet it is within the powers of this Court to allow it when necessary to the purposes of justice.

But it is not clear that the case comes within the exception of the Discount Act, 4 Stat. 76, respecting the individual and representative rights of executors and administrators. That exception was intended to apply to the adjustment of accounts between the executor and strangers—debtors and creditors of the estate—and not between the executor and legatee. It was designed to protect the estate for the benefit of the legatee, which might otherwise be exhausted by the debts of the executor. But when the legatee stands in-

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debted to the executor individually, and seeks to take the estate out his hands, the reason does not apply. In fact, the balance remaining in the hands of the executor, after the settlement of the estate, is his personal debt of the legatee.

Decree affirmed by the whole Court.

Haynesworth, for appellant.

Marant, contra.

#### Harp. Eq. 170

ELIZABETH HANION, by Her Trustee, v.  
SOLOMON McCALL.

(Columbia. April Term, 1824.)

[*Husband and Wife* ⚭29.]

Four slaves in dispute, with other slaves and land, were devised to complainant, by her brother O. D. deceased. This property was settled on her, previously to her marriage with her late husband, in 1814, and the deed of settlement recorded in Georgetown, where the parties lived: *Held*, that the deed was void as to creditors, for want of being recorded in the Secretary of State's office<sup>1</sup>.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 167; Dec. Dig. ⚭29.]

[*Fraudulent Conveyances* ⚭104.]

In 1818, the slaves in dispute were sold under execution against the estate of O. D. and purchased by the husband of complainant, who on the next day executed a deed conveying them in trust for her. The husband had then no other property except what he had acquired by his wife, and was indebted to defendant. To secure this debt and other demands, the husband in 1820 mortgaged the slaves to defendant. *Held*, that the deed of trust was void as to defendant and his mortgage valid.<sup>2</sup>

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. ⚭104.]

The bill was filed to restrain the defendant from proceeding to sell four slaves, which had been mortgaged to him by Henry Hanion, deceased, the late husband of the complainant.

The slaves belonged originally to one O. Dwight, who bequeathed them with other slaves and land to his sister, the complainant. On the 8th of January, 1814, a deed of marriage settlement was executed by the complainant and her intended husband, by which all the property bequeathed and devised to complainant was conveyed in trust for her. The deed was recorded in Georgetown, where the parties lived, but not in the office of the Secretary of State.

On the 10th of June, 1816, the land devised to complainant was sold by the sheriff.

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under execution against the estate of \*O. Dwight, deceased, and purchased by her husband, Hanion. This land, Hanion, on the 15th of March, 1817, conveyed to W. Alston, and the complainant renounced her right of dower therein.

On the 3d of August, 1818, the slaves in dispute were sold under execution, as property of the estate of Dwight, and purchased by Hanion for three thousand, six hundred dollars; who next day conveyed them to — Pauley, in trust for the complainant.

A balance of the purchase money, after satisfying the executions under which they were sold, amounting to one thousand nine hundred dollars, was paid over to Hanion and wife.

On the 17th of June, 1820, Hanion mortgaged the four slaves to defendant, to secure a debt of about one thousand, eight hundred dollars. This debt had been gradually accumulating from the year 1814, and upwards of six hundred dollars of it was due at the time of the execution of the deed of trust to Pauley. It appeared that Hanion owned no other property than that which he had acquired by his wife, and some testimony was offered to show that at the time of execution the deed of trust, he owed other debts besides that to defendant.

DE SAUSSURE, Ch.—The complainant seeks to restrain the defendant from seizing and selling certain slaves, under his execution against her late husband, Henry Hanion. She relies on a marriage settlement, executed at the time of her marriage, on the 28 January, 1814, afterwards recorded in the Register's office in Georgetown district; and she also relies on a deed of conveyance, by which her said husband, Henry Hanion, conveyed on the 4 August, 1818, the slaves in question to a trustee, Mr. Pauley, in trust for her, for which she contends a valuable consideration was given by her, in renouncing her right to certain lands which were sold by her said husband. With respect to the marriage settlement, it may be remarked that it cannot have any application to those slaves purchased by Hanion long after; but if it could, the marriage settlement itself cannot be sup-

<sup>1</sup>Barsh v. Riols, 6 Rich. L. 162. Harper v. Barsh, 10 Rich. Eq. 150.

<sup>2</sup>Supra, 72, 145.

ported. It has not been recorded according to law, and is therefore void as to creditors.

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\*Then as to the deed of trust, Henry Hanion, the husband, was considerably indebted at the time of executing that deed on the 4 of August, 1818, he was indebted to this very defendant for a large part of the very debt now attempted to be enjoined, as well as to other persons; and it is now in proof that Hanion had not property to pay his debts. Such a conveyance, if voluntary, cannot under such circumstances be set up to protect the property in question against creditors. As to the consideration alleged, the proof offered of the negroes having been conveyed in trust because the wife joined in renouncing her right in certain lands for the benefit of the husband, is insufficient to establish that. It is not sufficiently distinct or clear even if admissible, but its admissibility is more than doubtful, being the parol declarations of the parties interested. If however that evidence were admissible and clearly proved the fact, it would not support the deed, for the lands being her's, the husband could sell only his life interest therein, and her joining in renouncing her dower does not bar her interest; so that in reality there was no consideration to support this voluntary deed.<sup>3</sup> The Court cannot therefore grant the relief prayed. It is ordered and decreed that the injunction be dissolved, and the bill dismissed with costs.

From the decree complainant appealed on the grounds,

1. That the marriage settlement had been duly recorded, and was good and valid.

2. If the marriage deed be void, the presiding Chancellor decided erroneously that Hanion was insolvent at the time of executing the deed of trust, as he had no property, acquired by his wife, more than sufficient to pay all his debts.

3. That there was a valuable consideration proved, sufficient to support the deed of trust.

For the appellant, it was argued that the marriage settlement was recorded according to law. 1 Brev. Dig. 176, Tit. 51. Sec. 38; 2 Brev. Dig. 46, Tit. 158, Sec. 7. If the marriage settlement was properly recorded, then although the sale by the sheriff divested the title of complainant, yet when they were

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\*again settled on her by the deed of trust, she was remitted back to her former title. 1 Co. Inst. 351. a.

But if the marriage settlement was void, the deed of trust cannot have been fraudulent, although voluntary; for Hanion was abundantly solvent. Besides the four negroes mentioned in the deed of trust, he had thirteen other acquired by his wife, which were liable to his debts; and all the debts,

proved or attempted to be proved to have been owing by him at that time, amount to little more than one thousand dollars. The being in debt at the time of making such conveyance, is not of itself conclusive evidence of fraud. *Tunno v. Trezevant*, 2 Eq. Rep. 270.

But even if the deed was void as to creditors, the defendant should be restrained from seizing and selling the negroes under his pretended mortgage. A voluntary conveyance, though void as to creditors, is good as respects the parties to it. Hanion had transferred the legal estate to the trustee, and could not divest it by any act of his own. The mortgage to defendant was his act, and conveyed no title, although in satisfaction of a precedent debt. If defendant seeks to make this property liable, he must obtain an execution; but if he had an execution, he would find other property to satisfy it.

There was sufficient evidence of a valuable consideration for this deed. The complainant renounced her right of dower in the land sold to W. Alston. Her husband sold another tract devised to her. From the evidence of the circumstances of Hanion, it is clear that the purchase of these slaves and of the land bought by him, must have been with the profits of the estate of Dwight, which was in the hands of complainant, as his executrix. But those profits ought to have been applied to the payment of the debts of the estate; and it was a fraud in the husband to suffer the property to be sold, and purchase it himself with those funds. The Court regards the husband of an executrix as liable to the heirs, and will restrain him from committing waste, and compel him to give security, as an administrator. The Court will protect the interests of the wife, when they perceive a manifest disposition on the part of the husband to impair them. 3 Eq. Rep. 40 to 60.

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\*For respondent. The marriage settlement is clearly void for want of recording. See *Taylor v. Heriot*, 4 Eq. Rep. 247. Even if properly recorded, the sheriff's sale would have vested the property in Hanion.

The other question involved in the case is, could Hanion make a voluntary conveyance of the property for the benefit of his wife. It seems hardly necessary to quote authorities to show that one who is in debt cannot make a voluntary conveyance in fraud of his creditors. The defendant was an existing creditor, at the time of the conveyance, to the amount of six hundred dollars. Such conveyance will also be void as to subsequent creditors, if it can be inferred that it was executed with a view to the contracting future debts, and such fraudulent intention will always be presumed, unless rebutted by the circumstances, as where a man becomes involved by suretyship. This is established by the case of *Stanyarne v. Stanyarne*, re-

<sup>3</sup>*Bank v. Brown*, 2 Hill, Eq. 558 [30 Am. Dec. 380].



cently decided by this Court in Charleston. See also, *Ld. Hardwick's opinion in Townsend v. Windham*, 2 Ves. 10; *Taylor v. Heriot*, 4 Eq. Rep. 232; *Robts. on Fraud. Con.* 18, 19.

But it is said that complainant was a purchaser for valuable consideration. If the sale of land made by the sheriff was good, she was divested of her inheritance, and had only a right of dower. This is a mere contingent interest, and not a sufficient consideration for the purchase of property worth one thousand dollars more than the real estate sold for. But no such consideration is expressed in the deed or proved to the Court. If the sale of the sheriff be not good, then she has never renounced her inheritance, and the sale by the sheriff is a mere pretence. But in fact there is not the least reason for supposing any connection between the sale of the land and the purchase of the slaves; more than a year intervened between them; besides, no such consideration is expressed in the renunciation and none other can be proved.

Decree affirmed by the whole Court.

Flagg and Green, for the complainant.  
King and Taylor, for defendant.

#### Harp. Eq. \*175

\*WILLIAM MUSGROVE et al., v. JESSE WOFFORD and SAMUEL JAMISON.

(Columbia. April Term, 1824.)

[*Life Estates* ⚡6.]

Bill to compel tenants for life of slaves, to give security for their forthcoming. The answers denying all fraudulent intention to remove the property or defeat complainants' rights, the bill was dismissed.<sup>1</sup>

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 18, 23; Dec. Dig. ⚡6.]

The complainants allege in their bill, that Edward Musgrove, their father, in 1790, made his will and died, leaving the same unrevoked. That among other things, he made the following bequest:—"I give to my loving wife, Ann, during life my plantation and five negroes, to wit: Tom, Phillis, Jude, Kissy and Lott, to raise and maintain herself and children; and after her death, to be equally divided among my children." That Ann Musgrove intermarried with one David Smith, who sold and conveyed his wife's life estate in said negroes. That the negro Kissy and her children, Phillis, Stephen, and Silvy, are now in the possession of Samuel Jami-

son. That Jesse Wofford has in his possession two, to wit: Dick and Phillis, the issue of the negro Lott; and that the said Jesse Wofford has altered the names of said negroes, to defraud your orators as remaindermen, and to prevent the negroes being identified; and that complainants have just reasons to believe that said negroes will be removed to parts unknown, before the death of the tenant for life. The bill prays that defendants may be required to give security not to remove said negroes until the determination of the life estate, &c.

The defendants admit that they have the negroes in possession; but deny that they intend to remove them. The defendant, Wofford, admits that he altered the names of some of the negroes; but states that he did it for convenience.

At the hearing, the presiding Chancellor dismissed the bill; and on appeal, his decree was confirmed by the whole Court.

Irby and Goodman, for appellants.  
Roddy and J. W. Farrow, contra.

#### Harp. Eq. \*176

\*WM. DEAS and Others v. CHARLES SPANN.

(Columbia. April Term, 1824.)

[*Executors and Administrators* ⚡495.]

The distributees of an estate having purchased property at the executor's sales and given bonds, the executor was held entitled to commissions on the amount of the bonds delivered to the distributees respectively, and set off against their claims for shares of the estate.<sup>1</sup>

[Ed. Note.—Cited in *Gist v. Gist's Ex'rs*, 2 McCord, Eq. 475; *Ball v. Brown, Bailey*, Eq. 374; *College of Charleston v. Willingham*, 13 Rich. Eq. 204; *Lanier v. Brunson*, 21 S. C. 42; *Jones v. Jones*, 39 S. C. 252, 17 S. E. 587, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2099; Dec. Dig. ⚡495.]

[*Executors and Administrators* ⚡118.]

[In order to charge an executor with the loss of a debt on the ground of negligence, the neglect must be proved.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 472; Dec. Dig. ⚡118.]

The complainants, distributees of the estate of which defendant was executor, purchased part of the property at the sales of the personal estate made by the executor, and gave bonds and security. On a settlement with the distributees, the executor delivered to them respectively the bonds thus taken; setting off the amount against their claims for portions of the estate. The commissioner, to whom the accounts were referred, reported against the defendant's claim to commissions on the amount of the bonds thus delivered and set off. In his report he

<sup>1</sup>Post, 272. *Gardner v. Harden*, 2 McC. Eq. 32. *Smith v. Daniel*, Ib. 143 [16 Am. Dec. 641]. *Cordes v. Ardrian*, 1 Hill, Eq. 154. 2 Rich. 136. 1 Strob. 43. 2 Strob. 327. *Carson v. Kennerly*, 8 Rich. Eq. 259. *Badger v. Harden*, 6 Rich. Eq. 147. *Bentley v. Long*, 1 Strob. Eq. 52 [47 Am. Dec. 523]. *Joyce v. Gunnels*, 2 Rich. Eq. 269. *McM.* 253. 1 Hill, 44, 74, 147.

<sup>1</sup>*Gist v. Gist*, 2 McC. Eq. 473. Explained, *Ball v. Brown*, *Bail. Eq.* 374. Post, 223.

also charged the defendant with the gross amount of the debts due to the estate, some of which had not been collected. On these points the report was excepted to.

DE SAUSSURE, Ch.—The Commissioner has reported fully on this case, and defendant has filed two exceptions: First, because the report does not allow commissions upon the amount of the purchases made by the heirs at the sale of the estate, for which defendant took bond and security, and paid the amount coming to each heir, and is therefore entitled to commissions. The rule settled by the Court in Summer's case, 4 Desaus. Eq. Rep. 529, and others, is a plain one; that where executors or administrators deliver to heirs slaves or other property, they are not entitled to commissions; but when the sale of the estate is on credit, and the executor takes bond and security, and is to collect the money and pay over the same to the heirs, in proportion to their respective rights, he is entitled, in my opinion, to charge commissions. This exception is therefore sustained and the account must be amended. The second exception is, because the report charges the executor with all the debts; whereas, some are not collected, and when the costs of collection are not brought into the account. The rule on this subject is also plain;

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the executor is not chargeable \*with the debts, unless he has received the money, or unless the debts have been lost by his neg-

ligence in collecting them. When it is intended to charge executors on this ground, the neglect must be shown to the Court to judge in each particular case, which has not been done in this case. The executor is also entitled to the proper and reasonable fees and costs of collection. This exception must therefore be sustained.

The complainant excepts to the report so far as it allows commissions for negroes delivered over, and notes transferred in payment—to the heirs I suppose is intended. Certainly, where the executor merely delivers slaves to the heirs, or transfers notes to them, he is not entitled to commissions. This exception is therefore sustained so far as the facts warrant it.

The complainants appealed on the ground that the decree was erroneous in allowing commissions on the bonds delivered to the distributees. The decree was affirmed by the whole Court.

Haynesworth, for appellants.

S. D. Miller, contra.

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Columbia, May 4, 1824.

NOTE.—Not more than two counsel shall be heard on each side in any cause argued in the Court of Appeals.

HENRY W. DE SAUSSURE,  
THEO. GAILLARD,  
THO. WATIES,  
W. THOMPSON,  
WM. D. JAMES.



# EQUITY CASES

DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, DECEMBER TERM, 1824.

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CHANCELLORS PRESENT.

HON. H. W. DE SAUSSURE,  
" THOMAS WATIES,  
" THEODORE GAILLARD,  
" W. THOMPSON,  
" W. D. JAMES.

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Harp. Eq. \*179

\*ABRAHAM MYERS, v. THOMAS SKRINE.

(Columbia. Dec. Term, 1824.)

[*Limitation of Actions* ⇨48.]

A legatee under the will of which defendant was executor, drew an order on defendant, in favor of complainant, to be paid out of the legacy: on a bill to compel the executor to account and pay the amount of the order, the plea of the Statute of Limitations was sustained.<sup>1</sup>

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 259; Dec. Dig. ⇨48.]

It appears that a legatee, under the will of which defendant was executor, drew an order on defendant, in favor of complainant, to be paid out of the legacy: which order defendant accepted. The bill was filed after the lapse of four years, from the acceptance of the order, to compel the defendant to account and to pay the amount of the order. Defendant pleaded the Statute of Limitations.

THOMPSON, Ch.—The rule of law is, that the Statute of Limitations will not run against a legatee suing for a legacy. The reason is obvious. The executor and legatee stand in the relation of trustee and cestui que trust, and so long as that relation exists, the statute is no bar. But if the legatee receives a note or bond from the executor, in

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lieu of the legacy, \*it creates a new obligation, and in the event of the insolvency of the estate, he is individually liable. The present is an analogous case. The legatee drew an inland bill of exchange on the execu-

tor, who accepted it. The legatee received a valuable consideration for it, and, eo instanti, the trust was executed, and a new debt was created between the drawee and payee, with whom there was no trust, and subject to the operation of the statute. It is ordered and decreed that the plea be sustained and the complainant's bill be dismissed with costs.

On appeal, it was contended that this was not a bill of exchange being an order to pay out of a particular fund; 1 Esp. Dig. 25; 3 Wils. 209, 213. It was merely an authority to the payee to receive, or an equitable assignment of so much of the legacy, and did not destroy the fiduciary relation between the executor and the legatee or his assignee. A suit could not have been sustained at law, without showing funds in the executor's hands; and this could only be done by calling him to an account in this Court.

Decree affirmed.

DE SAUSSURE, GAILLARD, THOMPSON, and JAMES, C. C., concurring.

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Harp. Eq. 180

HOLLOWAY JAMES v. JOHN MAYRANT.

(Columbia. Dec. Term, 1824.)

[*Payment* ⇨73.]

An attachment was issued against defendant, to compel the payment of the balance of a decree in equity. He delivered to the sheriff, cotton, who sent it to a factor to be sold and the proceeds remitted to him. The money was received by the sheriff after the attachment was returnable. On a rule against defendant to show cause why the attachment should not be

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<sup>1</sup>Coleman v. Davis, 2 Strob. Eq. 334.

renewed, he made oath that he was directed by complainant's solicitor, who was now dead, to pay to the sheriff. This with the facts stated, was held sufficient evidence of the sheriff's authority to receive.<sup>1</sup>

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 220, 222–225, 232–238; Dec. Dig. ☞73.]

[*Contempt* ☞28.]

[Held, also, that it was a satisfaction of the decree.]

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. § 83; Dec. Dig. ☞28.]

[*Contempt* ☞55.]

[Under an attachment for nonperformance of a money decree, the sheriff is authorized to receive the property of the party; and, if he received it before the return day, the proceeds of the property may be received by the sheriff after the return day.]

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. § 150; Dec. Dig. ☞55.]

The debt in this case was contracted before 1808, and a decree that it should be paid out of the trust estate of Mrs. Isabella Mayrant, was made by the Appeal Court in 1815. This decree directed the trustee, William Mayrant,

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and the agent, \*John Mayrant, to account before the Commissioner, and pay out of the proceeds of the estate, the debt, the interest and costs. Some payments were made in 1815, leaving a balance due.

No further payment having been made on the said decree, an attachment for contempt was taken out against John and William Mayrant, returnable on the fourth Monday in June, 1820, the day in that year on which the Court of Equity commenced its term in Camden.

This attachment was lodged with Hodges, acting deputy of Wiggins, sheriff of Kershaw District. On the 20 April, 1820, Hodges wrote a letter to North & Webb, factors in Charleston, stating that he had shipped four bales sea island cotton, marked W. H. M., to be sold by them; the proceeds to be remitted to him, Hodges, as the cotton was placed in his hands as sheriff. The cotton was received at Charleston, 9 of June, 1820, and the proceeds of the sale remitted to Hodges, by mail, 20 July, 1820. The nett proceeds of the cotton were \$232.83. No part of this sum, so remitted to Hodges, was ever paid over by him to complainant, or his solicitor. Hodges and Wiggins were dead; their estates wholly insolvent. Silliman, the counsel on record for complainant, was also dead.

John Mayrant, being ruled to show cause why the former attachment should not be renewed, appeared and made affidavit, upon which the Court ordered a reference to ascertain whether Mayrant was authorized to pay to Hodges.

The commissioner reported that Mayrant had offered no other evidence of such authority than his own affidavit; in which he states that he was directed by Silliman, the solicitor of complainant, to pay the balance due to Hodges.

James, Ch. The commissioner reported in this case that complainant obtained a decree against defendant for \$886.99; that the whole of said decree, except \$232.96, is satisfied, and that said sum was paid to Alexander Hodges, Deputy Sheriff of Kershaw District, on the 10 July, 1820, by Messrs. North & Webb, of Charleston, on account of defendant. But there was no evidence other than the affidavit of defendant, that Hodges was authorized

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to receive the said sum. \*It is admitted that an attachment was issued, returnable June term, 1820. There is no dispute as to the payment to Hodges, and it is admitted that he was deputy sheriff at the time. The only question is as to his authority to receive the money. He is dead and insolvent, and complainant seeks to make defendant repay the money. Alexander Silliman, the solicitor of complainant on record is also dead. Under these circumstances, two years after the payment, defendant is called upon to account, and he makes an affidavit that Silliman directed him to pay to Hodges. In such a case, I consider the affidavit of defendant, not as to payment, but as to a collateral matter, the authority to receive, in the light of an answer; which is corroborated by the letter of Hodges to North & Webb, wherein he states that the cotton was placed in his hands as sheriff. This is conclusive, and complainant's motion must be overruled with costs.

The complainant appealed on the grounds,

1. Because the sheriff in whose hands an attachment is lodged against one for failing to account, is not at liberty to receive the money instead of executing the writ.

2. Because the sheriff, if he receives such money, is the agent of the defendant who pays, and not of him in whose favor the attachment issues.

3. That the sheriff was not authorized to receive produce or any thing but money, instead of the body of the defendant; nor to receive money, after the day on which the attachment is returnable.

4. That the affidavit of defendant, even in connection with the letter of the deputy sheriff, was no evidence to show the sheriff's authority to receive.

Holmes, for appellant. The attachment against the defendant, as appears by the order of the Court, was for failing to account, and the contempt could not be purged by paying the money. This is not analogous to the instance of a ca. sa.; but, if it were so, the sheriff is not at liberty to receive the money

<sup>1</sup>Gordon v. Saunders, 2 McC. Eq. 151.



and discharge the debtor. 1 Sellon, 522. It is not a good return to a ca. sa. that the sher-

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iff has made the money. \*The attachment is to enforce the performance of a decree. If money is to be paid, the defendant must pay it immediately and give security to perform the rest of the decree, in order to entitle himself to his discharge. 2 Har. Ch. 175. Certainly, however, the sheriff was not authorized to receive cotton, nor does the defendant's affidavit state that he was to deliver cotton. The money was not received by Hodges till after the attachment was returnable; when the attachment was at an end, and could give no further authority. Hodges could only be considered the agent of defendant, for the purpose of selling the cotton and applying the proceeds. 2 Johns. Rep. 263.

JAMES, Ch., delivered the opinion of the Court.

I have reconsidered the decree given by me in the Circuit Court in this case, and am decidedly of opinion that the same is correct. It is admitted that an attachment issued against the defendant, returnable to June term, 1820, which is lost. Now, on the 29 April, 1820, the deputy sheriff, Hodges, writes to North & Webb, factors, that he had shipped four bales of sea island cotton, marked W. H. M., to be sold, and the proceeds remitted to him in Camden, as sheriff of the district. It has never been disputed that these were the four bales of cotton of the trust estate which Hodges received from Mayrant, which were afterwards sold, and the proceeds, \$232.96, were remitted to Hodges on the 10 July, 1820. The object of the attachment was, to compel payment, and not merely to incarcerate defendant's body, and that object could be effected by levying upon or receiving defendant's property. The levy was made before the writ was returnable, and kept it alive until payment; besides, as stated in the decree of the Circuit Court, Mayrant, being called upon by rule to account on oath, and having accounted that the said sum was paid to Hodges, as deputy sheriff, his affidavit must be taken as an answer as to Hodges' agency, and Hodges' letter confirms it, while the evidence, or the account of North and Webb received as such, proves the payment of the said sum of money.

I cannot see, under these circumstances, why Mayrant should pay the money a second

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time. Therefore the decree of \*the Circuit Court is affirmed.

DE SAUSSURE, GAILLARD and THOMPSON, CC., concurred.

Holmes, for appellant. S. D. Miller, for respondent.

Harp. Eq. 184

LESTER RICHARDS v. DANIEL M'KIE and JOHN VAUGHAN.

(Columbia. Dec. Term, 1824.)

[Attachment 57.]

Land in the possession of a vendee, under an agreement to convey upon the payment of the purchase money, is not liable to be sold under judgment and execution against the vendee, though part of the consideration has been paid; nor will the Court compel the vendor to convey to the purchaser at sheriff's sale, upon his paying the balance of the purchase money.

[Ed. Note.—Cited in *Watts v. Witt*, 39 S. C. 369, 17 S. E. 822; *Ex parte Allison*, 45 S. C. 343, 23 S. E. 62; *Whitmire v. Boyd*, 53 S. C. 342, 31 S. E. 306.

For other cases, see *Attachment*, Cent. Dig. § 151; Dec. Dig. 57.]

[Adverse Possession 63.]

Vendee, in possession under such agreement to convey, not having paid the whole of the purchase money, cannot acquire a title against the vendor by the Statute of Limitations.<sup>1</sup>

[Ed. Note.—Cited in *Gillison v. Savannah & C. R. Co.*, 7 S. C. 181; *Blackwell v. Ryan*, 21 S. C. 123; *Connor v. Johnson*, 59 S. C. 132, 37 S. E. 240.

For other cases, see *Adverse Possession*, Cent. Dig. § 343; Dec. Dig. 63.]

[Execution 245.]

The vendor having consented that the land should be sold under execution against the vendee, but having afterwards forbidden the sale in the hearing of the purchaser at sheriff's sale, will not be compelled to convey to the purchaser.<sup>2</sup>

[Ed. Note.—Cited in *D. C. Roddy & Co. v. Elam*, 12 Rich. Eq. 345.

For other cases, see *Execution*, Cent. Dig. § 681; Dec. Dig. 245.]

The bill stated that Daniel M'Kie sold the land in dispute for \$500 to Henry Edge, who paid \$200 of the price, and took a bond for titles, and took and held possession of the land for two years; that Edge sold the land and transferred the bond for titles to one John Vaughan, to whom he delivered the possession of the land, and he paid \$250 more to Daniel M'Kie, who received the same, which left a balance of only \$50 to be paid, for which M'Kie took Vaughan's note of hand; that judgment was obtained by a creditor of John Vaughan, on or about the 20 November, 1820, and the land was sold under the execution, and was purchased by complainant for the sum of \$137: that Daniel M'Kie, before the sale, repeatedly declared that \$50 was all that was due to him, and when that should be paid, he had no other claim on the land, but would make title therefor, and complainant procured the consent of Thomas Edge to the sale; but the said Daniel refused to receive the balance of the purchase money and interest, which was tendered to him, unless

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the sum of \$800 was paid \*him, and colluded

<sup>1</sup>*Frazier v. Center*, 1 McC. Eq. 270. *White v. Kavanagh*, 8 Rich. 377; *Court of Errors*.

<sup>2</sup>*Gregorie v. Bulow*, Rich. Eq. C. 235.

with John Vaughan to defraud the complainant, and to secure to themselves the land. The bill prayed that Daniel M'Kie might be decreed to execute titles to the land in question, and give up the possession thereof, upon the payment of the balance due to him, and which was tendered to him, or that the complainant might have the relief adapted to his case.

The defendant Vaughan puts in no answer, and a decree was taken pro confesso against him.

The defendant Daniel M'Kie filed a demurrer, and also an answer to the bill. The demurrer was first argued, and was overruled, chiefly on the ground that the bill charged a collusion between the defendants, Daniel M'Kie and John Vaughan, to defraud the complainant and to secure to themselves the land in question, of which the complainant had been a fair purchaser. The answer of Daniel M'Kie stated that the defendant bargained the tract of land to Thomas Edge about the year 1813, for the sum of five hundred dollars; that two hundred dollars were paid down and he gave a bond for titles, which were to be executed on the payment of the balance; that about 1818, Edge sold to John Vaughan and transferred the bond for titles; that at that time two hundred dollars more were paid, leaving unpaid one hundred dollars and the interest on the whole from the purchase; that in the year 1821, Vaughan finding himself unable to pay the balance of the purchase money, proposed to relinquish his contract and rescind the purchase; that it was acceded to by defendant; that Vaughan gave up the bond for titles and a general and mutual settlement took place; that Vaughan relinquished all claim to the land, and the defendant advanced him a sum of money and released him from some demands to a considerable amount previously due: that on the 10 of August, 1821, Vaughan, by an instrument in writing filed, became the defendant's tenants on the same land and promised to pay an annual rent; that after this, he the defendant understood that the land was advertised for sale. He denied that he caused any rumor to be circulated as stated, or that he made it known that on being paid the balance of the purchase money,

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he would execute titles to \*the purchaser at sheriff's sale. On the contrary, he caused the sheriff to be directed not to sell, and employed a person to attend and forbid the sale. He admitted that complainant called on him and offered him some money, he knows not how much, and required a title; that he refused to make one, and evaded giving him any satisfaction as to the situation of the land, and admitted that he did not intend to make him any titles on the terms stated in the bill, nor on any other, except being paid a reasonable price for the land.

At the hearing of the cause, the following

evidence was given on the part of the complainant: the bond from Daniel M'Kie to Thomas Edge, dated 27 July, 1813, in the penal sum of one thousand dollars, with condition thereunder written, that if Daniel M'Kie, his heirs, executors or administrators should well and truly make or cause to be made a good and sufficient title of, in, and to a certain tract of land therein described (the one now in dispute) and should comply with his contract in relation to said land, then the above obligation to be void. On the bond was an endorsement by Thomas Edge, requesting Daniel M'Kie to make titles for the land to John Vaughan.

Mr. Greer, the witness who proved M'Kie's bond, testified that he had it in his possession some time in August, 1822, or a little before the sale of the land by the sheriff. That Vaughan had placed it in his hands as a security for a debt. The witness offered the bond to M'Kie, and requested him to make titles to him under an order from Vaughan, which he had. M'Kie said there were fifty dollars with interest still due him, and when that was paid he would make titles, but not to witness; and he requested him to tell Vaughan to come to him. Witness did not then offer the money to M'Kie, because he said he wanted to see Vaughan; witness told Vaughan, and Vaughan went to see him; witness placed the bond back in Vaughan's hands; after this, M'Kie set up a pretence that he was owner of the land and Vaughan came back with a message to forbid the sale of the land as Vaughan's property. He accordingly forbade the sale, as M'Kie had directed; Richards, the complainant, was

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present and heard the \*sale forbidden, as M'Kie claimed it as his own; all that passed with M'Kie was verbal.

Charles Dean testified that he saw Daniel M'Kie a few days before the sale of the land. He went to M'Kie to know what was due on the bond of Vaughan, and told him the reason of the inquiry and his desire to purchase was because he had a judgment against Vaughan next in date to one other judgment. M'Kie told the witness that fifty dollars, and the interest on it, was all that was due him, and when that was paid, he could make titles to the land, for he had no other interest. M'Kie also said he might tell the sheriff he might sell the land as Vaughan's property, and he would make titles when the money would be paid him. He added that Greer had been with him to make titles; he had not money to pay the balance due M'Kie, and offered him a note, which was refused. Witness saw a bond in the hands of Greer, which is the one now produced to the Court. Vaughan was poor. Witness was present when Richards applied to M'Kie to make titles, and he said, I am willing to make titles on payment of the balance. Richards asked what was due. M'Kie said there are seven



or eight hundred dollars. Richards replied you know that there are but fifty dollars due, and the interest on it. M'Kie then said, where is my bond to make titles?—I cannot make titles till I get up my bond. Richards said, you have the bond—Vaughan says he has given it up to you; which M'Kie denied. Richards offered M'Kie a bag of silver money to pay the balance; there were about forty dollars in silver and some paper money; but M'Kie said I cannot take the money without my bond is given up to me. Vaughan was in possession of the land and continues so now.

Shephard testified that he accompanied Richards to M'Kie's on the 6 of September, 1822, directly after the sale of the land by the sheriff. Richards informed M'Kie that he had bought the land, and that he understood he, M'Kie, had directed the sheriff to sell the land, and would make titles for it when the balance due should be paid. M'Kie replied that he had, and that he would make titles when the balance due him was paid, which was all he wanted. At one moment

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M'Kie \*said he would receive the money from Richards; but after a while he paused and said, I would rather have my bond up, or something to acknowledge that it was fulfilled, from Edge or Vaughan.

Abraham Coffin testified that when Greer went to M'Kie to get titles, in August, 1822, Vaughan gave an order to M'Kie to make titles to Greer. Vaughan said there were about fifty dollars due to M'Kie.

Mr. Cowder testified that when sheriff, he sold Vaughan's land under execution—that Richards was the purchaser—and witness executed conveyance to him on 5 September, 1822; which he proved.

The judgment was in November, 1820; sale in September, 1822. It was admitted that M'Kie forbade the sale. There was no evidence offered on the part of the defendants.

De Saussure, Ch.—The bill being taken pro confesso as to Vaughan, the charges, supported as they have been, by the testimony, will be taken for true against him. With respect to the other defendant, M'Kie, there are two distinct grounds relied on, to prevent a decree against him. It is insisted that Vaughan the holder of the land under the contract with him, which was a mere agreement to convey the land on the payment of a stipulated price, had agreed to rescind the contract, and had given him up the agreement or bond, on certain terms and payments, which had been performed by him—and that Vaughan had a right to make this retrocession of the land to M'Kie, because the first contract with Vaughan gave him a mere equitable title, and that the land was not bound by the judgment against Vaughan, as equitable titles are not subject to the operations of judgments and executions.

There is no other evidence of Vaughan's

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having agreed to rescind the agreement and return the land for a consideration which is alleged to have been paid, than the defendant's answer. He does indeed in his answer say, that such an arrangement was made and completed between him and Vaughan, prior to the sale by the sheriff. His answer however is not evidence on this point; he was

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not interrogated to such facts, and his answer stating them is a new allegation and requires to be supported by proof. Such a rescission of a written contract relating to lands must have been susceptible of proofs and required them, none are given. Defendant M'Kie, in his answer states with precision the price originally agreed to be paid him by Vaughan for the land, and sets forth the exact payment which he says was made him, but he cannot tell how much was to be paid Vaughan on the rescision, only that they had a general settlement of accounts, and he satisfied Vaughan by a horse and in other things. Not a single document of such transaction is produced. The defendant sets forth that in the year 1821, John Vaughan made the rescision in question; now it is distinctly in evidence by several witnesses, that in 1822 and down to August, Vaughan made no pretence of such an arrangement to rescind the original contract with M'Kie, that he was in possession down to that period, not only of the lands but of M'Kie's bond to make titles to it, and he actually placed that bond in the hands of a creditor as a security for debt and desired M'Kie to make titles to the land. The evidence also establishes, that long subsequent to 1821, the alleged time of the rescision, M'Kie did not pretend that such rescision had taken place; but he said again and again to different persons, that there was a balance of fifty dollars and interest due him, and that when that was paid he would make titles. The evidence on these and other particulars is wholly at variance with the answer and must overcome it. There is some variance in the statements of the witnesses as to the different conversations of M'Kie, but this variance might arise from the different language of M'Kie at different times, for he states in his answer, that when the complainant Richards, who had purchased the land at sheriff's sale in September, 1822, called on him and required him to make titles, and offered him money said to be the balance due him, he evaded the demand and gave him no satisfaction as to the true state of facts. Upon the whole, I feel bound to say that there is no evidence of the rescision of the original contract between M'Kie and Vaughan, and that the instrument alleged to have been made in

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August, 1821, by \*which Vaughan became tenant to M'Kie, seems not to have been a real transaction, but a contrivance clumsily got up and contradicted by all the facts of the case, to defeat the complainant's claim,

by what is called in the bill a collusion with Vaughan. If, however, such rescission had been made in 1822, or even in 1821, it might not have affected this case, as will be presently discussed.

It was further argued, that in any event the complainant could not have relief in equity, because the debtor, Vaughan, had only an equitable interest in the land, which was not subject to the judgment and execution of his creditors, and therefore the sale by the sheriff to the complainant being illegal and void, this Court would not interfere to perfect or protect a right thus acquired. In support of this doctrine, the counsel for the defendant cited and relied upon a very important case in 3 Atk. 352, 6, *Edgell v. Hayward & Dawe*; but in examining that case, it does not apply conclusively to the one we are considering. The question was, whether an execution at law could be made to operate directly of itself or by the aid of this Court, on a pecuniary legacy, which was a mere chose in action; and Lord Chancellor Hardwicke decided that the plaintiff at law could not, as a judgment creditor, come into this Court for a satisfaction out of the legacy; for according to the general rules of this Court, choses in action are not liable to execution, because the creditor has a remedy by seizing the person or by an outlawry; which last has been the chief ground upon which this Court has proceeded in denying a specific remedy. Now it might be sufficient to say that this chief ground does not exist in this country, and therefore this court ought to be more ready to give the relief sought. It is, however, certainly true, that choses in action are not liable to executions at law. This general rule, distinctly laid down by the Lord Chancellor in 3 Atk. 357, is supported by the cases cited by the counsel from 12 Johnston's New York Law Reports, 220, 395; 5 John. Rep. 167; [*Turner v. Fendall*] 1 Cranch, 133 [2 L. Ed. 53]; 4 Johns. 96; 9 Johns. 42.

This case before us, however, is not exactly one of a chose in action. It is real estate,

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in the actual possession of the debtor, \*held under a bond from M'Kie, to make titles, and levied on as the property of the debtor. The counsel for the defendant, M'Kie, contends that this property is not liable to the judgment and execution at law, and he cited and relied upon the case of *Rogers v. Perry* and others, 17 Johns. 351, (and see 1 Johns. Ch. Cas. 52, 57,) where it was decided first by the Court of Chancery and then by the Supreme Court of Errors, that a judgment and execution does not bind real estate held by a purchaser under a contract for the sale and conveyance thereof, even when the purchaser, (or his assignee) or vendee has paid part of the consideration and entered into the possession of the land, but neglected to pay a balance which still remained due. The Chief

Justice, Spencer, who delivered the unanimous opinion of the Court of Appeals, (17 Johns. 353,) stated that though by the provisions of the statute of uses, (27 Hen. 8, ch. 10, 2 Stat. 466) the cestui que use is the real owner of the land, and his interest is bound by the judgment and may be sold under execution, yet the vendor or contractor to sell, who merely stipulated to make a conveyance when the purchase money should be paid, is not seized to the use of the vendee or contractor to purchase, or in trust for him or his assignee, until the whole of the consideration money is paid. The reason given for this is, that if the person contracting to sell and convey the land should be considered as seized in the first instance in trust for the vendee or his assignee, then the purchaser at the sheriff's sale, under judgment and execution against the purchaser or his assignee, who, by force of the statute, holds the land purchased under the execution freed and discharged from the incumbrance of the vendor's claim for the balance of the purchase money. The payment of great part of the purchase money is not allowed to have any influence on the case, because there can be no divided use, partly in the vendor and partly in the vendee, in proportion to their interests in the estate; and the learned Chief Justice adds, that the statute embraces those cases only, where the entire estate out of which the uses arise, vests in the cestui que use, in consequence of his having paid the whole of the consideration money. He admits that if the

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assignee of \*the contract had paid the whole of the consideration money, the statute would have applied, for then the vendor's retaining the legal estate, would as regarded creditors have been fraudulent; but as the whole of the purchase money had not been paid, in the case the Court was considering, the vendee or his assignee had only an equity in the lands, which could not be touched by an execution. This is certainly a great authority, both on account of the learning and talents of the Court which decided it, and of the force of reasoning on which the decision is founded. It is also in conformity with the case of *Barton and Rushton*, decided by our own Court, much earlier than the decision in *New York*, see 4 Desaus. Eq. Rep. 378. These decisions will be conclusive on the case I am now considering, unless there be something in the case which may distinguish it from those, and take it out of the principles so firmly settled by them.

Two circumstances which may be supposed to distinguish this case from that in *Johns. Rep.* require to be examined: the first is, that the purchaser, Edge, or his assignee or sub-purchaser, Vaughan, were in the actual possession of the land from July, 1813, the date of the contract, to September, 1822, the time of the sale of the land by the sheriff, as the property of Vaughan; which posses-



sion gave a legal estate to Vaughan, and subjected it to judgments and executions against him. The evidence of that possession is very clear; the witnesses testify it and the answer admits it. The answer states that Edge, the contractor to purchase, occupied the land till he sold it to Vaughan, who then occupied it under that purchase until August, 1821, when he gave up the purchase and became the tenant of M'Kie. The witnesses bring down the possession of the land by Vaughan from his purchase in 1815, till the sale in September, 1822, and since. The other facts of the case disprove the alleged recision and tenancy of Vaughan, and leave the question of the effect of the possession of Vaughan as the real one. Did this actual possession of the land for seven years by Vaughan give him such a legal title as to subject it to the judgment and execution under which it was sold by the sheriff to Richards, the complainant? The decision of this question in the affirmative,

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\*will certainly distinguish this case in one strong feature from those which have been strongly relied on; for in them, there is no pretence of such a possession as gave a legal title. The possession of Vaughan for seven years is longer than is sufficient to establish a legal title against all the world, unless prevented by the disabilities recognized by the same law which gives effect to the possession, or unless there be something to prevent in the relation between the parties contending. The circumstances do not bring the case within the usual disabilities established by law, so as to prevent the statute from running and giving title by possession; but there does seem to be something in the relation of the parties here which prevents this possession from giving a legal title; for it is a settled doctrine that the possession is always consistent with the title or claim under which the party enters. Thus a tenant cannot set up his possession of many years under a lease into a legal title to the land. So here, Vaughan held under Edge, and Edge entered on the land and held under his contract with M'Kie, which gave him an equitable title, and which was to be converted into a legal title by a regular conveyance, only on the payment of the whole of the purchase money. That payment has never been made, and the tender by Richards, the purchaser, after the sale, which was tolerably well made out by the evidence, cannot remedy the defect and give validity to the sale, which was irregular and illegal when made, because there was no legal title in Edge, or Vaughan, the sub-contractor. Such at least is the doctrine in the great and well considered case decided by the highest judicial authorities in New York; and though I may be permitted to entertain some doubts whether the ill effects would follow to the vendor which are stated in the New York case, I should be

reluctant to depart from authority on my own undecided judgment.

The other ground relied upon is, that the sale was regular and legal, because made with the consent of M'Kie. The affirmative evidence on that point is, as we may remember, that M'Kie said to Greer, that if the balance due to him was paid, he would make titles, and he told the witness, Dean, that fifty

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dollars \*and interest was all that was due to him, and that he might inform the sheriff, he might sell the land as Vaughan's property, and that he would make titles when the balance due was paid him. The witness, Shephard, testified, that after the sale, McKie acknowledged to Richards, in his presence, that he had directed the sheriff to sell the land and would make titles when the money was paid; but, on Richards offering to pay McKie the money really due to him, he set up first a pretence that a great deal more was due to him, to wit, seven or eight hundred dollars, and afterwards that he must have his bond, to Edge, produced and given up to him, though he had at that very time obtained the bond from Vaughan by collusion. All this looks like a sufficient proof of the consent of McKie to the sale of the land by the sheriff as Vaughan's, and that he agreed to make titles to the purchaser, on being paid the balance due to him, and it would be hard to shake a sale made under such circumstances to the prejudice of the purchaser; for however parol the directions were for the sale of the land, yet they were obligatory on McKie, on the ground that though a contract for the sale of land must be in writing to satisfy the Statute of Frauds, yet the agent's authority to sell need not be in writing, and the sheriff in this case must be considered as the agent of McKie, who had sent him word to sell. The authorities cited were Rob. on Frauds, 111, 113; also 9 Ves. jun. 251. Unfortunately, however, for the application of the whole of this argument, there is no doubt, that whatever difference of language was held at different times and to different persons by McKie, (and of which there is abundant proof) he did at least give orders to forbid the sale. The complainant's witness, Greer, testified to this, and he adds that Richards was present and heard the sale forbidden. Now, if the validity of the sale be made to depend upon McKie's consent and direction to the sheriff, surely he could recall that consent and annul the authority given to the sheriff to sell, and this it is even admitted that he did. I have thus come to the conclusion that this is a case in which I am not at liberty to give relief; and I acknowledge that I regret it. I have been so satisfied

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of impropriety in the conduct of defend\*ants, that I have long struggled against the conclusion to which I have been forced. It would be very satisfactory to me if my breth-

ren could take a different view of this case. I should have been glad to have decreed a specific performance of the contract by the defendant, on the ground of the original contract; but it does not appear to me that complainant can claim under that contract. It was never transferred to him, and Vaughan who held it is a defendant resisting his claim. Complainant's title is by a sale of the land under execution against Vaughan, who as we have found had not a legal estate subject to such a sale; hence, even the improper conduct of the defendants does not affect the case. Their collusion was for the purpose of preventing or defeating the sale of the land under the judgment and execution against Vaughan, but the sale was illegal and void of itself. It is therefore ordered and decreed that the bill of complainant be dismissed; but I cannot under the circumstances decree costs.

The complainant appealed on the ground that McKie was bound by his promise, made both before and after the sale, to make title to the purchaser on the payment of the balance due, and that it would be permitting him to practice a fraud to refuse to decree a conveyance.

In addition to the arguments and authorities relied on before the Circuit Court, the case of *Moore v. Millet*, decided in this Court, was cited. In that case, the land in possession of the vendee under an agreement to convey, was sold at sheriff's sale, and upon a bill filed for that purpose, the vendor was decreed to make title to the purchaser. It was replied that in that case, the land was sold with the consent of the vendor, which consent was never retracted, and that the whole of the purchase money had been paid before the sale. The case of *Higgins v. Coates* and others, decided at Newberry and afterwards in this Court, was also cited.

The opinion of the Court was delivered by

DE SAUSSURE, Ch.—On considering this case, we are of opinion that the decree is correct. It is in conformity with the decision in *Barton & Rushton*, 4 Desaus. Eq. Rep. 373, and indeed with other decisions in

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this \*State and New York; which establish that an equitable interest is not subject to sale under a judgment and execution at law. It was supposed that this case resembled the case of *Moore v. Millet*, decided in Sumterville, and afterwards by the Court of Appeals. There is a general resemblance between them. But there are essential differences. Those differences were correctly stated by the counsel for the respondent to be, that Vaughan, the holder of the equitable title, never consented to the sale of the land, as Rees did in the case of *Moore v. Millet*; and though McKie, the contractor to sell, at

first consented verbally to the sale of the land under the judgment and execution, as the property of Vaughan, provided the balance due to him were paid, he recalled that consent before the sale, and forbade the sale whilst Richards, the purchaser was present; the whole of the purchase money was paid in *Moore v. Millet*; not so in McKie's case; nor would the possession of Vaughan, from the date of the bond to make him titles on payment of the money, till the sale in 1822, give him a legal title. This possession was consistent with his equitable title, and not adverse to it, nor could it be, till he paid the purchase money. In *Higgins v. Coates*, from Newberry, this Court decided the same point, and all these decisions are supported by other cases. See 3 Atk. 342; 1 Johns. C. C. 52, and 16 Johns. Law Reports, 351. It is therefore ordered and agreed that the decree of the Circuit Court be affirmed.

GAILLARD, WATIES, THOMPSON, and JAMES, CC., concurred.

Davies and W. Thompson, for appellants.  
Earle, for respondents.

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\*DANIEL THOMAS, Adm'r of Wm. Johnson v. JOHN GAGE, Sen., and HARMON JOHNSON, Adm'r of W. Johnson.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⚡115.]

The defendant J. G. one of the heirs and distributees of the estate, purchased property at the administrator's sale and gave his note for the amount, eight hundred and fifteen dollars. One of the administrators (the defendant H. J.) was indebted to G. four hundred and twelve dollars on a judgment. H. J., who was in embarrassed circumstances, as was known to G., gave G. a receipt against his note, then in the possession of the other administrator, the complainant, upon his entering satisfaction on the judgment and giving a new note for the balance, which H. J. disposed of to his private use. G. had a demand against the estate, on which he brought suit at law. The other administrator offered G.'s note as a set off, which was rejected on the production of H. J.'s receipt, and G. recovered a judgment. Decreed that G. should come to an account with complainant, in which he should not be allowed credit for the amount of his judgment against H. J., that the entry of satisfaction should be vacated, and the judgment stand revived against H. J.

[Ed. Note.—Cited in *Rhame v. Lewis*, 13 Rich. Eq. 304; *Geigers v. Kaigler*, 9 S. C. 428.

For other cases, see *Executors and Administrators*, Cent. Dig. § 468; Dec. Dig. ⚡115.]

The bill alleged that defendant G. was indebted to the intestate, in his lifetime, for cotton sold, &c. This the answer of G. admitted, but stated that he had accounted with the intestate and paid the debt. Referred to the Commissioner: Complainant to be at liberty to support the demand by proof, and the Commissioner to receive G.'s answer as evidence.

[*Descent and Distribution* ⚡112.]

[An administrator, deducting from the distributive share of decedent's heir the value of advances made in decedent's lifetime, must fol-



low the rule prescribed by St. Feb. 1791 (5 St. at Large, p. 162), requiring the value of the portion advanced to be estimated at the ancestor's death, excluding from the computation the increase of the personal estate advanced.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. 112.]

De Saussure, Ch.—On the death of Col. Wm. Johnson, intestate, he left six children, one of whom married the complainant, D. Thomas, and another of whom married the defendant, John Gage, Sr. Daniel Thomas and Harmon Johnson, a son of the deceased, administered on his estate, and they made a sale of the personal property, by an order from the Ordinary, on the 18 November, 1819. The sales amounted to eight thousand one hundred and eighteen dollars and ninety-three cents. Most of the heirs made purchases at the sales; John Gage to the amount of eight hundred and fifteen dollars; Harmon Johnson to the amount of one thousand and thirteen dollars and sixty-five cents; the complainant, D. Thomas, to the amount of one thousand nine hundred and seventy-three dollars, and the other heirs to various amounts. The whole of these purchases by the heirs, amounted to seven thousand six hundred and eighty-five dollars and fifty-six cents. The estate was stated to be in debt to the amount of between four and five thousand dollars, to pay which it is

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stated by \*complainant that it was agreed the lands should be sold, and they were accordingly sold under a process for partition.

The defendant, John Gage, gave his note for the amount of his purchase, to the administrators, Daniel Thomas and Harmon Johnson.

John Gage brought suit against the administrators, to recover a private debt due to him by the deceased, and established his demand. At the trial of that cause, the defendant, Daniel Thomas, offered as a discount, the note of the said John Gage, given for the amount of his purchases at the sales of the estate, to the administrators. But John Gage produced a receipt in full against the said note, given him by Harmon Johnson, one of the administrators, which was supported, and thereby defeated the discount set up of said note, and John Gage obtained a verdict and judgment for eight hundred and eight dollars and forty-nine cents against the said estate, besides interest and costs. One of the objects of the bill is to set aside the said receipt, and to restrain the defendant John Gage, from enforcing his judgment at law; because it is alleged the said receipt was given by Harmon Johnson and accepted by John Gage, in order to deceive and to defraud the heirs of the intestate, Col. William Johnson. That the said receipt was not given on account of any actual payment made by Gage, of his note to the administrators, but because Harmon Johnson was indebted

to said John Gage, the amount of four hundred and twelve dollars and thirty-six cents, and that Gage on obtaining the receipt, gave his note to the said Harmon Johnson for the balance. And it was insisted that the said receipt itself was antedated, in order to give it effect.

The answer of the defendant Gage, denies that the note was antedated; and there is no proof of that allegation to contradict the answer. But the defendant admits that Harmon Johnson, being indebted to the said defendant in the sum of four hundred and twelve dollars and thirty-six cents, gave him a receipt in full for the above note, and took a new note for the balance, which he understands the said Harmon Johnson has since passed away to pay a private debt of his own. Defendant insisted on the power of the administrator, Harmon Johnson, to act as he did, and relies on the judgment at

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law, \*establishing his demand, notwithstanding the said note of Gage to the administrators, then in the hands of the complainant, Daniel Thomas, was set up in discount.

The general doctrine on this subject is, that in many respects and for many purposes, third persons are entitled to consider executors and administrators as complete owners of the estate in their hands. See Madd. 286, and 7 Ves. 166 & 209. The object of this policy is to prevent the general inconvenience of entangling persons in inquiries after the application by executors of the money of the estate. See 2 Vern. 444, *Humble v. Bill*, the doctrine of which case appears to have been followed, though the decree was reversed by the House of Lords. See 1 Bro. P. C. 74, and other cases cited in the note q. to page 286, 7 of 1 Madd. But if a person dealing with an executor is aware that an executor is misapplying the testator's property, a Court of Equity will, in a strong case, interfere in behalf of persons beneficially entitled. As if one concert with an executor to misapply the assets, by paying the private debt of the executor, such concert will involve the person so concerned and make him liable. See 1 Ves. 105; 3 Bro. C. C. 626; 2 Ves. 95; 4 Ves. 665; and 17 Ves. 167; 1 Cox. 145.

In the case we are considering, the defendant, Gage, knew that the estate was in debt; he also knew that Harmon Johnson, one of the administrators, was not in good circumstances; and he had reason to know that the note was in the hands of the other administrator, Daniel Thomas, for Harmon Johnson could not produce it, but gave him a loose receipt. Under these circumstances. I think he ought not to have taken a receipt against his note due to the estate, for a private debt due to him by Harmon Johnson. But the Court of law has so far protected him as to have rejected the discount set up by the administrator, Thomas, against

his (Gage's) private demands against the estate. This Court cannot therefore restrain Mr. Gage from enforcing his judgment at law. It may, however, without interfering with that judgment, direct an account and settlement of the estate of the intestate, William Johnson, and that in such an account, the defendant, Gage, be not allowed the

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amount of the private debt of \*Harmon Johnson to said Gage, if it should appear that Harmon Johnson is unable to settle what is due by him to the estate, on his administration account.

Another point in the case was as to certain debts alleged to be due by Gage to the intestate in his lifetime, for cotton and other articles. The answer admits that the defendant, Gage, had sold some cotton for the intestate, William Johnson, but insists that he had settled the same in his lifetime, and there is no contrary proof. This seems to be conclusive.<sup>1</sup> But I will give the complainant an opportunity to support such demands, if he is able, before the Commissioner, who shall, in the inquiry, give due weight to the answer of the defendant.

Another point was made as to a mortgage given by Harmon Johnson, to Mr. Mitchell, of his private property, which will sweep away his estate, and prevent his paying the debt he may owe to the estate, on settlement thereof. But there were no previous liens on said property, and the insolvency of Harmon Johnson is not fully made out, and Mr. Mitchell is no party in the suit. The Court cannot therefore interfere with that mortgage. It was insisted that Harmon Johnson, the late administrator, (who has been displaced by the Ordinary) should account for his share in the affairs of the estate, to enable the acting administrator, the complainant, to make a general settlement: to this there can be no objection.

It was further insisted, that in the general settlement, Mr. Gage should bring into hotch-pot, the value of the advances made to his wife, by her father, the intestate. The complainants have a right to require this, but in doing so, the rule laid down by the Statute of February, 1791, 5 Stat. 162, is, that the value of the portion advanced shall be estimated at the death of the ancestor, but so that the increase of the personal estate advanced, shall not be taken into the computation; and this rule must be followed.

It is therefore ordered and decreed, that the administrators, Daniel Thomas and Harmon Johnson, and all parties beneficially interested in the estate, do come to an account before the Commissioner, and that in such ac-

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count, the private demand \*of Gage, against

Harmon Johnson, the administrator, be not allowed him against the estate, and that inquiry be made what Harmon Johnson has done with the note given him by Gage, for the balance due the estate; for which Gage shall not however be responsible to the estate, if he has paid it to any holder thereof; and that complainant be at liberty to support by proofs, any demands of the intestate against said Gage, the defendant; and that in the settlement of the estate, the advances made to Mrs. Gage, by her brother, be brought into account, under the restriction of the Statute 1791, and that Mr. Gage be credited the amount of his judgment at law, unless paid to him by the administrator, since the judgment was obtained.

The defendant Gage, appealed:

1 Because the case made by the bill and answers had been fully heard and determined by the Court of Common Pleas.

2. Because the transaction between the defendant Gage and Harmon Johnson was bona fide: at least it was so on the part of Gage.

3. Because the complainant was too late in applying to this Court for relief.

4. As by the decree of the Court, the defendant Gage was not allowed credit for the amount of his judgment against Harmon Johnson, on which he had entered satisfaction by way of payment on his note to the administrators, the Court ought at all events to have decreed his entry of the satisfaction to be vacated and the judgment to stand revived against Harmon Johnson.

A. W. Thompson, for appellants, as to the jurisdiction of the Court after the trial at law, cited 3 Johns. Ch. Ca. 355; 3 Eq. Rep. 324, 5; 7 Cranch. 336; 2 Johns. Ch. Ca. 557; 6 Johns. Ch. Ca. 87; 1 Johns. Ch. Ca. 555; 1 Madd. 77. Contended that the case of a party combining with the executor to misapply the funds of the estate was not made out by proof, and there was a difference in the application of the doctrine to executors and to administrators who give security.

DE SAUSSURE, Ch., delivered the opinion of the Court.

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\*We have considered this case with the attention due to it, and are of opinion that the decree is correct as far as it goes. But we think that in opening the case as the decree does, it should have gone further, and decreed that the satisfaction entered on the judgment of Gage against Harmon Johnson should be set aside and the judgment revived. It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed, but that the satisfaction entered on the judgment against Harmon Johnson be set aside, and the judgment revived and be regarded as though satisfaction had not been entered thereon.

<sup>1</sup> But see *Ison v. Ison*, 5 Rich. Eq. 15. *Cloud v. Calhoun*, 10 Rich. Eq. 358.



GAILLARD, WATIES and THOMPSON, CC., concurred.

A. W. Thompson for appellants.  
Williams, for respondents.

Harp. Eq. 202

THOMAS ADAMS v. G. W. HOLCOMBE  
et al.

(Columbia. Dec. Term, 1824.)

[*Descent and Distribution* ⚭122; *Fraudulent Conveyances* ⚭182.]

Bill to recover a debt due to complainant by the deceased father of defendants, on the grounds that no administration had been taken out on the estate of the deceased, and that defendants were in possession of all his property, under voluntary conveyances made subsequently to the accruing of plaintiff's demand, and otherwise without lawful authority. Decree against defendants, to be liable in the first instance, in proportion to the value of the property they had respectively derived from the estate of deceased.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 446; Dec. Dig. ⚭122; *Fraudulent Conveyances*, Cent. Dig. § 568; Dec. Dig. ⚭182.]

De Saussure, Ch.—This is a suit brought by complainant to be indemnified for the loss he has sustained on the purchase of a slave named Anthony, from John Evans, now deceased. The complainant states, that the slave was conveyed to him by bill of sale, dated 8 April, 1818, but was recovered from him in an action at law, by John Cheatham, who claimed under a bill of sale made by Mrs. Evans, the wife of John Evans, and confirmed by him, before the sale to complainant.

The complainant brought suit at law against John Evans, on the warranty in the bill of sale; but before he could recover, the said Evans died, intestate, and no person has administered on his estate, so that no suit at law could be instituted.

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\*The defendants, who have married the daughters of John Evans have possession of his real and personal estate, partly under voluntary deeds, made after the above transaction, and partly since Evans' death, without any authority at all. The defendants admit the voluntary conveyances made to them by John Evans, and their possession of his property; but they endeavored in their answer to make a different case from that stated in the bill respecting the sale of the slave. As it was, however, a distinct and independent statement of newly alleged facts, not interrogated to by the bill, such a statement in the answer could not be supported thereby without proof.

The defendants feeling this, and having no proofs to offer in support of such allegations, filed a cross bill against Francis Adams, charging the facts which they had previously alleged in their answer. The defendant, Francis Adams, denied those allegations, and

made his own statement of the case. The case then depends on the proofs, and these are simply the bill of sale, with warranty, by John Evans to Francis Adams, on the 8 April 1818, of the slave Anthony, for five hundred dollars; also the record of a suit at law, by John Cheatham against Francis Adams, for the above Anthony, under an elder bill of sale, (21 January, 1817,) of the slave Anthony, signed by Mrs. Evans, and confirmed by John Evans at a subsequent time; and the recovery in that action, by verdict and judgment, for seven hundred and twenty dollars, besides costs. The complainant in the original bill, Francis Adams, is therefore entitled to recover against the defendants in this Court, as indeed he would have been at law, if the voluntary deeds by John Evans to his children, and the absence of any administration, had not obliged the complainant to come here for relief. The complainant, however, does not claim the recovery of so much as he was obliged to pay on the verdict and judgment. He furnishes a statement, by which, instead of claiming seven hundred and twenty dollars, the amount of the verdict, and ninety-seven dollars, the amount of the costs, he claims five hundred and ten dollars and thirty-nine cents, including all costs and fees, and to be indemnified against his note for one hundred and forty-four dollars, passed away to a third person by John Evans, as part of the original purchase money of the slave Anthony.

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\*The voluntary conveyances made subsequent to the transactions, and the possession of the property of John Evans by his children, who refused to administer, cannot be set up to bar this just claim.

It is therefore ordered and decreed, that the defendants do pay to the complainant, Francis Adams, the sum of five hundred and ten dollars, out of the estate and effects of the late John Evans which came into their hands by the voluntary deeds above mentioned or otherwise. And that they do indemnify the said complainant against the sum of one hundred and forty-four dollars, on note passed away to a third person; or repay the same sum to said complainant, if he pays the same to the holder of the note. Costs to be paid by defendants.

The appeal was on the ground that the defendants should have been made liable in the first instance, in proportion to the value of the property they had respectively derived from the estate of the deceased, John Evans.

By the Court.—We are of opinion that the decree of the Circuit Court is correct. The appellant, however, requests that the decree may be modified, that each of the defendants may be made liable in the first instance for a share of the demand in proportion to the

amount received of John Evans; we think this equitable.

It is therefore ordered and adjudged, that the decree of the Circuit Court be affirmed. But that the resort shall be had in the first instance to each of the defendants according to the amount each received from John Evans; all to be ultimately liable. The Commissioner to examine and report the proportions.

DE SAUSSURE, GAILLARD, WATIES, THOMPSON and JAMES, CC., concurred.

#### Harp. Eq. \*205

\*JOHN BLACK v. WM. LIGON, the Trustees of the Wadsworth Poor School, DANIEL COOK and DANIEL BEACHAM.

(Columbia. Dec. Term, 1824.)

[Wills ⚡693.]

Testator by his will devises land to three trustees named by him, for the support of a charity school, never to be sold or alienated, "the said school to be under the direction and government of five trustees, to be elected every two years," &c., "and if after these lands are delivered over to the trustees to be appointed, &c," they shall cease to apply the funds for two years, or attempt to dispose of the lands, then he revoked the gift: *Held*, that the power of leasing the lands was in the five trustees elected for two years.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. ⚡693.]

[Charities ⚡38.]

Under the particular circumstances of the case, it was held that the lease of a tract of land and mill by the trustees, for the term of ninety-nine years, and for a gross sum without the reservation of an annual rent, was valid, and not a violation of the testator's prohibition to alienate the lands.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 66; Dec. Dig. ⚡38.]

Thomas Wadsworth, deceased, by his last will and testament, made the following provisions:—"I do give and bequeath to my much respected friends, D. W. De Saussure, John Hunter, and John E. Calhoun, Esquires, in trust for the use and benefit of all that part of Laurens County, in Ninety-six district, known at this time by the bounds of Major Dunlap's Battalion, of the Saluda Regiment, all the remaining part of my lands, of every description and kind, for the sole purpose and use of supporting and maintaining a free school for poor children, residing within those limits, forever, never to be sold or alienated, except such lands as lay at a distance, which may be exchanged for lands of their full value, lying within the aforesaid limits, acre for acre, but not otherwise. The said school to be under the direction and government of five trustees, to be elected every two years by the free white men residing within the aforesaid limits, so soon as my executors shall have arranged and so disposed of my personal estate, as to

bring in a sure interest of eighteen hundred dollars per annum, until which time the profits arising from those lands must go to make up the deficiency, designed for the maintenance of my wife and mother, during their lives; and if after these lands are delivered over to the trustees to be appointed as aforesaid, if they shall neglect at any time or cease to apply the same for the space of two years to the purpose above mentioned, or shall attempt to dispose of any

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\*of the said lands, or apply them to any other use, then and in that case I do hereby revoke this gift."

The trustees to whom the lands were devised by the will, proceeded to organize the school, and delivered it and the lands into the possession and management of the trustees elected by the free white men within the bounds of the battalion, according to the directions of the will.

A large quantity of land within the designated limits, consisting of many tracts, passed under this devise; of these, the principal in value was the tract now in dispute, on which was erected a mill. The elected trustees, after entering on the management, for some years made short leases, of one, two, and three years, of the mill tract as well as the other lands, until 1803, when after public advertisement, the lands were put up at auction for a term of ninety-nine years, and the defendant, William Ligon, bid off the mill tract for the gross sum of two thousand two hundred dollars, payable by eight equal annual instalments, and the trustees executed to him a lease for that term. No annual rent was reserved by the lease. After putting improvements on the tract to the value of upwards of three thousand dollars, Ligon sold and assigned his term to Daniel Cook and Daniel Beacham, who afterwards sold and assigned to the complainant, John Black, with covenants for quiet enjoyment. The complainant, after the purchase, added improvements to the land, of the value of eight thousand dollars.

The bill of complainant alleged that doubts had arisen whether the elected trustees had power to lease under the will, whether that power did not pertain to the trustees to whom the lands were devised in the first instance, the powers of the elected trustees being restrained to the management of the school.

And if they had the power of leasing, whether it extended to the making of leases for more than twenty-one years, and whether the leasing for so long a term as ninety-nine years, might not be considered an evasion of the testator's restriction against alienating the lands. The bill prayed, either that the complainant's term might be sanctioned and confirmed by the decree of the Court, or that if the lease should be declared void, he



might be reimbursed and indemnified, by

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the parties \*properly liable thereto, the amount which he and his intermediate lessor, Ligon, had expended in improvements.

Various testimony was offered. In general it appeared, that at the time of the lease to Ligon, the mills, which constituted the principal value of the tract, were out of repair and going to decay, and that the trustees had no means of raising the funds necessary to put them in proper repair; that the income from them was then very small, not exceeding twenty-two dollars per annum; and that previous to leasing for ninety-nine years, repeated attempts had been made to lease for two and for ten years. No attempt had been made to lease for an intermediate term. Most of the witnesses examined were of opinion that the lease for ninety-nine years, was the most advantageous disposition that could have been made of the lands: that tenants for a shorter term could not have made such improvements, or kept the premises in such repair as to secure an income from them: that it would not have been practicable to lease for twenty-one years, or any shorter period: that if the leases had not been made for long terms, the continuance of the charity would have been put to hazard, and that the price given, two thousand two hundred dollars, was nearly the full fee simple value at the time of the lease. Other witnesses thought that the leases for ninety-nine years were improvident: that the mill tract, at the time of the lease, if rented for short periods, might have produced one hundred dollars per annum, and that the value of a term of twenty-one years from the date of the lease in 1804, was one thousand five hundred dollars. It was conceded on all hands that the trustees had acted with the utmost honesty and good faith.

De Saussure, Ch. 'This case has been before the Court in various shapes and on various questions, and several decisions have been made on some of those questions, all which, I understand, have been disposed of by the Court of Appeals, and I am not now called upon to give my judgment upon them. The point immediately before me, and fully argued, was whether the trustees or commissioners had a right to make leases for ninety-nine years of the lands devised by the late Mr. Wadsworth for certain public and

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benevolent purposes, \*and if they had not, what was the remedy, and the proper indemnification to the parties who might be injured by disturbing the present state of things.

It appears by the documents and exhibits in the cause, that the late Thomas Wadsworth, formerly of Laurens District, a man equally distinguished for his public and private virtues, for his patriotism and his benev-

olence, in and by his last will and testament, duly executed, and left of force at his death, devised to John E. Calhoun, John Hunter and D. W. De Saussure, in trust for the use and benefit of that part of Laurens County known at that time by the bounds of Major Dunlap's Battalion of the Saluda Regiment, all the remaining part of his lands, of every description and kind, for the sole purpose of maintaining a free school, for poor children residing within those limits forever, never to be sold or alienated, (except in a certain specific case wherein he permits an exchange;) the said school to be under the direction and government of five trustees, to be elected every two years by the free white men residing within the said limits, and if after these lands are delivered over to the trustees to be appointed as aforesaid, if they shall neglect at any time or cease to apply the same, for the space of two years to the purposes above mentioned, or shall attempt to dispose of any of the said lands or apply them to any other use, then and in that case, the testator revoked the said gift, and directed the application of the said trust estate to other charitable uses; and he requested the three aforesaid gentlemen, to whom he devised the lands, to proceed to organize the said school, and to fix the same upon such a footing as would best answer the purposes designed, for the benefit of the children of the poor inhabitants; who were to be educated and brought up in pure republican principles, as established constitutionally in America.

The remainder of Mr. Wadsworth's real estate was, in pursuance of his will, delivered up to the trustees, who were first elected under and in conformity to his last will, and the lands have been constantly since in the possession of the trustees and their succes-

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sors and their lessees, and they have \*kept up a school conformable to the testator's intentions. It appearing to the trustees to be difficult to make advantageous leases for short terms, those who were in office in 1803 were induced to make leases for ninety-nine years, to commence from the first day of January 1804, to William Ligon and his heirs and assigns, of the most valuable tract of land belonging to the trust estate, on Little river, comprehending the mill tract, and the grist and saw mills, with all the apparatus belonging thereto, for and in consideration of the sum of two thousand two hundred dollars, to be paid by eight annual instalments two hundred and seventy-five dollars, for eight years. William Ligon, the lessee, in consideration of six thousand dollars paid to him by Daniel Cook and Daniel Beacham, sold and conveyed all his right, title and interest in the mill and tract of land, leased to him by the trustees of the Wadsworth poor school, for the remainder of the time granted to him, to the said Cook and Beach-

am, their heirs and assigns, with a clause for the quiet and peaceful possession and enjoyment for the remainder of the term. By another instrument of writing, executed on the 10 of February, 1817, Daniel Cook, in consideration of three thousand five hundred dollars in hand, paid by John Black, granted, bargained and assigned to the said John Black, his heirs, executors and assigns, all that parcel of land on which the dwelling house, and store house and out-houses built by Wm. Ligon then stood, being part of a tract of land leased by the trustees of the Wadsworth Poor School to Wm. Ligon for ninety-nine years, and by him sold and assigned to Daniel Cook, with a covenant for his enjoyment of the premises for the remainder of the term. There was also another bond or instrument of writing, executed by the said Daniel Cook on the 20 February, 1817, by which he bound himself in the penal sum of ten thousand dollars, to John Black, his heirs, &c., with condition thereunder written, to perform and abide by an agreement that day entered into with John Black, by which he assigned to him, the said John Black, all the balance (meaning the remainder) of the land leased to him by Wm. Ligon, including the one-half share of the big mill and tract of land annexed to it, and leased to the said Daniel Cook and Daniel

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Beacham, being all that remained \*to him of the said purchase or lease, except that part heretofore assigned by him to said John Black, and stipulating in what manner he was to be paid, by an exchange of lands at a stipulated price per acre.

In the course of the discussion which arose on several of the questions that were heretofore made before the Court, a doubt arose as to the validity of the lease for ninety-nine years, made by the trustees elected biennially by the battalion, and also as to the due execution of the power of leasing. Whereupon the Court of Appeals ordered it to be referred to the Commissioner, to report to the Court what was the value of a lease for twenty-one years, of the premises leased from the trustees by William Ligon, and by him transferred to John Black, and also the value of the improvements put thereon by the said Black. The Commissioner reported on this part of the case, that the value of a lease for twenty-one years amounted to one thousand five hundred dollars, and that the improvements put thereon by Wm. Ligon amounted to three thousand two hundred and seventeen dollars, and that the improvements put by John Black amounted to the sum of eight thousand and forty-six dollars and forty-one cents—total for improvements, eleven thousand, two hundred and sixty-three dollars and forty-four cents. The apprehensions excited in the minds of the lessees on the subject of the leases of the lands of the Wadsworth poor

school by the trustees, caused a full and able argument on the question of the authority by which such long leases of these lands were made, and of the validity of these leases. In the argument, it became the duty and the interest of the sublessee to bring to the view of the Court every objection and difficulty which might ultimately affect his rights under the leases, and he is not liable to the imputation of unnecessarily seeking to disturb the rights under which he claimed.

It was submitted to the Court in argument, that the trustees directed to be elected biennially by the battalion in Laurens District, had no authority to lease the lands at all, because the lands were devised to the three particular friends of the testator named in the will, and in them the legal title was vested, and the trustees directed to be elected to manage the school, had no other authority or duty to perform. On a careful

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perusal \*of the will, that is not my opinion now, nor was it at any time the opinion of the three friends of Mr. Wadsworth, the testator; they were, and considered themselves, the devisees and holders of the land, subject to the uses of the will; the legal estate was given to them to support the trusts, Atk. 581, and the schools were to be under the direction of five trustees, to be elected every two years by the free white men residing within the prescribed limits. It was their duty to raise an income, and they were to apply that income. No slaves were left to cultivate the land; an income then could be raised by renting alone. I think, then, the power of leasing was necessarily implied. The testator must be considered as having had this course in his view; for two of his selected friends and devisees were advanced in life, and lived far distant from the lands in question, and could not have any useful agency in leasing the lands. Whereas, the trustees to be biennially elected, were intended to have, and actually had, the power of leasing the lands in question, in the manner best adapted to the benevolent purposes of the testator, within the restriction which forbade a sale or alienation.

The next question which arises is, whether the trustees have exercised that power within legal and reasonable bounds. It will be remembered that the lease actually made, was for ninety-nine years, at the price of two thousand two hundred dollars, payable in eight years without interest and without any reservation of an annual rent, and there is no stipulation for delivering up the land and mill seat and the improvements in good order at the end of the term. It should also be remembered that by the Commissioner's report, the value of the lease for twenty-one years was one thousand five hundred dollars, and that improvements have been put



upon the land and mills to the amount of eleven thousand two hundred and sixty-three dollars and forty-four cents. Upon this summary of facts, it was argued for the complainant that the trustees have no authority to make leases of such an extreme length nor on such terms, and that they were wholly void or subject to the control and regulation of the Court, which would reduce them to a reasonable term or give some other relief. On the other hand, it was contended for the defendants, that there was

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no law \*restraining the trustees from leasing to any extent which in their judgments would be best for the institution—nor was there any restraint by the will of the testator, consequently that they had as unlimited power over the subject as the testator himself whom they represented, and in fact the power had been wisely and beneficially exercised for the institution; and that if this is doubtful, these leases ought not to be disturbed or controlled or limited, which would work a prejudice to the lessees and sub-lessees, who had laid out a great deal of money in improvements, and were not to blame in accepting the leases given by trustees professing to have authority; and that at all events, if the leases should be disturbed, the lessees ought to be reimbursed for their advances and improvements made on the faith of these leases. It is certainly true that there is no statute in our code which limits the term of years beyond which trustees and others exercising delegated powers may not grant leases of real estate over which they have control. But it does not follow as a consequence that there is no limit to their power and abuse of it. It is not correct as was contended at the bar, that trustees stand in the place of the donor who created the trust, and with as absolute power over the land as he had himself; their power exists only for the benefit of the cestui que use. The absolute owner is irresponsible for the use or abuse of his right of property. The trustees are responsible for their conduct to the statute and common law of the country, to the rules prescribed by the deed or will which created the trust and gave them existence, and finally to the general rules and principles of justice as administered in Courts of justice. In applying this responsibility to the case before us, we are led to inquire how the leases given by them for ninety-nine years conformed to the powers and directions given by the will of the testator and with the course of business in such cases, and whether such leases were beneficial to the cestui que use. The will of the testator does not give the power to lease directly to the trustees; we have, however, agreed that, though the legal estate was not devised to them, the power of leasing was necessarily implied from the duties to be performed by them; but the

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power is \*controlled by the twice repeated injunction of the testator, that no sale or alienation or attempt to dispose of any of the lands devised, or to apply them to any other use, should be made or done, under the penalty of a revocation of the gift, it sued for. A lease for ninety-nine years seems to be an unreasonable exercise of the power to lease, in this country. It is an attempt to dispose of the land far beyond the usual time of leases. It amounts substantially to a sale or alienation, and therefore comes within the prohibition of the testator. It also diminishes, if it does not wholly take away, the certainty of getting back the land at the expiration of the ninety-nine years. The population of our country is extremely migratory, and events and rights more easily lost sight of than in other countries; besides a gross sum is contracted for, and no annual rent is reserved, to keep alive the right and the memory of it: this gives it the character of a sale rather than a lease. Besides such a lease is exposed to other serious objections on various grounds. In a country like this, of a continually increasing population, and increase of the value and price of land in favorable situations (such as the present) a lease for ninety-nine years deprives the cestui que use of the advantage of the enlarged rent arising from the increasing value of land. Already this is felt, for the lease in 1803, for ninety-nine years, was made for a gross sum payable in eight years of two thousand two hundred dollars. The Commissioner now reports that the lease for the past twenty-one years was worth one thousand five hundred dollars; now allowing no further increased value (and that is an error) the lease for ninety-nine years ought to have brought seven thousand sixty-five dollars, instead of two thousand two hundred dollars; but in reality there is every reason to believe that from the growing prosperity of the country each succeeding term of twenty-one years would have produced a larger rent. Against these very strong objections to these leases, it was argued that no leases could have been made for shorter terms, as no person would have taken them at all and erected expensive mill works, as has been done by Wm. Ligon, and by Mr. Black, the sub-lessee, under the long lease. Mr. Burnside and other gentlemen have proved this to be their opinion, and

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they believe the leases for ninety-nine years were proper and reasonable. There is no doubt, that these were respectable and intelligent witnesses, who really believed what they stated; but it should be remembered that many of these witnesses had been trustees, and had early and prematurely formed that opinion, and had acted upon it by joining in leases for ninety-nine years; this

weakens the authority of their opinions. Other witnesses differ in opinion from these, and think that better prices might have been obtained for shorter terms, and testify to facts which go far to prove that the lease for ninety-nine years, at two thousand two hundred dollars for the whole term, was very disproportionate to the value, being only twenty-two dollars and twenty-two cents per annum. Besides, where is this to end? If they were at liberty to lease for ninety-nine years, they might for nine hundred and ninety-nine, which surely would be selling the fee simple. On a long deliberate, and anxious consideration of this subject, I have come to the conclusion that the trustees, in making leases for ninety-nine years, exceeded the power given them, or violated the restriction imposed on them; such a lease for a gross sum, without reservation of an annual rent, approaching nearer to a sale, which was prohibited, than a lease, and putting the ultimate right to the property, and even the memory of it, in danger.

With respect to the general power of trustees to alien, even absolutely, and to the prejudice of the cestui que use, (see Maddock 456,) that can only be where the legal estate is absolutely vested in the trustees. Now there is no direct devise to them of the estate; the estate is devised to Mr. Wadsworth's three confidential friends, whom he names in his will, and it is only incidentally that a provision is made for the estate to be put into the hands of the biennially elected trustees, to be managed by them; and Mr. Maddock states that the power of the trustee over the legal estate vested in him, exists only for the benefit of the cestui que trust, and that such alienations as would injure them can rarely happen; for the legal estate, the possession of the trust estate and the title deeds, must all be in the trustee. It would be great injustice to the trust estate to permit such leases, made for such

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an improvident length of time and at so small a gross sum, to stand; more especially, as the Commissioner's report shows that the first term of twenty-one years was worth one thousand five hundred dollars (nearly equal to the sum paid for ninety-nine years), and each succeeding term would have become more valuable, from the increasing population of the country and other causes.

The conclusion to which I have come involves me in great difficulties. What can now be done for the benefit of the cestui que use, with the least injury to the lessees? for as there is no reason to impute to them, or to the trustees who have made the long and improvident leases in question, any corruption or intentional misconduct, I feel great reluctance that they should be sufferers. The strict and regular conclusion would be, that the leases for ninety-nine years should be set aside for the excess of the time which should

appear to have been the reasonable term that they ought to have been made, as having been made without authority and in contradiction to the restriction of the testator's will and improvidently and injuriously to the interest of the cestui que use. That is the course which I must pursue, unless a moderate compromise and new agreement can be made by the parties, under the direction of the Commissioner and to be reported to and approved by the Court. The parties may therefore, if they please, compromise, by entering into a new agreement that the lease shall be extended as was originally intended to ninety-nine years from the original date in 1803, on the conditions that the lessees and their assigns pay a very moderate annual rent in addition to the sum heretofore paid, and that the lessees and their representatives do stipulate to deliver up the land and premises at the expiration of the lease in reasonable order, the ordinary wear, tear, fire and other accidents excepted. Or the parties may agree upon a gross sum, corresponding in some moderate and diminished degree with the above-stated calculations and principles, but reserving at all events a small annual rent of a few dollars, the regular payment of which will keep alive the interests of the trust estate and the memory of them by all

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the parties. I must however make a definite decree, which must be carried into effect in case no such compromise be made.

It is therefore ordered and decreed, that unless a compromise or new arrangement be made in writing by the parties, and reported by the Commissioner to the Court at its next sitting, and approved thereby and confirmed, the leases of the premises in question, made by the trustees of the Wadsworth Poor School, to William Ligon and William Cook, and by them to John Black, for ninety-nine years, be set aside, and declared null and void, for so much thereof as exceeds the term of thirty-one years, and that at the expiration of thirty-one years from the 1 January, 1804, the lessees, or persons holding under them do deliver up to the trustees or their successors full and peaceable possession of the premises, buildings, mills, &c., in reasonable order and condition, fire and other accidents and the ordinary wear and tear excepted; and further that the Commissioner do examine and report what moderate deduction or allowances or compensations John Black is entitled to, by reason of shortening the leases, and from whom, whether William Ligon, Wm. Cook, or the trustees who made the illegal leases aforesaid. All parties to pay their own costs.

The defendant appealed on the grounds:

1. That as the Circuit decree admits the power of the trustees to lease, the consequence of the abuse of that power ought to be, not to render the leases void, but to make the trustees personally liable, that the power



to lease is expressly given by the will, and the trustees have not violated its letter or spirit.

2. That there was no misuse of the power given to the trustees, the contract having been proved to be an advantageous one; that instead of twenty-two dollars per annum, stated by the decree to be the income derived from the lease, the trustees receive one hundred and fifty-four dollars, the interest of the gross sum for which the term was sold.

3. That the leasing for a gross sum, which is regarded by the decree as objectionable, shows the advantage of the disposition made by the trustees, as thereby a distinct capital is created, from the interest of which an income is derived.

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\*4. The most important point in the case, in what manner, and by whom, the sub-lessees were to be indemnified for their improvements, should not have been referred to the commissioner, and was not a matter within the scope of his duties or powers.

W. Thompson and Simpson, for appellants. —It seems hardly to be doubted that the lease made by the trustees was the best arrangement in their power at the time it was made; and indeed the only practicable one by which they could have derived an income from the property. It is not doubted that they had the power to lease, and that they acted with perfect good faith. Their successors, now in office, are satisfied, and unwilling to disturb the contract; the original lessee is satisfied; no complaint has been heard from any individual interested in the charity; no one seeks to set aside this lease but the complainant, the sub-lessee; who would avoid his contract; finding it, perhaps, less advantageous than he expected, and believing that if he be refunded what he has laid out in his purchase and improvements, he may invest his capital to more profit.

Our positions are, that the trustees had power to lease; and, if so, that their acts are binding, unless fraudulent. The Circuit decree establishes that the trustees elected by the freemen of the battalion, had the power of leasing, and we are to seek for the limits of their power. What is the term beyond which they are incapable of leasing? Twenty-one years has been mentioned; with reference, we suppose, to the English statutes, on the subject of ecclesiastical leases. But those statutes are not of force here, nor have any application to this case. Their policy is to prevent ecclesiastical persons from impoverishing their successors. If the trustees acted within their powers, this Court has no authority to avoid their acts; this can only be restrained by law or the will of the testator. It is plain that there was no violation of the letter of the will; was there a violation of its spirit? It is said to have

been an evasion of the testator's prohibition to sell or alienate. The act does not come within the terms of the prohibition; it was

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neither a sale nor an alienation. If its effect was not to defeat, but to promote the objects of the testator; it cannot have been a violation of his intentions or the spirit of his will. His objects were to perpetuate his name, and the benefits of the institution to the country; and if those objects are not promoted, we consent to give up the case.

The highest rent fixed for the property in its present improved state is two hundred dollars. But the trustees derive an income of one hundred and fifty-four dollars from the interest of the purchase money. They have an additional capital of two thousand two hundred dollars, which a former decree of the Court has secured from being encroached on, together with the reversion of the property sold. There is a fallacy in relying on the commissioner's report, that a term of twenty-one years was worth one thousand five hundred dollars. He calculates the aggregate of the annual rents for every year of the term, which would have been disbursed as they accrued. The interest on two thousand two hundred dollars for twenty-one years amounts to more than three thousand dollars.

But the question is not respecting the comparative advantages of long and short leases. This was the only practicable method. The principal value of the tract of land consisted in the mill seat. Apart from this, there is no doubt but that the two thousand two hundred dollars was more than the fee simple value of the land.

The testimony is, that attempts were made, without effect, to lease the lands for two and for ten years, and the witnesses think it would have been equally impracticable to lease for twenty-one years. And if we had no testimony, we must infer the same thing from the circumstances. Independently of paying rent, no tenant could have found it his interest to put expensive repairs and improvements on the property for a term of ten or twenty-one years. The trustees had no means of repairing or improving, as they could not change the investment of their capital; and their income was hardly sufficient to keep their institution in operation. Soon after the lease, the mills were burnt. What should have been done if the property had remained in the hands of the trustees? A tenant for a short term would not have repaired; the trustees could not have repaired. Must the institution have ceased? Would it

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have been pursuing the testator's intention, to defeat his objects altogether. Admitting that it would be in the power of the trustees to make a better bargain if the property were in their hands now, can this be an argument for avoiding the contract, when it was the

best in their power at the time it was made, and the only practicable mode of effecting the testator's object?

It is said that the evidence of title may be lost before the end of the term. But other means may be found of guarding against this danger, than declaring the lease void. The Court may direct, by its decree, that there shall be a periodical acknowledgment of title by the lessees.

If the intentions of the testator were clearly expressed, it would be the duty of the Court to effect them, without regard to consequences; but if they are doubtful, it may have some weight to consider the consequences of declaring these leases void. The complainant seeks to be reimbursed what he has expended in making his purchase and improvements. But on whom shall the loss fall? Shall the individual trustees, who made the contract, be rendered personally liable? This would be unjust and oppressive, as it is admitted they acted honestly, and to the best of their judgment. Besides, they are not parties to this suit, and cannot be bound by the decree. Shall the institution refund? The property, it appears, would not now sell for near the amount which has been expended in improvements, and to decree this, would be to defeat the charity altogether. The testator, too, expressly directs that none of the land shall be sold; and it would be impossible to refund without selling. If the institution does not refund, it gains an unfair advantage. Shall the loss fall on Ligon, the original lessee? He seems to have been equally innocent with the trustees, and there appears no more reason why he should bear it than the complainant. This part of the case was referred to the commissioner; but it was not a matter proper for his determination, and it is certain the Court must ultimately decide it.

Johnston, for respondents.—Whatever may be the views or interests of the complainant, if the trustees exceeded their powers in making the lease, the Court will declare it void.

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He, \*however, is indifferent, and content to abide by his contract, if it is sanctioned by the Court.

We contend, first, that the trustees elected by the freemen of the battalion had no power to lease at all. The lands are given to other trustees, named by the testator, and the office of the elected trustees is pointed out by the provision of the will, that the school shall be "under their direction and management." The will is rendered consistent and intelligible by the construction, that the trustees named shall manage and lease the lands, and pay over the proceeds to the elected trustees, who shall manage the school.

But we contend further, that the lease for ninety-nine years is an alienation. It is, according to the showing of the defendants,

a substitution of a monied capital for the landed capital on which the testator intended the institution to be founded. Why were the trustees forbidden to alienate the lands? We may suppose because the testator supposed a landed capital to be more permanent and secure, and not subject to the casualties which would attend it if otherwise vested. But are not greater hazards incurred by the trustees putting the property out of their control for a century? Does it not strike every one as an alienation? It is said, that the gross sum paid for the term was equal to the fee simple of the land. If this be true, it is an additional circumstance to show that it was regarded by all parties as an alienation.

THOMPSON, Ch.—The opinion of the circuit judge, that the power of leasing the Wadsworth lands is vested in the five trustees elected biennially, I think fully sustained by the reasons assigned for it in his decree. The question to be considered relates to the exercise of that power. The object of Wadsworth's bounty was the supporting and maintaining of a free school, for poor children residing within certain limits in Laurens District. It was to be under the direction and government of the trustees, and if they should neglect at any time, or cease to apply for two years the funds destined for this purpose, the gift is revoked. There is

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also a restriction that the lands, \*from which the funds are to arise, should never be sold or aliened.

It is objected to the leases by the trustees, that they were made for ninety-nine years, for the inadequate sum of two thousand two hundred dollars payable in eight years, without a reservation of an annual rent, or stipulation to deliver up the land and mill-seat with the improvements, in good order at the end of the time. The testator does not prescribe any mode of raising the funds necessary to carry the object of his bounty into effect. The trustees are left to act on this point subject only to the restriction that the lands should not be sold or aliened. They were under no obligation to reserve an annual rent, or to require any stipulation respecting the delivery of the premises at the expiration of the leases. The restriction on selling or aliening would have been violated if, as was put in the argument, the trustees had made leases for nine hundred and ninety-nine years; such leases would obviously have violated the intention of the testator, and it must be admitted that these leases for ninety-nine years could not be supported, but for very strong and special circumstances under which they were disposed of. The trustees acted with the utmost fairness and, to the best of their judgment, for the benefit of the institution. They tried to dispose of leases for two and ten years, and failed; and, Col. Bailey says, even made several at-



tempts to lease at ninety-nine years before they succeeded; and several witnesses declare that the lands brought as much as the fee-simple of them was worth. Col. Burnside says that the price of the mill-seat was the greatest fund, and if that had ceased, the fund would have been too small to have gone on. The sale of these leases put the institution out of the reach of casualties which might have been ruinous. It appears that the mill got burnt soon after the lease to Ligon for ninety-nine years, and Major Dunlap says, that after the mill had been burnt, if it had been on a short lease, the scheme and plan of the testator could not have been carried on for want of funds, as no one would have rebuilt on a short lease. It was therefore fortunate for the institution that these long leases were made. But we must judge of the conduct of the trustees

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\*by the state of things as they existed when the leases were made, and not by subsequent events. The property has appreciated greatly since, but, as Col. Baily observes, it owes its chief value to Ligon's skill and expenditures. The mills and improvements are estimated at eleven thousand dollars, a sum far exceeding the value of the lands in fee-simple when the leases were made, the benefit arising from the application of which cannot, in my opinion, be justly taken from fair and bona fide purchasers and given to the institution; and it is a consideration entitled to weight, that the setting aside of the leases would disturb many titles of which the holders had no reason to doubt the validity, and which were fairly acquired, give rise to much litigation, and involve a number of persons confessedly innocent, in expensive and ruinous law suits. The danger that in a lapse of so long a time as ninety-nine years the tenants of the lands might set up and acquire a right by possession, can be efficiently guarded against by requiring a recognition of the title of the trustees at the expiration of every four years, and it is the duty of the trustees to see that this recognition is made.

It is ordered and adjudged that the decree of the Circuit Court be reversed, the leases of lands for ninety-nine years made by the trustees be confirmed, and that the present and future tenants of the leased lands be required, from time to time, to make such a recognition of the title of the trustees as they may think proper to demand, in order to protect the said leased lands against any claim of right which might be set up or acquired by possession or otherwise; the parties to pay their own costs.

GAILLARD and JAMES, CC., concurred.

DE SAUSSURE, Ch.—I concur, for the reasons stated in a separate paper.

DE SAUSSURE, Ch.—I have reconsidered this case with great attention, and remain of the same opinion that I was at the hearing of the cause, with respect to the authority of the trustees to make leases for ninety-nine years. I am still of opinion that the restriction in the will of the testator, Mr. Wadsworth, ought to have prevented their

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making leases of such \*unreasonable duration. I also think that, looking to the future, it was improvident to make such long leases, and thus deprive the institution of the benefits of the continued rise in the value of property. It was also improvident to sell for a gross sum, without some reserve of annual rent, however small, which might have kept alive the rights of the trustees and the poor school, and preserved the memory of them coextensively with the leases.

As, however, it is acknowledged on all hands that the trustees acted bona fide, and for the best, according to their judgment; as they obtained the full price at the then rate lands were selling and leasing; as great and extensive improvements have been made on the lands, and it would be a great hardship on lessees and sub-lessees, who are not in fault, to set aside the leases; and as the Court places the question on the ground of a confirmation of the leases on the special circumstances, and also provides for the recognition, by the lessees, of the rights of the lessors every four years, I shall, on these considerations, concur in the decree.

#### Harp. Eq. 223

GEORGE E. KIDDLE, Adm'r of J. Teasdale v. CHARLES HAMMOND and Others.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⇨ 495.]

A creditor of the estate of which defendants were executors, purchased property at the sale made by them, and gave credit for the amount. *Held*, that the executors were entitled to commissions on the amount thus settled, though no money was paid.<sup>1</sup>

[Ed. Note.—Cited in *Jones v. Jones*, 39 S. C. 252, 17 S. E. 587, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2099; Dec. Dig. ⇨ 495.]

DE SAUSSURE, Ch.—In this case the only question for the judgment of the Court is, whether the defendant is entitled to commissions under the following circumstances. At the sale of the estate of John Hammond, the testator of the defendants, Isaac Teasdale, who was a large creditor of the estate, purchased property to the amount of thirteen thousand three hundred and seventy-six dollars, four and three-quarters of a cent. No cash was paid, but the business was settled by mutual debts and credits to that amount.

<sup>1</sup>Ante 176.

In the settlement of the executors' transactions, no commissions were allowed on the above sums, though allowed on other parts

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of the account of the executors \*of John Hammond. Whether the omission was by design or accident is not now known. The report was opened by Judge Gaillard, in order to let in the consideration of the question whether Charles Hammond was entitled to commissions on the transaction. The commissioner has reported that he is entitled to commissions, and I am of the same opinion; for I do not perceive any substantial difference between an executor obliging a creditor who has purchased property of the estate actually to pay the money, and then to repay him the amount as a creditor, and passing receipts with him. It is therefore ordered that the report be confirmed and the commissions allowed.

On appeal, decree affirmed.

DE SAUSSURE, GAILLARD and WATIES, CC., concurring.

Butler and Thompson, for appellants.  
Simkins and Bauskett, contra.

#### Harp. Eq. 224

JEFFERSON L. EDMONDS and Wife, and Others, Legatees of Cates, v. ANDERSON CRENSHAW and JAMES M'MORRIES, Executor of Aaron Cates.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⇐104, 142.]

Bill against Executors, for an account, &c. Testator by his will directed his whole estate to be sold, on a credit of one, two and three years, to be secured by bonds bearing interest from the date, with good personal security and mortgage of the property, and the proceeds vested in stock, to accumulate until certain of his legatees should come of age. The executors sold the property, but never made any investments in stock, and failed in returning accounts of their administration to the Ordinary. In accounting before the Commissioner, it was held that they were properly charged with the whole amount of the bill of sales; with interest on that amount until the bonds became due; the interest then compounded, and annual rests made.<sup>1</sup>

[Ed. Note.—Cited in *Wright v. Wright*, 2 McCord, Eq. 203; *Livingston v. Wells*, 8 S. C. 363; *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 432, 577; Dec. Dig. ⇐104, 142.]

[*Executors and Administrators* ⇐500.]

The testator bequeathed to the executors ten per cent. on the amount of his estate, for their services in executing his will; though they failed grossly in discharging the duties prescribed

<sup>1</sup>See our cases on interest collected, in a note to *Baker v. Lafitte*, 4 Rich. Eq. 392. See also *Huggins v. Blakely*, 9 Rich. Eq. 408. *Myers v. Myers*, Bail. Eq. 29. *Henderson v. Laurens*, Car. L. J. 134. *Oswald v. Givens*, Riley, Eq. 38. *Ib.* 24.

by the will, yet as they were charged with the whole amount to which the estate would have accumulated if they had performed them properly, they were held to be entitled to the per centage.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2138; Dec. Dig. ⇐500.]

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[*Executors and Administrators* ⇐111.]

\*The executors not allowed credit for the amount of a commission of ten per cent. on the debts of the estate, paid by them to an attorney for his services in collecting the debts and paying over the moneys.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 455; Dec. Dig. ⇐111.]

[*Executors and Administrators* ⇐124.]

One of the executors who remained in the State, gave to the other who was about removing out of it, and who did afterwards remove, an acknowledgment of having received all the moneys, evidences of debt, property of every kind, &c., of the estate. *Held*, to be conclusive evidence to charge the executor who remained with the whole estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 497; Dec. Dig. ⇐124.]

[*Executors and Administrators* ⇐22.]

This executor having neglected to make collections, having failed to make the investments directed by the will, having neglected to file accounts with the ordinary, being embarrassed in his private affairs, and negligent and intemperate in his habits, and there being ground to apprehend that he intended to leave the State, was removed from the executorship, and a receiver appointed.<sup>2</sup>

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 125; Dec. Dig. ⇐22.]

[*Executors and Administrators* ⇐102.]

It appearing, after a lapse of eight years from the death of testator, that it would be more advantageous to vest the funds in land and in slaves, than in stock; by consent of the legatees who were of age, that change in the mode of investment was directed to be made, with respect to the portions of the estate that were to be held in trust for them. With respect to the shares of the minors, it was referred to the commissioner to report whether it would be clearly and indisputably for their advantage to change the mode of investment.<sup>3</sup>

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 420; Dec. Dig. ⇐102.]

[*Executors and Administrators* ⇐152.]

Land was purchased by the executor in his own name, and paid for partly with funds of the estate in his hands, and partly with money raised on a note discounted in bank. The land was mortgaged by the executor to his endorser on the note, for his security, who afterwards paid the note: *Held*, that the land was liable in the first instance for the satisfaction of this mortgage.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 628; Dec. Dig. ⇐152.]

[*Executors and Administrators* ⇐500.]

[An executor will not be entitled to commissions, if it appears that he did not account for

<sup>2</sup>*Wright v. Wright*, 2 McC. Eq. 203.

<sup>3</sup>See *Burton v. Yeldell*, 9 Rich. Eq. 9. *Lawton v. Hunt*, 4 Stro. Eq. 1. *Drayton v. Rose*, 7 Rich. Eq. 339 [64 Am. Dec. 731].



transactions which took place during some of the years of his administration, unless the transaction of each year can be distinctly ascertained by his accounts.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2134; Dec. Dig. § 500.]

De Saussure, Ch.—This case came up on the Commissioner's report and exceptions thereto; and on various motions grounded on the facts of the case, which appeared upon the hearing. The report of the Commissioner is drawn up with remarkable clearness and judgment, and it might be sufficient to decide on the points made by the report and exceptions, merely referring to them for the questions growing out of the proceedings. But the great importance of the case itself,

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and \*of the questions to be decided, makes it proper that a short statement of the facts should be made, in order to a right understanding of the case.

It appears, by the bill, the answer, and the evidence, that the late Aaron Cates, being seized and possessed of a considerable real and personal estate, made and duly executed his last will and testament on the 7 day of February, 1816, and departed this life, leaving the same in full force and virtue; wherein he directs all his real and personal estate to be sold at auction, on a credit of one, two and three years; the purchasers to give bond with two good freehold sureties, and a mortgage of the property, drawing interest from the time of the sale; with some exceptions as to purchasers for smaller sums than two hundred dollars, when only one year's credit was to be given. The testator then gives a few small pecuniary legacies, and directs that his executors should receive a compensation for their services, more fully stated hereafter. The testator further directs as follows: "after which I will and direct that my executors vest the clear balance in bank stock, or in shares or capital of such company or corporations, as in their judgment will be most proper and productive of interest, for the following benefits and uses, and subject to the following restrictions and regulations, viz., to each of my three grand-daughters, Dorothy Ann Wadlington, Polly Brooks Wadlington, and S. S. F. Wadlington, on their respectively attaining to the age of twenty-one years, I will that my executors pay one-fourth of the profits arising from the aforesaid shares or stock; and should either die without issue living at her death, the provision herein made for her to go to her survivor or survivors. After they respectively attain the age of twenty-one years, they are to receive the profits annually: the remaining fourth part of said profits I will to my daughter Dorothy, so long as she remains a widow; and on her death or marriage, to my three grand-daughters in manner as aforesaid. Should my said grand-daughters all die without leaving is-

sue alive at their death, then I will that their parts, together with that of their mother, go to my next of kin: and it is my intention that my daughter or grand-daughters shall

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not \*sell or alien the provision herein made for them, under the pain of forfeiting the same as if they were dead; but that they are merely to receive the profits annually: and lastly I constitute and appoint my friends Anderson Crenshaw and James M'Morries, executors of this my last will and testament; and on the death of either of my executors, it is my desire that his survivor be sole executor, with power of appointing, either by deed or will, a proper person to carry into effect the provisions and intentions of this my will and testament. I desire my grand-daughters to be reasonably educated by my executors, out of the provision above made for them."

The above named executors, after the death of the testator, (which took place soon after executing his will) proved and established the said will in the Court of Ordinary, and qualified thereon as executors. They caused the personal estate to be inventoried and appraised, and on the 11 March, 1816, they caused the real and personal estate of the testator to be sold, on the terms and credits directed by the will, and the sales amounted to twenty-five thousand one hundred and forty-four dollars and thirty-three cents, as appears by the sale bill. It appears also that the executors possessed themselves of the cash left by the testator, and of his bonds, notes and books of account.

It appears further, that Anderson Crenshaw, one of the executors, being about to remove out of this State and to settle in Alabama, came to a settlement with the other executor, James M'Morries, and surrendered up the whole estate of the testator to the said J. M'Morries, who, on the 21 day of April, 1819, signed an instrument of writing, by which he acknowledged that, on a full examination and settlement then made, he the said James had received of and from the said Anderson Crenshaw, executor of said Aaron Cates, all moneys, notes, bonds, bills, mortgages, books of accounts, deeds, abstracts of judgments and decrees, debts, and all dues, receipts, papers and effects, and every thing of every description, which ever came to his hands or possession, for or belonging to the estate of the said Aaron Cates; in consideration of which, the said James M'Morries undertook to account for and an-

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swer for the management of the whole of the estate of the said Aaron Cates, both real and personal, and to indemnify the said Anderson Crenshaw against any responsibility or damage on his part.

It appears further, that after this transaction, the said James M'Morries had the entire management of the estate of Aaron

Cates, but he has never made any returns to the Ordinary of his transactions, except for the years 1816, 1817 and 1818; and it appears that the said James M'Morries has never made any investments of the proceeds of the sales of the estate of Aaron Cates in bank stock, or in any other stock, but has received large sums of money from the purchasers of the said estate and from the debtors of said estate, without accounting for the same, or employing the same beneficially for the heirs. It appears further, that the affairs of the said James M'Morries are greatly involved, and that all his visible and known property, estimated by competent persons, is entirely insufficient for the payment of what is due by him to the estate of Aaron Cates, besides his debts to other persons, and it was insisted by complainants and supported by proofs, that the habits of the defendant, James M'Morries, had become intemperate to a high degree, so as to render it unsafe to trust him with the management of affairs.

The complainants who are the legatees, allege that it might have been practicable for the executors originally to have made advantageous investments in stock, according to the directions of the will, but that the opportunity of doing so has now passed by, after a lapse of eight years—and they pray that investments may be made in lands and negroes.

The complainants further insisted, that the executors have, by their misconduct and non-performance of the duties prescribed by the will of the testator and by law, forfeited their right to the compensation directed by the will, or to any other compensation; and they prayed that they might be decreed to give security for the faithful performance of their duties, or that the funds should be taken out of their hands and management, and that they might have such other relief as their case might require.

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\*The bill was taken pro confesso, as to Anderson Crenshaw, who is resident out of the State.

The answer of the defendant, James M'Morries, admitted the due execution of the will of Aaron Cates and his death, leaving the same in full force, and the probate thereof, and the qualification by the executors, and the sale of the real and personal estate, according to the directions of the will. The defendant, James M'Morries, also admitted that his co-executor, Anderson Crenshaw, had departed from the State, and resides in Alabama, and that previous to his departure, he surrendered up the estate to him, the said James, and he gave the said Anderson the receipt and discharge stated and set forth in complainants' bill. But he alleges that he was indisposed at the time, and having implicit confidence in his co-executor, he acted upon his statements, (he having been until then the principal acting exec-

utor) without knowing whether they were correct, and he disclaims being made responsible for more than his own acts, and for the funds which actually came into his hands. The defendant admitted that no investments in stock had been made of the proceeds of the sales of the estate, and alleges as an excuse, that Mrs. Dorothy Wadlington, the daughter of the testator, had solicited that such investments should not be made; but the defendant insists that such investment ought now to be made, conformably to the will and not in the purchase of lands and negroes, as the complainants desire. The defendant claims the full allowance of ten per cent. on the amount of the sales of the real and personal estate, and of debts due to the estate, conformably to the will of the testator.

The case having been referred to the Commissioner, he reported: That from the sales made of the estate, there results a debt due by the executors of thirty-eight thousand and seven dollars and twenty-five cents, including interest, calculated up to the time of making up the report, (June, 1824) with which amount the commissioner charged the executors. To this part of the report the defendant filed exceptions, and the principal question in the case arises as to the priority of this charge. The evidence in the

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case was large, and the arguments of counsel extensive. They will be submitted to the Court of Appeals, if the cause should be carried up there. It is unnecessary now to detail them. In considering the question whether the executors are properly chargeable with the whole amount of the sale bill, it must be remembered that the testator, by his last will, directed all his estate to be sold by his executors, on specified terms, which required them to take good personal security from the purchasers of so much of the property as might be sold on a credit, as well as the bond of the purchaser and a mortgage of the premises; for which, and other services they were to receive a larger compensation than the general law allows. The executors made the sales prescribed, and if they pursued the instructions of the will, the debts must, in all probability, have been good, and easily recoverable. If any were bad without their neglect, it was easy to show it. It was their duty to have applied for and received payments, as soon as the terms of credit expired, and to have made regular annual returns to the Ordinary, of moneys received and paid away, and invested according to the will. This has not been done. They made the sales, but have not made the collections regularly or with any diligence, nor have they made returns to the Ordinary, except for the years 1816, 1817 and 1818, and the returns made for those years amount to a very inconsiderable part of the estate (scarcely more than a tenth part of what they are chargeable with.) Nor



have they invested one dollar according to the direction of the will; nor have they shown any losses on the sales of the estate; nor why they have not collected what remains unaccounted for in their returns. Under these circumstances, it does appear to me, that the Commissioner has acted properly and judiciously in charging the executors with the whole amount of the sale bill. The exceptions are therefore overruled, and the report of the commissioner on this point confirmed.

The Commissioner's report goes on to examine the question of interest and to state the reasons why he has charged the executor with interest, in the manner he does in the statement he submitted. The report is full

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and particular, and \*exceptions are filed to it. I was at first in doubt, whether the commissioner had adopted the proper rule as to interest; but upon comparing his reasoning with the circumstances, I am satisfied he has done right. It is obvious that he has not charged too much, as he states, "that the executors at the sale of Mr. Cates' estate took notes and bonds, from all purchasers whose purchases exceed two hundred dollars, (all below was cash) payable with interest, precisely in the manner with which this report charges the executors with interest. The executors are, therefore, by this report charged with no more than what they have received of compound interest." I am satisfied in this, but my principal difficulty was, whether as the executors were directed to invest the money of the estate in stock which would have produced a regular annual return of interest, the surplus of which, after allowing for the maintenance of the children, could and should have been re-invested, the executors ought not to be charged more largely with the interest than the report has done. But upon the whole, I will be satisfied therewith, and I hereby overrule the exceptions and confirm the report.

The next question arises out of that part of the report which discusses the question, whether the executors are entitled to the ten per cent. claimed by them under the will of the testator. The will, after prescribing the duties of the executors, then proceeds to say, "I will and direct that my executors (after paying the above legacies and all just debts, and other proper charges and expenses) receive as a compensation for their services, ten per cent. on the whole amount of the moneys to be collected from the sale of my estate, and of outstanding debts which may be due me at my decease, or which may become due thereafter. After which, I will and direct that my executors vest the entire clear balance, (including the net proceeds of my estate then in their hands) in bank stock, or shares or capital of such companies or corporations, as in their judgment, will be most proper and productive, in trust, &," for

the benefit of his daughter and three grand-daughters. The executor claims the ten per cent. on the whole amount of the estate, as a legacy.

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\*The Commissioner reports that the direction to allow ten per cent. to the executors, was for the performance of extraordinary services enumerated in the will; which have however not been performed; and therefore they are not entitled to the ten per cent.: but he is of opinion the executors are entitled to the five per cent. allowed by law, on so much of the estate as they have collected and applied according to the directions of the will. Exceptions were filed to this part of the report. The ten per cent. in question was undoubtedly a legacy; but it was a legacy given for the performance of important services, which are explicitly stated in the very sentence bequeathing the legacy, and coupling the duties and the reward together. They were not performed in many important particulars; and much loss has been sustained by their neglect, in not collecting and investing the moneys of the estate in stock.

Under these circumstances I am of opinion with the Commissioner, that the executors are not entitled to the ten per cent. bequeathed them for services to be performed, but which were not performed. The exceptions are therefore overruled, and the report confirmed.

I also concur with the Commissioner, that the executors are not entitled to the statute allowance of two and a-half per cent. receiving, and two and a-half per cent. on paying away money of the estate, for the years in which they neglected to make returns to the Ordinary of their transactions. For those years in which they made returns, it is proper they should be paid. The report in this respects is therefore confirmed, and the exceptions overruled.

The report further states, that the defendants claimed credit for so much money paid by them to Mr. Bauskett, as commissions for transacting the business of the estate. The Commissioner rejected the claim, because no distinct or certain amount was proved; and if proved, it was claimed by the executors on untenable grounds: "for it appeared that whatever was paid to Mr. Bauskett, was paid as a compensation for the trouble and responsibility of receiving and paying out the money of the estate, and not for counsel and

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professional services. It appears by the receipt of Mr. Bauskett to Mr. M'Morries, dated in May, 1819, that bonds and notes to a very large amount, say about twenty-eight thousand dollars, were placed in his hands "for collection;" which was soon after the whole amount of the estate and the management of it was surrendered by Mr. Crenshaw to Mr. M'Morries.

I have considered the reasons assigned by the Commissioner for disallowing this claim,

and I think them correct. The commissions allowed to executors for transacting the affairs of the estate, are restricted by statute to a per centage for receiving and for paying away the money of the estate. Now they cannot charge that per centage for themselves, and then another per centage for the same service by another person, though all reasonable services actually performed by counsel and paid by the executor should be allowed. The report in this respect must therefore be confirmed, and the executor overruled.

After allowing the defendants credit for all the sums properly paid by them on behalf of the estate, and all the charges legally payable to them for commissions, the Commissioner reports that the defendants, the executors of A. Cates, have an unexpended balance of the estate of their testator now on hand, to the amount of thirty-four thousand one hundred and forty-four dollars and ten cents and three quarters of a cent. For the reasons given above I have concurred with the Commissioner, that the defendants are liable to that amount.

It was, however, contended for the defendant M'Morries, that Mr. Crenshaw had been for a considerable time the principal manager and actor in the affairs of the estate; and that he M'Mories, ought not to be chargeable with the whole amount, now that Mr. Crenshaw had removed out of the State with his property. To this it was answered, that both the executors were jointly in possession of the estate, and both were responsible; also that Mr. Crenshaw before he left the State, surrendered and delivered up all the estate, bonds, notes, &c., to defendant M'Morries, who gave his receipt for the same and made himself liable. That receipt, bearing date the 21 April, 1819, and signed by James M'Mor-

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ries in the presence of a witness \*and certified by the Ordinary, states that Anderson Crenshaw and James M'Morries "had gone into a full and thorough examination of all the moneys, notes, bonds, bills, mortgages, books of accounts, judgments, decrees, debts, receipts, papers and effects, of all kinds and descriptions whatever, relating to or belonging to the estate of the said Aaron Cates, deceased, and after a satisfactory investigation and fair and full adjustment of all affairs of the said estate the said James M'Morries, as executor aforesaid acknowledged that he had received of and from the said Anderson Crenshaw, executor as aforesaid, all moneys, notes, bonds, bills, and all dues receipts, papers, and effects, and every thing of every description, which ever came to his hand or possession, for or belonging to the estate of the said Aaron Cates, deceased." In consideration whereof, he the said James M'Morries undertook "to account and answer for the management of the whole estate of the said Aaron Cates, deceased, both real and per-

sonal, and to indemnify the said Anderson Crenshaw, against any responsibility or damage on his part."

Against this receipt it was contended for Mr. M'Morries, that he had signed it incautiously, without due examination, and that he ought not to be bound thereby; but should be permitted to prove that he had not received the whole of the estate and effects conformably to the receipt.

It would be most dangerous to permit a party to aver against such a receipt, so deliberately and formally executed, without proof of fraud, and contrary to the presumption arising from the fairness of the character of Mr. Crenshaw. Mr. M'Morries would not be easily permitted to elude the force of that receipt, even in a controversy with Mr. Crenshaw; but it is wholly out of the question to permit him to deny its validity and effect in relation to the heirs of the estate in question; he must be bound by it, and be responsible to the full extent of it. Nor indeed has he furnished any proof to discredit the receipt.

We come now to the consideration of another question of importance to the in-

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terests of the parties. But it is not one \*in my opinion of any difficulty. It is whether James M'Morries is entitled as executor to be restored to the possession, care and management of the estate of the testator, Aaron Cates, which has been taken out of his hands by virtue of the orders of this Court, founded on certain affidavits. The objections made against him are, that though all the debts owing to the estate, well secured, were due in the year 1819, when the whole estate came into his hands exclusively, as appears by his receipt to Mr. Crenshaw, that he has made few collections, by which he disobeyed the will of the testator, and put some of the debts in jeopardy; that he has not made any investment of stocks, as directed by the will, which would have produced a great accumulation by this time, which was also in direct disobedience of the will of the testator; that since the year 1819, he has not filed any accounts with the Ordinary, which is contrary to law: that his private affairs are in great disorder and his debts very considerable, so that the estate is already likely to be a great loser by him; that his habits are intemperate, and grossly negligent; whence the most serious apprehensions are entertained of future mismanagement and loss to the estate; and finally, that there is reason to believe that Mr. M'Morries meditates leaving the State and the jurisdiction of the Court, to avoid responsibility. There was much proof gone into on these several allegations, and it is with regret I feel myself bound to say, that they were all supported; some of them conclusively, and most of them \*very strongly. The last allegation of an intention to depart the State, was the most feebly sup-



ported; but there appeared to be some ground even for that apprehension. On a case so made out it is impossible for the Court to hesitate. It would be a great defect in the jurisprudence of any country if protection could not be given to estates of minors, by the removal of trustees and executors who have grossly neglected their duties or abused their authority, to the manifest prejudice of the estate committed to them. That defect does not exist with us. The remedy has been often applied. In England it is carried so far that an executor and trustee becoming a bankrupt, a receiver is ap-

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pointed in his stead, though the testator knew after he had made his will that a commission of bankruptcy had been issued. See 5 Madd. Rep. 46, *Lang v. Hawkins*.

Under the circumstances of the case before me, I am bound for the preservation of the estate and for the protection of the legatees, and to give effect to the will of the testator, to consider the executor and trustee as incompetent to perform his duties, and dangerous to the interests of the legatees; and therefore to be set aside, and the appointment of a receiver to be confirmed.

Another question was made as to the ne exeat and the orders for sequestration grounded upon the affidavits. It was moved to set them all aside, on the ground that the evidence of a fixed determination to leave the country and carry off his property (to elude his creditors) was not sufficiently strong against said M'Morries to induce the Court to continue those orders. The affidavits originally made out a case sufficient to justify those orders. The denial of the answer and the testimony of defendant at the hearing has diminished the force of those affidavits, and I am very desirous to acquit Mr. M'Morries of this imputation: as, however, the affidavits originally made were sufficient to authorize the orders made, and though weakened by the answer and evidence, their force is not entirely removed; and as the capacity of the defendant M'Morries to pay what is due to the estate is more than doubtful, and he has not fully complied with the order, and as some points of the case are referred again to the Commissioner, and no real injury results to the defendant, who is allowed to remain on the estate and to have his living from it, no order will be made for the present on this motion. It may be renewed to the Court hereafter.

Another question was argued and the judgment of the Court required on it. It was, whether the Court would grant the motion of the complainants, that the funds which may be collected on account of the estate, should be invested by the receiver in the purchase of lands, and slaves, instead of being invested in stock, as directed by the will. In support

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of this motion, it was urged that so many

years had elapsed since the direction of the testator to invest the proceeds of the sale of the estate in stock, which had been utterly neglected by the executors, and such great changes had taken place in the prices of stock and of lands and slaves, that it would now be very injurious to the legatees to have the will of the testator literally carried into execution.

The evidence upon this point seems to establish the grounds of the application, and I shall therefore have no hesitation in decreeing that the two-fourth part of the estate, bequeathed to the daughter of the testator and to his grand-daughter, (now Mrs. Edmonds,) be invested in lands and slaves, by the receiver, if the same can be done advantageously, according to the best of his judgment, upon consulting the parties interested, to be held on the same uses and trust as the stock was directed to be held by the will.

With respect to the two remaining fourth parts, I have much hesitation. The testator is very explicit, that the proceeds of the estate should be invested in stock for the benefit of the legatees, and these two are minors and cannot give their consent to such a measure, changing the destination and character of the fund. To be sure, if during the delay of eight years, produced by the neglect of the executors, such a material change in the prices of property has taken place, that it would be very injurious to invest the money in stock, and very beneficial to invest it in lands and slaves, the Court would authorize that course to be pursued most beneficial to the legatees; but that must be clearly shown, and though some important testimony was given on the trial, I would prefer that the question should be referred to the Commissioner, for fuller examination. It is therefore referred to the Commissioner to make inquiry, receive further evidence, and report to the Court whether it would be indisputably and clearly for the benefit of the minor legatees, that their shares of the money should be invested in the purchase of lands and slaves, rather than of stock; to be held in trust to the uses and purposes of the will.

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\*Several motions were made by the counsel and submitted to the Court, at the close of the argument.

One was by Mr. Caldwell, on the part of the defendant, James M'Morries, that it be referred to the Commissioner to ascertain the extent of the receipts of each of the defendants, and their respective responsibility in this respect. It will be perceived from what has been stated above, that I hold the defendant, M'Morries, responsible for the whole amount of what is due by the executors to the legatees; as between them, therefore, the inquiry requested is unnecessary; but as it may be important to defendant, M'Morries, in settling with Mr. Crenshaw, though it is difficult to conceive how he can avoid the

effect of his own receipt, the inquiry requested, may be made by the Commissioner.

On behalf of the defendant, James M'Morries, another motion was made to discharge the levy made under the sequestration on the slaves, Will and Young, and one tract of land of one hundred acres in Laurens district, which it was alleged, were alienated or mortgaged, bona fide, before sequestration. If this be so, there can be no doubt of the propriety of the discharge; subject, however, to the lien which Cates' estate may have on one of the slaves, which, it is alleged, M'Morries purchased at the sale of the estate. The Commissioner is therefore directed to inquire and examine into these facts, and to report thereon to the Court. I thought at the hearing that as Mr. Garey and P. Page were not parties, no order could be made thereon. On reconsideration, I am inclined to the opinion that such an order, being for their benefit, may be made.<sup>4</sup>

There was another question of importance argued fully, which requires the decision of the Court. Mr. Caldwell moved on the part of the defendant, M'Morries, that a certain tract of land containing four hundred and forty acres, the property of James M'Morries, who mortgaged the same to William Calmes, to secure the payment of a certain debt, prior to the sequestration, should be discharged from the sequestration, or if sold, should be first held liable for the debt due to Calmes. It was objected by the complainants, that the debt alleged to be due to

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Calmes was \*not really due to him; and if it were due, still the land purchased by James M'Morries from Mason, (which is the land in question) was paid for with the funds of the estate; consequently, that the land so purchased and held, was in trust for the estate of Aaron Cates.

The evidence on this part of the case was as follows: that Mr. M'Morries purchased the tract of land in question from Mr. Mason, and the brother of Mason, the vendor, testified that the balance of the purchase money was paid to his brother by M'Morries, out of the money which he got from Dr. Glenn, on the sale of a tract of land made to him. Dr. Glenn testified, that he did buy a tract of land from M'Morries, in March, 1820, for two thousand five hundred dollars, which he then paid in cash, and took conveyances to himself. King, another witness, testified, that the debt contracted by M'Morries to Calmes, was to raise money to pay for the land he had purchased (from Mason.) He says that it was raised by a note in bank, endorsed by Calmes, and paid by him. But the witness knew this only from M'Morries' acknowledgments to him. Mr. Harrington proved that Calmes

paid the sum of nine hundred, and twenty-five dollars for M'Morries.

Mr. Bauskett, (examined as a witness) testified, that Mr. M'Morries had acknowledged to him, he had laid out part of the trust money of the estate of Cates, which came into his hands, in the purchase of lands and negroes; but he did not understand him that the trust money was laid out to pay for this land in question, for he had not paid for it at the time.

It was argued for complainant, that where a trustee invests trust funds in the purchase of property, and takes the title to himself, the estate so purchased and paid for, is held in trust for those entitled to the benefit of the trust fund. This is undoubtedly true. But the rights of innocent third persons are to be regarded. If M'Morries did pay for the land in question partly with the funds of the trust estate, which is by no means distinctly proved, though highly probable, it is equally, if not more certain, that he paid in part at least with his own money, and that the money which he raised in bank, on a note with Mr. Calmes for his endorser,

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was raised to pay in part \*for the land. Mr. Calmes was obliged to pay the note as endorser. He therefore was a most just creditor of Mr. M'Morries, and the latter acted justly in securing the debt by a mortgage of the land, which being first in point of time, must be first made. It is therefore ordered and decreed, that when the land in question shall be sold by order of the Court, the proceeds of the sale shall be applied in the first instance to the payment of the debt of nine hundred and twenty-five dollars, to Mr. Calmes, with legal interest, and that the balance be applied to pay what may be due to the heirs and legatees of Aaron Cates, deceased, in case the funds surrendered and delivered up to the receiver by J. M'Morries be insufficient to pay what may be due.

The defendant, M'Morries, appealed from this decree, on the grounds:

1. Because the interest is compounded in the calculation on the sale bill, and because the report charges the executors to the amount of the sale bill and the interest thereon; whereas, each ought only to be answerable and responsible for his own individual acts, and no interest ought to be charged, unless there was evidence that it was received, neither ought any to be charged if the funds were dormant.

2. Because the decree decided that the defendant, James M'Morries is individually liable to the amount of the sale bill; whereas, the defendant, James M'Morries, never received the amount of the sale, in either bonds, notes, or money, and ought not to be made liable to that extent, as the rule of responsibility is confined to the actual receipt

<sup>4</sup>The case was again heard, 1 McC. Eq. 252, on Commissioner's Report, and Page's claim sustained.



of funds, and not extended to make one executor liable for the conduct of his co-executor.

3. Because the defendant, James M'Morries, ought to be allowed the amount of the expenditures returned to the Ordinary; and as the Ordinary has admitted the returns, it ought to be sufficient evidence to this Court to allow them.

4. Because the defendant, James M'Morries, is not allowed the ten per cent., "on the whole amount of moneys to be collected from the sale," "of the estate," and "of the outstanding debts" "due," which is legatory; whereas, the report only allows five per cent. on the three returns. Also, because it was

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\*not necessary to make any returns of the estate, and if it were it was rendered impracticable by the absence of the co-executor, and, moreover, that the Act of 1789, 5 Stat. 106, is not applicable to cases where the compensation is left to the executor or executors, by the will, as the acceptance of the appointment vests the legacy; and because the report ought not to have rejected the compensation in the will, on account of the estate not being vested in bank stock, as it would have been impracticable to the executors, injurious to the estate, and contrary to the wish of some of the persons interested in the estate.

5. Because the report refused to allow the defendant, James M'Morries, the per cent. which he paid to the agent employed in collecting a part of the estate, and which ought to have been allowed.

6. Because the defendant, James M'Morries, ought not to be charged with the amount mentioned in the answer of the defendant, James M'Morries, which was retained in the hands of his co-executor, for his services, before he left the said State.

7. Because the decree sets aside the executor and confirms the appointment of a receiver, and directs two-fourth parts of the estate to be invested in lands and slaves, which is contrary to the will; and because the motion to set aside the ne exeat and sequestration was not sustained.

8. Because the decree is contrary to equity, &c.

The complainants also appealed on so much of the decree as related to the mortgage of the two slaves to Page and Garey, and the land to Calmes, upon the grounds:

1. That the *lis pendens*, and the order made that M'Morries should pay over to a receiver the whole funds of the estate, constituted a lien upon his estate for the whole amount of his testator's estate, and being prior in time to the mortgages ought to give the complainants the preference.

2. That the equity of the complainants was superior to the mortgagees, and they ought to be preferred.

3. That the complainants are entitled to rank as mortgage creditors, with at least an equal lien to the mortgages of Calmes, Page, and Garey.

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\*DE SAUSSURE, Ch.—In this case there are many points of great importance, and some of difficulty. We have considered the points decided, and we are satisfied with the decree, except on the points hereafter stated. The executors of Aaron Cates were directed to sell the whole of the estate, real and personal, and to invest the proceeds in bank stock, or in shares of some incorporated company, according to their judgments. These investments have not been made in the smallest degree; but the Circuit Court has made the executors liable for the amount to which the property would have accumulated if they had done their duty under the will. It appears therefore to us, that it is proper to allow them the compensation of ten per cent. on the amount of moneys of the estate received by them which is given, by the will of the testator, to the executors, for the performance of the duties assigned to them.

It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed, except so far as the same takes away from the executors the allowance of ten per cent., which we are of opinion should be allowed to them. And it is further ordered and adjudged, that the Commissioner do re-examine the accounts and statements, and report thereon; allowing the executors the ten per cent. given them by the will, on the moneys of the estate collected by them. In making up the account, the Commissioner will take care to make annual rests in his calculations. We have considered the complainant's grounds of appeal, and we do not think them well founded. It would be carrying the doctrine of implied liens to an extent which would be dangerous to third persons, and tie up the transactions of business and of life, to give the construction and effect to the will which is contended for by the complainants. Nor can we give the extent to the doctrine of *lis pendens* which is contended for by the complainants. Upon the whole, we are of opinion that the appeal of the complainants should be dismissed.

GAILLARD and JAMES, CC., concurred.  
O'Neill and Johnston, for complainants.  
J. J. Caldwell, for defendants.

Harp. Eq. \*243

\*SUSANNAH FRANKLIN v. JOHN M. CREYON.

(Columbia. Dec. Term, 1824.)

[Wills 302.]

Copy of will, certified by the clerk of the County Court, admitted in evidence, upon proof that the original, at the dissolution of those

Courts, was deposited in the office of the clerk of the District Court, which was afterwards burnt.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 709; Dec. Dig. ⚭302.]

[*Husband and Wife* ⚭137.]

Complainant's grandmother gave her by will a female slave, "not to be subject to the debts or contracts of any future husband;" but appointed no trustee. She afterwards married, and in 1810, her husband sold the slave and her child to defendant's brother, (now deceased) for a full consideration; who soon afterwards sold to defendant. To the bill of complainant, filed after her husband's death in 1820, defendant answered that when he purchased he had no notice of the will or of complainant's claim, and he believed his brother had no notice when he made his purchase: Decreed that defendant should deliver up the slaves and account for their hire. Plea of the Statute of Limitations overruled.<sup>1</sup>

[Ed. Note.—Cited in *Chavis v. Chavis*, 57 S. C. 176, 35 S. E. 507.

For other cases, see Husband and Wife, Cent. Dig. § 520; Dec. Dig. ⚭137.]

[*Husband and Wife* ⚭29.]

[The statute requiring marriage settlements to be recorded does not extend to a provision made for a married woman by the will of a friend.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⚭29.]

[*Husband and Wife* ⚭135.]

[Where property is given to a feme covert, for her separate use, without the intervention of a trustee, the husband will be deemed a trustee for his wife.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 503; Dec. Dig. ⚭135.]

The bill stated that Mary Maples, the grandmother of the complainant, by her will executed in 1793, and left of force at her death, bequeathed as follows: "Item, I give and bequeath unto my beloved grand-daughter, Susannah Stone, and her heirs forever, a negro girl named Hetty, with all her future issue and increase, and in no wise subject to or liable for any debt or debts, contract or agreement of her father-in-law or any future husband, in any shape, manner or form." That the said Susannah Stone, (the complainant,) afterwards married Benjamin Franklin; by which marriage the girl Hetty, so bequeathed to the complainant, came into the possession of her husband. That in 1810, the said Benjamin Franklin, without the knowledge or consent of complainant, permitted the girl Hetty and her child Damon to go into possession of Lucas Creyon. That Benjamin Franklin died in 1820, and since his death she has discovered that the said slaves, with other children since born, are in the possession of the defendant. That complainant is ignorant of the number and names of the children, of which she prays a discovery, and that defendant may account for their hire.

The defendant by his answer denied any knowledge of the will of Mary Maples, or of her bequest to complainant, or of complain-

ant's marriage with Franklin. He states

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that in 1810, \*his brother L. Creyon, deceased, purchased the slaves Hetty and Damon, of Franklin, who was in possession of them and apparently their owner, at the price of five hundred dollars, which was their full value. That soon afterwards the said slaves were bona fide sold by the said Lucas Creyon to the firm of John M. Creyon & Co., for five hundred dollars, paid down, or passed to the credit of the said Lucas on the books of the firm, whereby the defendant became owner of two-thirds of the said property, and upon the death of the said Lucas, the owner of the whole. That defendant, when the purchase was made by the firm of John M. Creyon & Co., had no notice of complainant's claim, but was a bona fide purchaser for valuable consideration; and from the circumstances he is perfectly well satisfied that Lucas Creyon had not notice at the time of his purchase.

At the hearing, the complainant offered in evidence, what purported to be a copy of the will of Mary Maples, deceased, certified by Wm. Humphries, clerk of the County Court, for Clarendon County. A witness named as executor in the said alleged will was examined; who testified that after the death of Mary Maples, he saw her will, or what was understood and admitted to be such, but was not a witness to its execution. That the paper offered in evidence was about that time delivered to him by one of the other executors named therein, and had been always acted upon as the will of Mary Maples by the executors, and acquiesced in by all who were interested in her estate. The witness knew not of his own knowledge what had become of the original, but understood that it was deposited by Humphries, clerk of the County Court, at the dissolution of those Courts, with other official papers, in the office of the clerk of Sumter Court, and was burnt in his office.

Gaillard, Ch.—I am satisfied with the proof offered of the will of Mary Maples. In the clause referred to, the girl Hetty is given to Susannah Stone (the complainant Franklin,) and her heirs forever, not subject to or liable for any debt or debts, contract or agreement of her father-in-law, or any future husband, in any case, manner or form, &c. The husband sold the property absolute-

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ly and it is claimed under a \*title from him, which he could not make; and from his death to the filing of the bill, the time is not sufficient to support the claim set up under the Statute of Limitations. It is ordered and decreed, that the defendant do deliver Hetty and her issue to the complainant, and account for their hire from the death of the husband of the complainant, and pay the costs of suit.

<sup>1</sup>Long v. Cason, 4 Rich. Eq. 60. Ellis v. Woods, 9 Rich. Eq. 19.



The defendant appealed principally on the grounds,

That the proof of Mary Maples' will was loose and insufficient.

That the defendant should have been protected, as a bona fide purchaser for valuable consideration, without notice.

That his title was good under the Statute of Limitations.

Gregg and Harper, for appellants. The existence and loss of Mary Maples' will were not proved, but as the witness believed and understood.

But the ground which we consider as perfectly clear is, that defendant must be protected as a purchaser for valuable consideration without notice. We need hardly cite authorities for the familiar equity doctrine, that he who acquires the legal estate, for valuable consideration, without notice of an equity subsisting in a third person, will be protected, or rather any such purchaser whether he have the legal title or no, if he has an advantage by which he can defend himself at law, will not be compelled in equity to give it up. It would seem equally superfluous to attempt to show that the legal title to this property was in the husband. The rule of law is that a wife cannot hold personal property, apart from her husband. Courts of Equity, however, for the protection of the wife, have determined that though the legal title to property given to the wife for her separate use, vests in the husband, yet he shall be considered as a trustee for her. The cases however which establish this doctrine, say in terms as express as can be used, that a purchaser from the husband, for valuable consideration and without notice, will acquire a good title. 2 Roper's Law of Husband and Wife, 155.

Was the defendant a purchaser for valuable consideration without notice? We do not

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perceive that this can be made clearer \*by argument. He positively denies notice by his answer and not the slightest attempt has been made to prove it. The answer is corroborated by the proof of Lucas Creyon's having paid the full value of the slaves.

The Statute of Limitations also protects the defendant's title. He had possession three times as long as was necessary to acquire a title by the statute. The argument seems to be, that she was a cestui que trust, and likewise a feme covert disabled to sue, and therefore the Statute of Limitations will not run as between trustee and cestui que trust, because as between them there can be no adverse possession; but we have never heard that it would not run in favor of third persons, against both. With respect to real property, a feme covert is expressly enabled to sue by statute, but the time is extended within which she would be barred. She can have no personal property, save that which is

vested in a trustee, and with respect to that, the trustee is capable to sue. If the trustee by his negligence, permits a third person to acquire a title by possession to the trust property, he is answerable to the cestui que trust. Cited, 2 Madd. 255; 2 Fonb. 167, n. 2 Ves. Jun. 457; 1 John. Ch. Ca. 300; 9 Ves. 24; 5 Wheat. 808; 4 Eq. Rep. 477.

Holmes for respondent. If Mrs. Franklin had actually sold her separate estate, or if her husband had sold it and she had joined in the sale, the sale would have been void under the decisions of our Courts. Ewing v. Smith, 3 Eq. Rep. 455. But it is contended that he had power to sell her separate property without her knowledge and against her consent. The doctrine that a purchaser without notice shall be protected, applies when the purchase is of the legal estate, without notice of the equity. But here the legal estate was in the wife, because the bequest was "in no wise subject to any debt or debts, contract or agreement, of her father-in-law or any future husband." A married woman may have a legal estate in personal property; she may be both trustee and cestui que trust. Reid v. Shergold, 10 Ves. 380. The defendant was bound to make inquiry into the title of his vendor, and if he had done so, would

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\*have had notice of the will. A separate estate was given to the wife, but not a separate use, the husband was entitled to the use for his life. This he might sell. This is a sufficient reply to the argument in support of the Statute of Limitations. The sale was good for the life of the husband, and there was no right of action and no adverse possession until his death. Cited, 2 Fonb. 151; 5 Ves. 521; 4 Eq. Rep. 457.

DE SAUSSURE, Ch.—This is an appeal by the defendant from the decree of the Circuit Court, in favor of complainant.

The following is the substance of the case as made by the pleadings, on which this appeal is founded:—Mary Maples made and executed her last will and testament in the presence of two witnesses, on the 24 October, 1793, wherein and whereby she bequeathed, among other things, as follows: "I give and bequeath to my beloved grand-daughter, Susannah Stone, and her heirs forever, a negro girl named Hetty, with all her future issue and increase, and in nowise subject to, or liable for, any debt or debts, contract or agreement of her father-in-law, or any future husband, in any shape, manner or form; and in case of her death before she shall attain the age of twenty, or without issue, then that part I give and bequeath unto my beloved grandson, Samuel Stone, and his heirs forever." The testator died, leaving the will in full force, and the bill states that the same was proved in open Court, on 27 March, 1794, on the oath of William Terry, a subscribing witness to the same, as appears by the

certificate of William Humphreys, the clerk of the Court. The legatee, Susannah Stone, intermarried with Benjamin Franklin, who came into the possession of the slave Hetty, and some time afterwards, to wit: in the year 1810, without the knowledge or consent of the complainant, sold the slave Hetty and her child, Damon, to the defendant, or some other person, as is alleged by the bill. The said Benjamin Franklin, husband of the complainant, died some time in the month of January, 1820, since which time the complainant alleges that the said slaves have been in the possession of the defendant, and the woman has several other children be-

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sides the boy Damon. \*The complainant charges that she has demanded from the defendant the delivery of the said slaves, or that he would acknowledge the possession of said slaves, and give information of the numbers, ages and sexes of the children, which defendant has refused, and complainant is unable to prove without the oath of defendant. She therefore filed her bill for a discovery and the delivery up of the slaves, and an account for their hire and labor.

The defendant, in his answer, stated that he had no knowledge of the will of Mrs. Maples, or of complainant's marriage with Benjamin Franklin, except as stated by complainant, and puts her to the proof thereof. The defendant states on the 3 February, 1810, Lucas Creyon, since deceased, the brother of defendant, purchased the slave Hetty, now in question, and her child, Damon, from one Benjamin Franklin, who was then in possession of the said slaves and pretended to be the owner thereof, and that the said Lucas Creyon gave a fair and full price, to wit: five hundred dollars, for said slaves, and obtained a receipt and bill of sale for the same. The defendant also states his belief that Lucas Creyon had not, at the time of the purchase, and never had any knowledge of Mary Maples or the said last will and testament, or of any claim by the complainant, or that said sale was made without her knowledge or consent. That after said purchase by Lucas Creyon, he conveyed to the firm of J. M. Creyon & Co. the said slave and her child, for five hundred dollars, which was paid or passed to his credit, by the said firm, of which he was a member, by which the defendant became a joint owner, and entitled to two-thirds of said slaves, and the defendant positively avers that at the time of said transfer, he had no knowledge of the said will or the claim under it, and upon the death of Lucas Creyon, defendant became entitled to the whole of the said slaves under his last will and testament, and he claims protection of his title as a bona fide purchaser, for valuable consideration without notice. Defendant also insists that the will of Mary Maples has never been recorded in the office of Secretary of State, and that any

settlement containing a separate estate or claim thereunder, is fraudulent and void as to

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\*defendant. The defendant admits the death of Benjamin Franklin about the time mentioned in the bill, and that the slave Hetty has two children living, Damon and a child about three years old. The defendant admits the demand and refusal, and relies on the Statute of Limitations.

The first question which arises in this case is, as to the proof of the execution of the last will of Mary Maples. The original was not produced, but a copy certified by William Humphreys, clerk of the County Court of Sumter, where the law as it then stood, requires last wills and testaments to be recorded. He certifies that it is a copy of the original will, which has been proved in open Court, by William Terry, one of the subscribing witnesses, on the 27 March, 1794. Col. J. B. Richardson, proves that the public offices at Statesburg were afterwards burnt, and the records burnt with them; that he was in possession of the abovementioned copy of the will of Mrs. Maples, and he has remained in possession of it ever since, as one of the executors, till now produced in evidence; and that all the dispositions of said will have been carried into effect, and all the affairs of the estate, for a period of about thirty years, have been regulated by it. Notwithstanding the objections made on the argument against the probate of the will, I am satisfied that the judge, holding the Circuit Court, did right in considering the proof sufficient. The law required that the probate of the will should be made in open Court, and that it should be recorded and the original deposited with the officer for safe keeping, and directed certified copies to be delivered to executors, devisees and others standing in need of them. All this is proved to have been done in this case; and it is further proved that the public records were burnt by accident; and that under the certified copy produced in Court, all the affairs of the estate and the rights of the parties interested have been regulated. It would be a severe rule which would work great mischief to the citizens, to ask higher proof than this.

It was further contended that to give the bequest in the will of Mary Maples, of the slave Hetty and her children, the effect of a separate estate, so as to be protected from the

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legal \*rights of the husband, and from his debts and assignments, the same ought to have been recorded in the secretary's office, where marriage settlements are required to be recorded. I apprehend that this would be giving an extension to the doctrine of recording marriage settlements, which is new and unwarranted. The statute has never been construed to extend to separate estates given to wives under the wills of their parents and other relations, and has always been confined



to the case which it provides for—real marriage settlements, by deeds, made by husbands themselves.

The question next arose, is this a separate estate, free from the control of the husband? The will is perfectly explicit on this subject; it bequeaths the slave Hetty, and her issue, to Susannah Stone, in no wise subject to the debts, contract or arrangement of any future husband, in any manner, shape or form. This makes as complete a case of separate estate, placed beyond the control of the husband, as can well be penned. And I agree with the Circuit Court in considering it a separate estate. But it is said there is no trustee, and therefore the provision fails, and the husband, Benjamin Franklin, acquired an absolute right, and could dispose of the slaves at his will and pleasure. This however is not the doctrine of the Court. It was originally considered to be necessary to have a trustee expressly named in the instrument which created the separate estate for the wife. See 1 P. Wms. 125; *Harvey v. Harvey*, and (2 P. Wms. 79;) *Burton v. Pierpoint*. But it has been established for a century, that if land or personalty be devised or settled to or upon a married woman, for her separate use, without the precaution of vesting it in trustees, the intention will be effected in equity, and the rights of the wife will be protected by the conversion of her husband into a trustee for her. And it may be added, that any other person who obtains or is put in possession of the wife's separate property, will be considered and construed to be a trustee for the wife; otherwise her right to the property which was intended for her, might be destroyed. The decisions in our own Courts have

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been so; and the English judges have pursued the same course. See 2 Roper's Husband and Wife, 152, 3, &c., and 2 P. Wms. 31; *Bennet v. Davis*, (9 Ves. 583;) *Parker v. Brook*. Even a Court of law has extended its protection to the wife, in some special cases, where no trustees were interposed, holding as the Court of equity does, that persons named in the will as trustees for the persons from whom she claimed, were also to be considered as trustees for her. See 5 Term Reports, 434; *David v. Atkinson*, and (2 Roper, 153, 4;) and this is the case whether the property be given by strangers to the wife's separate use, or the estate be given, by the husband for her use. See 2 Roper, 154; 3 Atk. 399; 2 Roper, 90; 9 Ves. 369.

The defendant however relies upon another ground, which his able counsel stated to be his strong one, on which he had great confidence. It was that he was a bona fide purchaser for valuable consideration without notice; and that such a title will not be disturbed in equity, in favor of an equitable claimant. It will be remembered, that Lucas Creyon was the immediate purchaser from B. Franklin, and that he sold part of the

interest in the slaves to his brother John, who on his death became heir of the whole; and John M. Creyon the defendant, swears that he believes his brother had no notice of the claim of the complainant under the will, and he swears positively that when he became purchaser of part of the interest from his brother, he had no notice. This is certainly a knotty question, and in my opinion the only difficult part of the case. It appears indeed that Lucas Creyon, the first purchaser, paid a fair and probably a full consideration, and this raises a presumption that he had no notice that B. Franklin was selling him property which he had no right to sell. But this is only a presumption; for the defendant very properly declines swearing positively that his brother Lucas had no notice of the complainant's claim, and puts it merely on the ground of belief.

<sup>2</sup>Now I am of opinion that when a purchaser sets up a purchase for valuable consideration without notice, to protect a manifest bad title, against the right owner, he is

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bound to make \*that out by very clear proof.<sup>3</sup> The Court requires the party who sets up the title of a purchaser for valuable consideration without notice, to be very particular, precise and positive in denying notice, and in setting forth every circumstance from whence notice could be inferred. See the language of Chancellor Kent, in 1 John. C. C. 802, 3; and see Lord Chancellor Loughborough's opinion in *Jerrard v. Sanders*, 2 Ves. jr., 454.<sup>4</sup> This has not been done and cannot be done in this case as to the purchaser Lucas Creyon. As this was a sale by a husband of separate property of his wife; which he had no right to make, would it not be monstrous

<sup>2</sup>Where notice is denied the burden of proving notice is on him who affirms it. *Bossard v. White*, 9 Rich. Eq. 495. *Thrower v. Cureton*, 4 Strob. Eq. 158 [53 Am. Dec. 660]. *Harper v. Barsh*, 10 Rich. Eq. 149. *Godbold v. Lambert*, 8 Rich. Eq. 155 [70 Am. Dec. 192]. *McLure v. Ashby*, 7 Rich. Eq. 430.

<sup>3</sup>Sed Qu. How is such proof to be made?—R.

<sup>4</sup>"I am perfectly satisfied upon the general reasoning, that this Court will never extend its jurisdiction to compel a purchaser who has fully and in the most precise terms denied all the circumstances, mentioned as circumstances from which notice may be inferred, to go on to make a further answer as to all the circumstances of the case, that are to blot and rip up his title. To do so, would be to act against the known established principles of this Court. I think it has been decided, that against a purchaser for valuable consideration without notice, this Court will not take the least step imaginable. I believe it is decided that you cannot even have a bill to perpetuate testimony against him. I am pretty sure it is determined that no advantage the law gives him shall be taken from him by this Court. The doctrine as to the jurisdiction of the Court is this; you cannot attach upon the conscience of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill."—Per Lord Loughborough, in *Jerrard v. Saunders*, 2 Ves. 457.

to make the sale of such property valid, when the husband was not the trustee under the will, but is construed to be a trustee expressly to protect the rights of the wife. The legal estate is not in him,<sup>5</sup> as in the cases where the grant is to the husband in trust for the wife: he is only quasi trustee, raised up by the Court to preserve the separate estate, and yet we are asked to permit the sale to defeat the estate. The counsel for the defendant cited [Wamburzee v. Kennedy] 4 Desaus. Eq. Rep. 477, to show the rule as to purchasers for valuable consideration. But there the rule is stated to be where the legal

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estate is in the \*trustee who sold the property, and in the case cited the sale was not supported.

It appears to me too, that it ought to be remembered that there are no markets overt in this country, where a sale of personal property to a bona fide purchaser for valuable consideration is good, though the title of the vendor to the property is bad. Therefore every purchaser is bound to inquire into the title. Then how stands the case between these parties? The wife, whose interests are at variance as to this property with her husband's, but whose hands are tied by the marital bonds, could not prevent the husband making the sale; nor does it appear that she was at all consulted or informed of his proceedings; the purchaser it is said asked no questions, for the defence rests on his having made no inquiry and obtained no notice; but he takes a title from a man who has no right to sell; he could and ought to have inquired from B. Franklin for his titles and his right to sell the slave in question, and he would then have learned the truth, that the property was the separate property of the wife, unsafe to touch. The equities then of these parties are not equal. There is some balance on the one side for not inquiring, none on the other. Now I do apprehend that to give application to the rule that the Court will not give relief to the equity of the wife against the purchaser for valuable consideration without notice, the equities must be equal or nearly so. See *Walwin v. Lee*. Lord Chancellor Eldon admits that it may be worth consideration whether both parties are equally innocent.<sup>6</sup> Though he uses it there in fa-

<sup>5</sup>It does not appear from the opinion of the Court in whom the legal estate was. In the executors of the grandmothers will? In the wife? Quere. Could either have maintained a suit at law after the husband's death, against the defendant?—R.

<sup>6</sup>*Walwin v. Lee*, 9 Ves. 24. "The bill stated the title of the plaintiff as tenant in tail under the marriage settlement of his late father, and an Act of Parliament, discharging part of his estates from the uses of the settlement, and settling other estates; and that he had suffered a recovery, and suggested that the defendant had in his custody or power the title deeds, &c., relating to the estates comprised in the Act of Parliament, claiming, under pretence of mortgages by the plaintiff's father, who was only

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vor of the purchaser; see 9 Ves. In that case Lord Eldon puts the very principle of the rule, that the Court will not give relief to an equitable claimant against a purchaser for a valuable consideration, on the ground that the purchaser has paid a valuable consideration, and therefore he is not bound to give information which may affect his title. Now in the case we are considering, the equities do not appear to me to be equal, and therefore the application of the rule may not be obligatory. Nor is the bill filed for a disclosure of the title or the delivery of title deeds; it was to have an account and information as to the increase of the slaves. Indeed it would be extraordinary to give that rule such an application in the case of the wife's separate estate sold by the husband, when the Court has manifested such a jealousy to protect the rights of the wife to a settled or separate property, that it refuses to sanction incumbrances made by the husband with the consent of the wife and her trustee, as in the case of *Ewing & Smith*, *Lowndes & Champney*, and others. Chancellor Kent, in the case of *Haviland & Myers*, 6 John. 27, says that the wife's equity to a suitable provision out of her separate estate, was so well established, that it would prevail against the husband or his assignees, and against any sale made by him even for a valuable consideration. The defendant finally relied on the Statute of Limitations. The interest of the husband and wife were adverse to each other in relation to this property, at and subsequent to the time of the sale, and she could not sue alone. The legal estate was not in him; he was only a trustee by construction, to preserve her rights and not to destroy them: he has been dead only about two years, and the statute has not had time to operate between his death and the filing of this bill. Upon the whole, I think the decree of the Circuit Court in favor of the complainant was correct, and ought to be affirmed.

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\*It is ordered and adjudged that the decree of the Circuit Court be affirmed.

tenant for life under the settlement, prayed that the defendant may be decreed to deliver up all deeds, &c.

"The defendant, as to so much of the bill as sought the discovery and delivery of the title deeds, &c., except the deeds after mentioned, pleaded that the plaintiff's father, alleging himself to be seized in fee, and being in actual possession of the premises as apparent owner, and being also in actual possession of the

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\*title deeds, &c., relating thereto, as apparent owner thereof, and having the actual disposal thereof, executed the several mortgages (stating them) under which the defendant claimed; and averred that the defendant and the other mortgages through whom he derived, had no notice of the Act of Parliament."

"The plea having stood a considerable time for judgment, was allowed."



**GAILLARD, WATIES and JAMES, CC.,**  
concurring.

**THOMPSON, Ch.,** dissentient. It is an established rule of law, that an innocent purchaser for a valuable consideration without notice shall be protected. All the evidence which the nature of the case could admit of has been adduced, and the defendant John M. Creyon has positively sworn in his answer, that he had no notice. I am therefore of opinion that the decree of the Circuit Court should be reversed.

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**Harp. Eq. 255**

**S. McCULLOUGH and Others v. D. DANIEL,**  
Executor.

(Columbia. Dec. Term, 1824.)

[Equity ⇨22.]

A bill will not lie to enforce the execution of a judgment of a Court of Ordinary, of a sum of money due by an executor; but the executor was decreed to account for his administration.<sup>1</sup>

[Ed. Note.—Cited in *Miller v. Alexander*, 1 Hill, Eq. 28; *Walker v. Pinson*, 12 Rich. Eq. 452, 453.

For other cases, see Equity, Cent. Dig. § 60; Dec. Dig. ⇨22.]

**WATIES, Ch.**—The complainants have brought this bill, to enforce the execution of a judgment of the Court of Ordinary, against the defendant, for the payment of certain sums of money, adjudged by that Court to be due him on the settlement of his accounts, as the executor of the estate of D. Muldoon; they seek also an account. This Court cannot give relief on the first ground. It enforces only the performance of executory agreements, and of such only in which some specific thing is wanted; but the subject here is the judgment of a Court for the payment of money, which if conclusive against the defendant, may be enforced by an action at law. The complainants have however a right to an account from the defendant. It is therefore ordered and decreed, that the defendant do account before the Commissioner for the administration of the estate of his testator.

On appeal, decree affirmed.

**WATIES, GAILLARD, THOMPSON and JAMES, CC.,** concurring.

Williams, for appellant.

Hill, contra.

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<sup>1</sup>Taylor v. Taylor, 2 Rich. Eq. 123.

The case in the text was again heard, May 1828, and the bill dismissed on Commissioner's Report that defendant owed nothing on the account. See *Miller v. Alexander*, 1 Hill, Eq. 28 and note.

**Harp. Eq. \*256**

**\*CHARLES SIMMONS v. JOHN SIMMONS.**

(Columbia. Dec. Term, 1824.)

[Equity ⇨396.]

Land was sold by the Commissioner, for partition among parties against whom there were unsatisfied judgments. The Commissioner having paid the money to the parties, under the order of the Court, was held not liable, on a rule, to the judgment creditors.<sup>1</sup>

[Ed. Note.—Cited in *Garvin v. Garvin*, 1 S. C. 60; *Ex parte Crawford & Sons*, 27 S. C. 161, 162, 3 S. E. 75.

For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ⇨396.]

Charles Simmons, senior, died seized and possessed of a tract of land, which upon his death descended to William Simmons, John Simmons and Charles Simmons. Proceedings were instituted by the said heirs or distributees, for partition of the said tract of land; and in February, 1823, the Court made the following order: "Let the land be sold by the Commissioner, on a credit of twelve months, (the parties being all of full age, and desiring it,) and the proceeds divided among them." The sale was made accordingly.

It appeared that previously to the institution of the proceedings for partition, there were judgments against William Simmons, which still remained unsatisfied. These judgment creditors moved that the Commissioner should be ordered to pay over William Simmon's share of the proceeds of the said land to them.

The Commissioner showed cause against the motion, as follows: "The share of William Simmons is one hundred and twenty-nine dollars and nineteen cents. Some time in May, 1823, I settled with William Simmons, and hold his receipt for eighty-three dollars and forty-two cents, in part of his share. On 27 August, 1823, I accepted and satisfied an order from the said William Simmons, in favor of John Garlington, for forty-five dollars and seventy-seven cents; which, added to the eighty-three dollars and forty-two cents, makes one hundred and twenty-nine dollars and nineteen cents, his full share. At the time of my thus paying out the share of William Simmons, I had received no direction, nor order, nor intimation, from any person whatever, not to do so, or to retain the money to be applied in any other way."

De Saussure, Ch.—This is a rule on the Commissioner, to show cause why he does not pay over money to persons interested, out of funds in his hand; or rather a motion for an order to oblige him to pay it over. The Commissioner makes return, in which he states that he has paid the money in ques-

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<sup>1</sup>Carlton v. Felder, 6 Rich. Eq. 59. *Rabb v. Aiken*, 2 McC. Eq. 125. *Black v. Steel*, 1 Bail. L. 307. *Keckeley v. Moore*, 2 Strob. Eq. 21.

tion exactly in conformity to preceding orders of the Court. \*This is not denied; but it is alleged that if the Commissioner had examined, he would have found that there were prior liens, which he ought to have satisfied, before he made those payments.

It appears to me that as the Commissioner has exactly obeyed the orders of the Court, it would be improper to make him responsible: at any rate, the Court will not, under such circumstances, make him liable in this summary way. If it is believed he is really liable, the parties must proceed by bill.

The motion is dismissed.

The grounds of appeal were,

That the judgment creditors had a lien on the land, before the order for sale made by this Court, and their rights ought not to be defeated.

That the purchaser of the land will be injured and the land liable to be sold for satisfaction of the judgments against William Simmons.

**PER CURIAM.**—We think the decree of the Circuit Court was correct. The Commissioner, having obeyed the order of the Court, ought to be protected. It is proper that he should respect the legal liens. It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed; and that the Commissioner pay over the moneys according to the orders of the Court, after satisfying the legal liens.

HENRY W. DE SAUSSURE, THEODORE GAILLARD, THOMAS WATIES, W. THOMPSON, WILLIAM D. JAMES, CC.

#### Harp. Eq. 257

HARVEY v. MURRELL.

(Columbia. Dec. Term, 1824.)

[*Equity* ⇨447.]

The inventory of an estate, which might have been procured at the Ordinary's office, cannot furnish ground for a bill of review, as newly discovered testimony.

[Ed. Note.—Cited in *Hinson v. Pickett*, 2 Hill. Eq. 354.

For other cases, see *Equity*, Cent. Dig. § 1092; Dec. Dig. ⇨447.]

[*Equity* ⇨447.]

A receipt which could not have altered the original decree, cannot furnish such ground.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1093; Dec. Dig. ⇨447.]

*Tomlinson v. Tomlinson*, MS. Columbia, May, 1859 [10 Rich. Eq. 300], where most of the cases are reviewed. *Simpson v. Downs*, 5 Rich. Eq. 422. *Simpson v. Watts*, 6 Rich. Eq. 364 [62 Am. Dec. 392]. *Hunt v. Smith*, 3 Rich. Eq. 540. *Cantey v. Blair*, 1 Rich. Eq. 41. *Jones v. Kilgore*, 2 Rich. Eq. 63. 1 Rich. Eq. 390. *Speer's* 343. *Haskell v. Raoul*, 1 McC. Eq. 23. *Perkins v. Lang*, Ib. 30, n. *Carr v. Green*, Car. L. J. 371. *S. C. Rich. E. C.* 405. *Ib.* 469, 2 Hill, 359. *Manigault v. Deas*, Bail. 296.

This is an application to the Court for leave to file a bill of review on the ground of the discovery of new matter. This matter is stated to be, first: The inventory and appraisalment of the estate of John Murrell,

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deceased; and secondly, a receipt \*which was in the hands of his executor, the existence of which was not known at the time of the trial.

In regard to the first, it is to be observed that, had it been considered as essential to the investigation of the case, it could have been easily procured by applying to the Ordinary's office, where it had been recorded, and having neglected to do so furnishes no grounds for this application. The receipt alluded to is irrelevant to the subject-matter in litigation, and, if it had been introduced, could in no manner whatever have altered or varied the decree, as it purports to be nothing more than an acknowledgment of John B. Murrell, that he had come to a settlement with the executor of his father, for his share of the estate. The Court is of opinion that the petitioner has not made out such a case as would authorize the granting the leave prayed for. It is therefore ordered that the application be discharged.

Decree affirmed on appeal, by the whole Court.

Green and Wilson, for motion.

R. A. Taylor, contra.

#### Harp. Eq. 258

LAVICIA CORNWELL v. PATRICK SPENCE.

(Columbia. Dec. Term, 1824.)

[*Frauds, Statute of* ⇨65.]

Complainant had sold to defendant a tract of land and took his two promissory notes for the purchase money. On complainant's application, defendant agreed by parol to rescind the contract, if she would permit him to occupy the land, rent free, for a year, and pay him fifteen dollars; which she did. Defendant received his notes and delivered up the title deeds, representing to complainant that this would be effectual as a conveyance to revest the title. Plea of Statute of Frauds overruled and specific performance decreed.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 106; Dec. Dig. ⇨65.]

The complainant sold to the defendant a tract of land, for which he agreed to give her four hundred dollars, in two promissory notes, of two hundred dollars each, payable at different times. The bill alleges that, soon after the sale, the complainant, being dissatisfied with it, applied to the defendant to have it rescinded; to which he agreed, on the condition that she would permit him to reside on the land one year, free of rent, and pay him fifteen dollars for a cupboard

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\*which had passed with the dwelling-house:



that, in pursuance of this agreement, he gave up the title-deed which he had received from her, and she had returned him his two notes, and paid him the fifteen dollars agreed on.

The defendant denies any agreement to rescind the sale, although he admits that he had given up the title-deed to the complainant, and received back his two notes; but he alleges that this was done to soothe her mind for a time, as she then had the appearance of being deranged, which he believes was feigned for the purpose of getting back the land; he further insists on the Statute of Frauds, because the alleged agreement was not in writing.

WATIES, Ch.—All the facts stated in the bill have been fully established, and there is no doubt but the defendant considered the agreement as absolute, for he immediately tore off his signature to the notes on receiving them, and afterwards demanded and received the fifteen dollars agreed on. It has been further proved that, when he delivered up the title-deed to the complainant, he had assured her that this was equivalent to a reconveyance from him of the land, as the deed had not been recorded, and that she, trusting to this assurance, had executed on her part the agreement as before stated, and has allowed him to keep possession of the land for a year, free from any demand of rent.

I should regret exceedingly if a case of this nature was without redress, not only on account of the unfair advantage taken of the complainant, but because it appears that her mind has been seriously destroyed by her grief at selling the land, which ought to be a motive with the Court to afford all the relief in its power. But I am satisfied that the Statute of Frauds is not in the way. It is plain, from the evidence, that the defendant has been guilty of ill faith towards the complainant, and it has been fully settled that where a party sets up the Statute of Frauds as the means of eluding the performance of an agreement, the complete execution of which has been prevented by his own fraudulent conduct, he shall not be allowed to shelter himself under the statute. 1 P. W. 620.

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Newl. on \*Con. 179. It is contended, however, that the defendant, being willing now to pay the amount of his notes, takes away the complainant's equity. I am aware that there are cases to this effect, but they proceed on the ground that there has been no fraud, and that no prejudice has been done to the party complaining. But both of these appear to me to exist in the present case. The defendant imposes on the complainant by representing that his surrender of the title to the land was as effectual as a reconveyance from him by deed, and she was induced by it to divest herself of all the legal evidence of her demand for the consideration of the sale. She might,

indeed, have called on him in this Court to acknowledge the debt, but he might have denied it, as he has done the facts which have been proved in contradiction to his answer. It appears to me, then, that the complainant has been prejudiced by the ill faith of the defendant, and this is a sufficient ground for requiring of him a specific performance of his agreement, although a parol one.

It is therefore ordered and decreed that the defendant do deliver up, to the complainant, the possession of the land which he purchased and afterwards agreed to reconvey to her, and that he be perpetually enjoined from prosecuting the action brought by him for the recovery of the title-deeds which he surrendered her, and from any other action or claim for the recovery of the said land.

On appeal, Williams for appellant, cited *Givens v. Calder*, 2 Eq. Rep. 189, 1 Madd. 383; 1 Sch. & Lef. 40, 41.

Decree affirmed by the whole Court.

#### Harp. Eq. 260

H. MILLAN v. Administrators of ELDRIDGE.

(Columbia. Dec. Term, 1824.)

The only ground of appeal in this case is that the Circuit Court erred in decreeing costs to the defendant.

This is not the subject of appeal; and it is ordered and adjudged that the decree of the Circuit Court be affirmed. By the whole Court.<sup>1</sup>

<sup>1</sup>*Lewis v. Wilson*, 1 McC. Eq. 210. *Lyles v. Lyles*, 1 Hill, 76, 92 and note. *Singleton v. Allen*, 2 Strob. Eq. 166. *Hext v. Walker*, 5 Rich. Eq. 5. *Spear v. Spear*, 9 Rich. Eq. 202.

#### Harp. Eq. \*261

\*STEWART and Wife ads. FOWLER.

(Columbia. Dec. Term, 1824.)

[*Appeal and Error* ⇨ 119.]

[No appeal lies from a decree or judgment for costs and expenses.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 827; Dec. Dig. ⇨ 119.]

[*Costs* ⇨ 36.]

[Where the whole merits of the case are decided against one party, he will not be entitled to costs of an issue out of the court, decided in his favor.]

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 100; Dec. Dig. ⇨ 36.]

This is an appeal on the question of costs alone. The appellant Stewart, contends, that as he obtained a verdict at law on the issue directed out of this Court, he is entitled to the costs of that issue at least. We are aware that some opinions have been expressed to that effect; but we are not of that opinion. The whole merits of the case have been decided against the appellant, and we think

he ought to pay all the costs. It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed.

By the whole Court.

**Harp. Eq. 261**

MARY FARYS v. V. J. FARYS, W. SMITH,  
T. L. YONGUE, and Others.

(Columbia. Dec. Term, 1824.)

[*Execution* ⇨ 316.]

Sheriff levied on a tract of land described as "the plantation of W. F. deceased, containing one hundred acres more or less," which he conveyed to defendant Y., but his description in the conveyance included two hundred and sixty-five acres which the deceased had devised to his daughter, the complainant. It appeared that one hundred acres on which the testator lived had been known as a separate tract, though it was included in a new grant for the whole of the lands devised, which testator had taken out on occasion of losing his titles by fire. Defendant Y. afterwards sold to two others of the defendants. The evidence affording reason to conclude that defendant Y. had by fraud induced the sheriff so to describe the land as to include the whole two hundred and sixty-five acres, the sheriff's deed to him and his conveyance to the other defendants were decreed to be set aside, except as to the one hundred acres.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 932; Dec. Dig. ⇨ 316.]

[*Executors and Administrators* ⇨ 391.]

The personal estate having been sufficient for the payment of the debts, and one of the executors of the will of deceased having been indebted to the estate, at the time of the sale, to more than the amount of the judgment under which the land was sold, he was decreed to pay to complainant the value of the land with interest.<sup>1</sup>

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1589; Dec. Dig. ⇨ 391.]

[*Executors and Administrators* ⇨ 50.]

[A debt due from an executor to the estate of the testator is assets in his hands, immediately, for the payment of debts.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 302; Dec. Dig. ⇨ 50.]

WATIES, Ch.—The bill in this case is brought to set aside a sheriff's sale of lands, which were devised to the complainant by her grandfather, W. Farys. The facts exhibited by the Commissioner's report, and other evidence, appear to be these: W. Farys, at his death, left a considerable real estate, and but a small personal one; his debts amounted

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only \*to one hundred and thirty-two dollars and seventeen cents, and the proceeds of the sale of his personal estate were one hundred and eighty-five dollars and eighty-two cents. The largest of his debts was one to D. R. Evans, of about twenty-five dollars, on which a suit was brought, and after judg-

ment obtained, an execution was issued and levied on the lands devised to the complainant. The levy, as designated on the execution, was "on the plantation of W. Farys, deceased containing one hundred acres, more or less;" and at the sale the sheriff put it up as "the tract on which W. Farys lived, containing one hundred acres, more or less." The lands devised to complainant comprehended, according to the description of the will, several tracts, containing two hundred and sixty-five acres, and are included in a new grant taken out by the testator, in consequence of losing his papers by the burning of his house: but the particular tract on which he lived, was always considered by the neighborhood as distinct from the others, and continued to be so after the new grant was taken out; it was still called the old tract of one hundred acres; and one of the surveyors testified that the other tracts did not even join it. The defendant, Yongue, was the purchaser at the sheriff's sale, and acknowledged at the time that he had purchased the old tract of one hundred acres; but he afterwards procured from the daughter of Joseph Farys, then a child, in the absence of her father, who was one of the executors of W. Farys, the new grant and other papers relating to the lands, and declared "that he would hold the whole of the land that was in the plat." The sheriff's title professes to convey but one tract of one hundred acres, more or less; but it adopts such a description of the boundaries as will comprehend the other tracts of land devised to the complainant. The price at which Yongue bought was three hundred and thirty-five dollars; he afterwards sold to one Robinson, for seven hundred dollars, and conveyed, two hundred and forty-four acres; but Robinson becoming mistrustful of the title for so much, resold to Yongue for nine hundred dollars, who finally sold to the defendants, John and Henry Castles, for two thousand nine hundred dollars.

It is manifest from this evidence that the complainant has been greatly wronged, and is entitled to all the relief which this Court can afford.

I do not however feel authorized to set

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aside the whole \*sale, for this must be considered valid as it respects the tract of one hundred acres; but it cannot be allowed to operate as a valid sale of the other tracts, and consequently can convey no right in them to the defendant, Yongue, or to the subsequent purchasers from him.

I could wish that the sheriff's deed could be so restricted on the grounds of construction; but it is plain that the terms in which it describes the land would give to the purchasers the unconscionable advantage which they claim. No fraud is imputable to the sheriff, as all his acts show that he only in-

<sup>1</sup>Schnell v. Schroder, Bail. Eq. 334. Swift v. Miles, 2 Rich. Eq. 147. Mathews v. Mathews, McM. Eq. 410. Bailey v. Boyce, 5 Rich. Eq. 187; 9 Rich. 77.



tended to levy on and sell the tract of one hundred acres; but I am constrained to believe from the evidence, that he must have taken the description of the land from the representation of the defendant, Yongue, who had procured the papers of old Farys for the purpose, and who afterwards avowed that he had got the sheriff to make the title "to his mind."

The complainant has a right to still further relief. The executors, J. Farys and W. Smith, have been shamefully indifferent to her interests, for it is not to be believed that they could not, with a small exertion, and without any loss to themselves, have raised the trifling amount for which her land was sacrificed. They can however only be held legally responsible for this on the ground of a devastavit, and this has been fully established against the defendant, Smith. The Commissioner has reported that the executor, J. Farys, was, at the time of the levy on the land, a creditor of the estate, to a small amount: but that the executor, Smith, was a debtor for more than was sufficient to satisfy the judgment of Mr. Evans. As a debt due by an executor to the estate of his testator is considered assets in his hands, the defendant, Smith, was under a legal obligation to apply his debt to the discharge of the judgment, and as by neglecting to do so, the complainant's land was subjected to it, he is answerable to her for the full amount of the injury she has sustained by the sheriff's sale.

It is therefore ordered and decreed, that the sheriff's title to the defendant, T. L. Yongue, and the subsequent title from him to the defendants, J. & H. Castles, for the land

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which \*belonged to W. Farys, deceased, be only operative so far as they convey a right to the tract called the one hundred acres, on which W. Farys lived, and which is designated by the letter B on the plat of re-survey, certified by the surveyor, Jas. Kennedy; and the said titles are declared to be null and void, so far as they convey to the said defendants any right to the other tracts of land devised to the complainant; and it is ordered that they do deliver up the possession of the said other tracts to the complainant, and account to her for the rents and profits thereof since they have had possession of the same. It is further ordered, that the Commissioner do ascertain and assess the value of the tract designated in the said plat by the letter B, at the time of the sale thereof, by the sheriff, and that the defendant, W. Smith, do pay the complainant the said value, with interest thereon from the time of the said sale, to the date of this decree.

The costs to be paid by the defendants, T. L. Yongue and W. Smith.

The defendants appealed on the grounds, That there was no mistake; the sheriff in-

tended to sell, and Yongue to purchase, the whole of the lands described in the deed:

That the evidence did not establish fraud on the part of Yongue:

That the defendants, H. & J. Castles, were innocent purchasers, for valuable consideration, without notice.

It was ordered and decreed that the decree of the Circuit Court be affirmed, and that the defendant, Yongue, pay all costs of this suit. By the whole Court.

P. E. Pearson, for appellants.  
Chappell and Clarke, contra.

#### Harp. Eq. \*265

\*SIMON MAGWOOD, Adm'r of J. Myler v. ANTHONY BUTLER and Others.  
(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⚭537; *Judicial Sales* ⚭12.]

Bill against an administrator residing out of the State and his surety to the administration bond for a demand against the estate of his intestate. Order pro confesso against the absent defendant. On proof of the demand, ordered that the property of the absent defendant in the State be sold, on a credit until the time shall have elapsed for the time of his setting aside the order pro confesso, and if this should prove insufficient to satisfy the demand, the surety to pay the balance.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2577; Dec. Dig. ⚭537; *Judicial Sales*, Cent. Dig. § 35; Dec. Dig. ⚭12.]

The bill was filed against A. Butler, as administrator de bonis non, of John Butler, deceased, against M. James, the surety to the Ordinary for A. Butler, on his administration bond, and against other persons charged to have property of A. Butler in their hands.

The bill stated that John Butler gave his bond to D. Miscally, in which complainant's intestate Myler, joined as surety, and that after the death of Myler, complainant had been compelled to pay the bond out of his estate. An order pro confesso was taken against the defendant Butler, who resided out of the State. Defendant James answered denying any knowledge of the complainant's claim, &c., and submitting that complainant's remedy, if he had any claim, was at law.

At the hearing, complainant proved the bond. It appeared that Myler had first been the administrator of John Butler, and had sold some of his estate; that his administration was revoked and the administration committed to the defendant, A. Butler.

THOMPSON, Ch. It is ordered in this case that the land belonging to A. Butler, as also the three negroes referred to in John J. Moore's answer, be sold on a credit of twelve months; subject to be re-sold for cash in the event of the terms of sale not being complied with, at the risk of the

former purchaser; and that the proceeds of said sale be applied first to satisfy the note due John Moore, with interest, and that the complainant do recover the balance due on the bond against defendants, A. Butler and Matthew James, and that the balance of the proceeds of said land and negroes be applied to the satisfaction of complainant's demand, or so much as will satisfy the said demand; and in the event of the said property not

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selling \*for enough to satisfy both complainant's demand and the said John Moore, then, that he may proceed against Matthew James for any balance; and it is referred to the commissioner to report whether any or how much has at any time been paid on said bond in cash, or what just discount the said Anthony Butler may have against said bond, for any property not accounted for by the said James Myler.

The defendant, M. James, appealed on the grounds.

1. That before a final decree, further time should have been allowed for the defendant, A. Butler, to account for his administration of the estate of John Butler.

2. That complainant's remedy was at law.

3. That before a decree, complainant should have been compelled to account for his intestate's administration of John Butler's estate.

Evans, against the motion to reverse decree. The complainant's remedy was in this Court or he was without remedy. The Court of law has decided that an attachment will not lie against an executor or administrator who is absent from the State. 1 Stat. Rep. 125; and until the Act of the Legislature, passed since the commencement of this suit, one obligor to a joint bond could not be sued where the other was out of the State.

McCord, for appellants, in reply. Myler was the administrator of John Butler. It was his duty and interest to pay this bond. He has never accounted for his administration; and until he, or his representative, has done so, he can have no right to recover against the administrator *de bonis non*. His administration was revoked, from which we may infer misconduct. The presumption is, either that he paid this bond or retained enough of the estate for his security.

But a decree should not have been now made for the sale of the property of the absent defendant, A. Butler; and at all events, not against the surety. The absent defendant has still near four years to set aside the decree made on the order *pro confesso*. After the surety shall have paid the demand, the principal will be allowed to show that nothing was due.

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\*It was ordered and adjudged that the decree of the Circuit Court be affirmed; but that the sale of the lands referred to in the

decree be postponed, until the time shall elapse which by law is allowed for defendants to come in and set aside the order *pro confesso* and disprove the demand.

DE SAUSSURE, GAILLARD, THOMPSON and JAMES, CC., concurring.

### Harp. Eq. 267

JAMES E. GLENN, Guardian, et al. v. LEWIS CONNER, Administrator of Lewis Mitchell, and Others, Sureties to the Administrator's Bond.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⚡314.]

Bill by distributees against an administrator residing out of the State, for an account, and against his sureties in the administration bond, to render them liable for what should be found due by the administrator. Bill dismissed as to the sureties.<sup>1</sup>

[Ed. Note.—Cited in *Teague v. Dendy*, 2 McCord, Eq. 209, 16 Am. Dec. 643; *Kenner v. Caldwell*, Bailey, Eq. 151, 21 Am. Dec. 538; *Gayden v. Gayden*, McMul. Eq. 445; *McBee v. Crocker*, Id., 488; *Taylor v. Taylor*, 2 Rich. Eq. 128, 129; *Crane, Boylston & Co. v. Moses*, 13 S. C. 581; *Burnside v. Robertson*, 28 S. C. 586, 6 S. E. 843.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. ⚡314.]

[*Executors and Administrators* ⚡534.]

[An action will not lie against the sureties in an administration bond until a devastavit has been established in a suit against the administrator.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2459; Dec. Dig. ⚡534.]

This was a bill filed on behalf of the distributees of Lewis Mitchell's estate, against Lewis Connor, the administrator, who had left the State, and the sureties of his administration bond. The sureties, by their several answers, insisted that they could not be made liable, or a bill sustained against them, until a decree should be made against their principal, and that then they could not be held liable in this Court, because the complainants have an adequate remedy at law, by an action on the bond.

His honor, the presiding chancellor, with an intimation of his desire to have the question solemnly settled by an appeal, decreed that the bill should be dismissed, as to the sureties, with costs.

<sup>1</sup>This case was followed as authority in *Teague v. Dendy*, 2 McC. Eq. 209 [16 Am. Dec. 643]; but in *McBee v. Crocker*, McM. Eq. 485, it was *Held*, that the sureties of an administrator were properly made defendants in a bill for account against their principal, wherever he was absent from the State or insolvent. See also *Gayden v. Gayden*, and *O'Neill v. Herbert*, Ib. 444, 495. Finally in *Taylor v. Taylor*, 2 Rich. Eq. 123, the unrestricted doctrine was established, that to a bill against an administrator for an account, his sureties may properly be made parties. See also *Wilson v. Waterman*, 6 Rich. Eq. 266.



The complainant's counsel now moved the Court of Appeals to reverse the decree; on the following grounds:

1. That although at law, the sureties to an administration bond could not be made liable in the same action with their principal; yet this Court, to avoid a multiplicity of suits, ought to sustain a bill against the whole, all being essentially interested in the subject-matter of the suit.

2. Because no injury to the sureties can be operated by this mode of proceeding; on the contrary, it best consults their interests.

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\*3. Because this mode of proceeding is strictly agreeable to all the analogies of the best English and American decisions.

A. Bowie, for appellants. The administrator, in this case, was insolvent, and had left the State. The bill is against him for an account, and in the event of his not satisfying the decree, for the purpose of making his sureties liable. The objections on the part of the sureties are, that they cannot be sued until a decree has been had against their principal; and that there is an adequate remedy against them at law.

The mode of proceeding which has been adopted seems the more convenient and is supported by principal and authority. It is advantageous to the sureties. If the suit were against the administrator alone, they could not defend it. The absent and insolvent administrator is not likely to make even such defence as may be in his power. Whatever decree may be obtained against him, would be conclusive evidence against the sureties in an action at law. They object that an injury has not been done them.

The general principle is, that all persons materially interested in the object of the suit shall be made parties. Are not the sureties materially interested in the investigation how far their principal shall be made liable—especially where the principal is insolvent?

The Court entertains jurisdiction in order to prevent multiplicity or circuity of actions. 2 Madd. 143. These objects will be attained by the present mode of proceeding. The Court may provide by its decree, that the sureties shall not be liable until the administrator shall have first been resorted to.

M'Craven and D. L. Wardlaw, for respondents. The undertaking of the sureties is conditional, and the sureties incur no liability, at law or in equity, until condition broken. The case of Howell and wife v. adm'rs. Carpenter, 4 Eq. Rep. 21, and Bague v. Blacklock, 2 Eq. Rep. 602, are directly in point.

The doctrines of the Court on the subjects of circuity and multiplicity of actions are, that where parties are very numerous, claiming under a common right, the right may be

tried with some of the parties and the whole

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will be bound; as in the case of a fishery. Or where loss and inconvenience would be occasioned by a circuity of actions, to the persons subject to intermediate liabilities, the Court will interfere to fix the person who would be ultimately responsible.

It is to be observed that the bond in this case is joint and several, so that the argument which has been used in another case, from the impracticability of suing the sureties separately, after a decree against the principal, does not apply.

Bowie, in reply. In the case of Bague v. Blacklock, the sureties were sued alone, the administrator was not a party. In Howell and wife v. Carpenter, there were other grounds on which the demurrer was sustained. The point was not necessarily involved in the case of Lenoir v. Winn, 4 Equity Report, 70.

DE SAUSSURE, Ch.—This is a bill filed on behalf of the distributees of Lewis Mitchell's estate, against Lewis Conner, the administrator, and the sureties in the administration bond. Conner left the State after the bill was filed, without answering it. The other defendants, sureties in the administration bond, have answered the bill, and insist that they cannot be made liable, or a bill be sustained against them, until a decree should be made against the administrator. The Circuit Court dismissed the bill against the sureties. This decision is in conformity with the decided cases in this Court. It is founded in reason and justice. The sureties are liable only on the failure of the administrator to account and pay, when that default and its extent is judicially established, then the sureties may be pursued and made responsible. That has not been done in this case, consequently the bill against the sureties was properly dismissed. It is ordered and adjudged that the decree of the Circuit Court be affirmed.

GAILLARD, WATIES, and THOMPSON, CC., concurred.

Harp. Eq. \*270

\*S. & J. BOND v. ANN BROWN and Others.  
(Columbia. Dec. Term, 1824.)

[Equity ¶73.]

The father of complainants gave to his mother a life estate in the lands in question, remainder to complainants. In 1796, the land was sold under a judgment against the mother, as administratrix of her son, and purchased by her, and in 1798 conveyed to complainants, who had held possession ever since. The grandmother of complainants died in 1819. The bill charged that the judgment and sale were irregular and fraudulent. Bill dismissed; the claim

being a stale one and barred by the Statute of Limitations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 222; Dec. Dig. ⚡73.]

The complainants filed their bill for the recovery of a tract of land, which their grandfather, Moses Bond, devised to his son Isom Bond, their father, who devised the same to his mother for life, and to the complainants in remainder. The bill alleges that their grandmother, after the death of their father, being his administratrix with the will annexed, procured, in the year 1796, a judgment to be obtained, on a pretended debt against the estate of Moses Bond, under which the said land was sold; that she became the purchaser, and afterwards, in the year 1798, sold the same to George Brown, the husband of the defendant Ann, for the purpose of defrauding the complainants of their right.

The defendant, A. Brown, admitted in her answer the sale of the land to her husband, but denied all fraud, and insisted on the Statute of Limitations. Mrs. Bond, the grandmother died in 1819. The complainants proved no actual fraud, but their counsel contended that there was such irregularity in the judgment against Moses Bond, apparent on the proceedings, as was sufficient to render the sale void, and that the possession of the land by the grandmother and by Brown, ought to be regarded as in trust for the complainants.

WATIES, Ch.—I think the claim too stale a one to be open to inquiry. The judgment and sale which are complained of, took place nearly thirty years ago, and every presumption ought now to be made in favor of the fairness and honesty of both. It is not pretended that the evidence of the alleged fraud has only recently come within the knowledge and reach of the complainants; and it cannot be doubted that the possession of the land by the defendants under the sheriff's

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sale, has \*been an adverse one; for they have held under that sale, and it is stated in the bill that the grandmother had procured this, for the purpose of depriving the complainants of their right. It is a case then clearly within the statute, and independently of that, I should say that the great length of time ought to be conclusive, however well founded the claim may originally have been. In *Deloraine v. Brown*, 3 Bro. C. C. 633, which was a case of gross fraud, the Court on the ground of great length of time, refused an account against persons complaining under the fraudulent party; and in case of *Keith v. Campbell*, decided in the Court of Appeals, although an error in an account was proved and the discovery of it was recent yet a lapse of only fifteen years was held a sufficient bar to opening the settlement. The rule has been

so settled in numerous other cases, and is founded on the policy of protecting persons against the mischiefs to which they might be exposed by the death of witnesses and the loss of documents, if required to defend their rights at any indefinite time against antiquated claims. It is therefore ordered and decreed that the bill be dismissed.

The complainants appealed, and contended that there was no right of action in complainants until the death of their grandmother in 1819, who had a life estate in the land by their fathers' will, and consequently no adverse possession in the grandmother or her alienee.

Decree affirmed by the whole Court.

Williams and Rogers, for appellants.

A. W. Thompson, contra.

The time of filing the bill is not stated, but apparently it was within five years, (the barring term of the Statute of Limitations as the enactments then stood,) after the death of the life tenant; if this judgment be that the statute or the presumption from lapse of time begins to run in the lifetime of the life tenant, against remainderman, it can hardly be maintained. See *Joyce v. Gunnels*, 2 Rich. Eq. 259. *Bell v. Talbird*, Rich. Eq. Ca. 361. *Habersham v. Hopkins*, 4 Strob. L. 238 [53 Am. Dec. 676]. *Davy v. Oxenham*, 7 Mees. and W., 131.

#### Harp. Eq. \*272

\*LUCINDA M'LEMORE v. BLOCKER,  
GOODE and JOHN M'LEMORE, Ex-  
ecutors of James M'Lemore.

(Columbia. Dec. Term, 1824.)

[Wills ⚡497.]

Testator, by his will, makes provision for a posthumous child. *Held*, that the child born after the making of his will, and before his death, was entitled to the provision.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1086; Dec. Dig. ⚡497.]

[Wills ⚡559.]

Testator gives to his wife, by the will, "all the property which belonged to her before my marriage, of what kind or nature soever." *Held*, that choses in action passed under this bequest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1208; Dec. Dig. ⚡559.]

[Wills ⚡576.]

Testator had received with his wife, on marriage, a note of hand, which, after the making of his will, he disposed of in the purchase of land. *Held*, that she was entitled to the value of the note, under the foregoing bequest.<sup>1</sup>

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1255, 1256; Dec. Dig. ⚡576.]

[Life Estates ⚡6, 21.]

Application to compel the wife to give security for the forthcoming of personal property after the termination of her life estate, refused;

<sup>1</sup>Sed quare. See *Warren v. Wigfall*, 3 Des. 47. *Pell v. Ball*, Speers, Eq. 48. *Ashburner v. Macquire*, and notes, English and American, 2 Whi. & Tud. L. C. 201. *Bailey v. Wagner*, 2 Strob. Eq. 1.



but she was ordered to sign a schedule of the property.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 17, 18; Dec. Dig. ☞6, 21.]

[Wills ☞576.]

[Cited in *Gambrell v. Gambrell*, 82 S. C. 212, 64 S. E. 1135, to the point that a testator by his will gave to his wife all the property which he obtained by her, "of what nature or kind soever," without specifying the property. He subsequently invested the amount of a note, part of the property bequeathed, in land. *Held*, that the land passed to the wife under the will.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1256; Dec. Dig. ☞576.]

[Wills ☞733.]

[An annuity was given, by will, to the wife of the testator, payable on the 1st of March, and the testator died in August. *Held*, that the annuitant was entitled to the full annuity on the 1st of the following March.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1838; Dec. Dig. ☞733.]

James M'Lemore made and duly executed his last will and testament, the 7 day of September, A. D. 1820. That will contained the following clauses. "I give and bequeath to my beloved wife, Lucinda M'Lemore, the whole of the property which belonged to her before my marriage with her, of what nature or kind soever, also one half of my stock of cattle and hogs, all my household and kitchen furniture, my riding chair and a good horse to draw it, which I wish my executors to purchase for that purpose, also two hundred dollars to be paid her annually, on the 1 day of March, for, &c., during her natural life, provided, nevertheless should she be pregnant at the time of my death and bring forth a living child, then and in that case, the property above given is only loaned to her, for and during her natural life, and is to revert at the time of her death to the child that she may have, if it should survive her, if not, it is to go with the balance of my estate; and the provision herein made for my beloved wife is intended in lieu and bar of dower." After the execution of this will, the testator had a son born in his lifetime, and he himself departed this life, leaving his will in full force and virtue, and leaving alive his wife Lucinda, and said son.

The widow filed her bill to have her rights established, and the defendants, who were

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the executors of the will, stated the \*points in controversy, which required the interposition and decision of the Court. It appeared that the testator, amongst other things, acquired, by his marriage, a number of notes of hand, due by various persons; some of which remained uncollected at the time of his death, That the principal note was one for one thousand dollars, which the testator passed away to Abner Blocker, as a reimbursement to him of money advanced to pay for a tract of land purchased by the testator, James M'Lemore, and since his

death sold by the sheriff as part of his estate.

De Saussure, Ch.—It is agreed that the notes of hand which came to the testator by his wife, and which were not collected by him during his coverture, do not form any part of his estate, but returned to the widow, and have been delivered up to her. One question arises in the case which is not pressed by the defendants, but is proper to be decided in order to prevent future litigation. It is whether the child born after making the will of the testator, but before his death, is entitled to the provision made in the will for such child as the testator's wife might be pregnant with at his death and hereafterwards? That was precisely the question, under the same circumstances, in the case of *White & Barber*, 5 Burr. 2703. The judges decided that notwithstanding the defect of expression in the will, that the children born before the death, are virtually included in the provision so anxiously made by a parent for his posthumous children. I concur in this view of the question, which alone could prevent the occurrence of cases, in which, by a different and more rigid construction, children would be disinherited by their own fathers, when most anxious to provide for them. The son of the testator, James M'Lemore, must therefore have the benefit of the provision made for an after-born child in his father's will.

We come now to consider what passed to the widow under that part of the will of the husband which is in these words: "I give and bequeath to my beloved wife, Lucinda M'Lemore, the whole of the property which belonged to her before my marriage with her, of what nature and kind soever." It was argued, for defendants, that notes of hand or

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choses in action, \*do not pass under the word property; but upon the argument of complainant's counsel and on reflection, I am of a different opinion. The word property, is of very extensive meaning, and coupled with the words, "of what nature and kind soever," indicates a clear intention to give to the wife every thing received with her.

It was further contended for the defendants, that as the testator had invested the largest note, received on his marriage, as part of his wife's fortune, in the purchase of land, neither the land nor the value of it, could pass under the devise above mentioned. This is in truth the difficult question in the case. The general rule is indeed a plain one. If a testator, after making his will, disposes of any thing given by his will, the legacy is at an end. If he devises lands and afterwards sells them and takes bond and mortgages for the price, these will not pass. So if he devises bonds and a mortgage of land, and he gives up the bonds and mortgage, and takes a reconveyance of the land, the land will not pass. See *Cogdell's case*, in 3 *Desaus*,

Eq. Rep. 346. This, however, like all questions arising under last wills and testaments, except a few which depend on mere technical construction, is a question of intention. It is presumed that the testator intended to rescind the bequest, when he has so parted with the thing bequeathed, that the words of the will cannot operate upon it. This presumption of intention may, however, be repelled by other presumptions; for a will may be so worded as to manifest that the testator did not intend the legacy should fail. What was the intention of the testator in the case before us? He means to give his wife all the property of whatever nature or kind, which she had brought him in marriage. He gives nothing specific. He seems to mean to place her on as good a footing as she was when she became his wife, and adds thereto some small provision from her own property; and this he gives in lieu of dower. If the alteration of the nature of the property by him, changing notes of hand for other estate, is to annul so much of the legacy, it will go far to defeat his intention wholly, for the note laid out in land was the greatest part of the property in

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question. It does not appear to me that he meant this. There is no specific bequest of money or devise of land; it is of all he got by his wife, that is, of the value or amount he got by her. It is a general intention which pervades the whole will, and I think ought to prevail. I am aware that this is a very difficult subject. The case of *Broome and Monck*, cited from 10 Vesey, 596, by Mr. Wardlaw, is very strong; but there are cases cited in that which look the other way. See *Coventry and Coventry*, 2 Atk. 365. The Lord Chancellor Eldon also makes a distinction, p. 612, (in which he follows Lord Hardwicke) that where a man has agreed to lay out money in land generally, and devises his real estate before such purchase is completed, the money agreed to be laid out will pass to the devisee of the real estate; which is different from the case of an agreement for a particular tract, which fails because a good title cannot be made. There the devisee is not entitled to the money intended for the purchase. There are many other important cases on this intricate subject; but looking on it as I do, as a question of intention, and believing that intention to be sufficiently clear for the wife, I must so decide. I acknowledge, however, that I am not very confident in this opinion.

The next question relates to the sum of two hundred dollars, which the testator bequeathed to his wife, payable annually on the first of March. He died August, 1821: Is he entitled to any part of the sum on the first of March, 1822? The general doctrine is, that an annuity is an entire thing and cannot be divided. I believe the equitable construction will be to say that the legatee

is entitled to the annuity of two hundred dollars in every August, but not payable until the succeeding March. This gives the full annuity and relieves the estate as to the time of the payment. If the executors neglect to pay the annuity accruing on the first of March in every year, she shall be at liberty to enforce the payment.<sup>2</sup>

As to the security required of the widow, for the forthcoming of the property at the termination of her life estate, I am not willing to order that: it will be an imputation upon her in relation to her own child, and that without any allegation or proof of misconduct. But it is right that she should sign

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a schedule of what comes to her hands for her life, and that is ordered to be done accordingly. Let it be referred to the Commissioner to adjust the matters of account between the parties, and particularly to ascertain and report the amount of the annuity now due to the complainant, and the amount of visible property and choses in action to which she may be entitled under the foregoing construction of the will, and to prepare a schedule, for her signature, of the property held by her during life under the will.

The defendants appealed on the grounds:

That choses in action do not pass under the term of property, where there are personal goods in possession to satisfy the bequest:

That if they should be held to pass by the terms of this will, the legacy was adeemed as to the choses in action, which were collected or disposed of by the testator after the making of his will.

DE SAUSSURE, Ch.—We have examined this case with attention. It is not clear of difficulties; but looking at the question as one of intention, which ought to prevail, if possible, in the construction of wills, we concur in the views taken by the Circuit Court. It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed.

GAILLARD, JAMES, and WATIES, CC., concurred.

THOMPSON, Ch., dissenting. The decree of the Circuit Court is predicated on the idea that it was the intention of the testator to give to his wife the note in the bill mentioned. There can be no doubt but it was his intention at the time of making the will; but as the will is ambulatory until the death of the testator, he had a right to alter it if he pleased, and his having disposed of the note in his lifetime was an ademption of the legacy.

F. H. Wardlaw, for appellants.

M'Duffie and Terry, contra.

<sup>2</sup>Waring v. Purcell, 1 Hill, Eq. 195, 199. Stephenson v. Axson, Bail. Eq. 274.



## Harp. Eq. \*277

\*WILLIAM DOUD and Wife v. JORDAN SANDERS, Surviving Executor of A. Smith, and Others.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⇐118.]

The estate of a deceased executor, who obtained judgments for debts due to his testator's estate, and afterwards gave credit to the debtors, who were perfectly solvent during his lifetime, but became insolvent after his death, was held not liable to the legatee for the loss so incurred.

[Ed. Note.—Cited in *Pope v. Mathews*, 18 S. C. 448.]

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 472-482; Dec. Dig. ⇐118.]

[*Executors and Administrators* ⇐118.]

The books of the testator showed an uncollected open account against an individual who was proved to have rendered him large professional services. Upon this fact; upon proof of the general great diligence of the executor, and the circumstances of the estate of the debtor (deceased) the executor's estate was held not accountable.<sup>1</sup>

[Cited in *Pope v. Mathews*, 18 S. C. 448, 453.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 472; Dec. Dig. ⇐118.]

In this case the Commissioner by his report had charged the estates of John Lide and Malachi N. Bedgegood, who were executors of Smith, with certain debts due to Smith at the time of his death, on the ground of negligence. To this report, Evans, solicitor for the administratrix of Lide, and the executors of Bedgegood, filed the following exceptions:

1. There was no proof that the judgment against Wm. Fields, was lost by the negligence of John Lide.

2. His estate is not chargeable with the debts of Samuel Wilds and Elisha Parker.

3. The estate of Bedgegood ought not to be charged with the judgments against M'Neill and Cook, against M'Neill and against Miles King.

These exceptions were overruled by the Commissioner, and the solicitor appealed from his decision. His Honor, Judge Thompson, on hearing the evidence and argument, dismissed the appeal and confirmed the Commissioner's report.

Notice of appeal was given, and a motion was made to the Court of Appeals to reverse the decree of the Circuit Court, and to sustain the exceptions to the Commissioner's report.

The evidence reported by the Commissioner was as follows, viz:—The evidence in this case, applicable to the first exception, is as follows:—"William Fields was indebted to

Smith, on a debt due 1 January, 1810. He was sued and judgment obtained in 1811. In July, 1811, John Lide, executor of Smith, gave directions to the sheriff to levy the execution

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and \*stay till further orders. The sheriff did levy on a negro, and stayed all further proceedings. Fields at that time was in good circumstances, and not embarrassed. Lide died in the spring of 1813. Fields continued to be solvent for a long time after Lide's death, and there was no proof that a nulla bona had ever been returned against him; and the solicitors for complainant and defendant both stated that they had collected debts from him within two or three years past, but all the parties considered Fields insolvent at this time."

The evidence on the second exception. "It appeared from the examination of Smith's books, that Samuel Wilds and Elisha Parker were indebted to him. There was no evidence why these debts were not collected. It was admitted by all parties that Mr. Lide had most faithfully discharged his duty as executor, and was exceedingly diligent in liquidating and securing the debts of his testator. The estates of Wilds and Parker were solvent and were abundantly able to pay, and are so now. It was also stated and not denied, that Judge Wilds whilst at the bar, had done much professional business for Smith; that he was appointed one of Smith's executors, but died soon after, without qualifying, that his estate was very much indebted, and there was an universal disposition of the creditors to indulge, and by such indulgence, his estate was saved from insolvency.

Third exception. "Until the death of Lide, Bedgegood did not interfere with the estate of Smith. Lide died in the spring of 1813, and Bedgegood the 4 July, 1814. During this time he stayed the executions against M'Neill and Cook and King. All the defendants were then good. M'Neill was sheriff of Chesterfield, or his office had just expired, Cook was a man of considerable property; and Dr. King was a physician in extensive practice and owned a house and lot in Cheraw, besides slaves. M'Neill has lately become insolvent. Cook removed to the western country with his property, long since Bedgegood's death, and Dr. King died probably insolvent; but it was admitted that he left a house and lot in Cheraw, and there was no proof that there was any older judgment against him than this."

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\*Evans, for appellants. This application is on the part of legatees, not of creditors of Smith. If the executor Lide had collected the money due by Fields, he must have put it out again to interest, and he could have vested it in no better security, for the proof is, that during the whole of Lide's life, Fields

<sup>1</sup>Martin v. Jefcoat, 10 Rich. Eq. 118. Chapell v. Brown, 1 Bail. 528. Taveau v. Ball, 1 McC. Eq. 456. 3 Des. 241. Clark v. West, 1 Strob. Eq. 185. Bryan v. Mulligan, 2 Hill, Eq. 364. Boggs v. Adger, 4 Rich. Eq. 408. Hext v. Forcher, 1 Strob. Eq. 170.

was abundantly solvent. An executor is not liable at all events for the goodness of the security on which he invests money of the estate; it is sufficient if he acts with diligence and good faith, 3 Ves. 839. At the death of Lide, the estate went into the hands of the surviving executors, and for their neglect, Lide's estate is not liable. 1 Eq. Rep.

Bedgegood, who survived Lide about a year, and managed the estate after his death, seems to have been guilty of no greater neglect; he only indulged those in whose hands the debts were to all appearance perfectly secure. If there was culpable negligence anywhere, it seems to have been in the third executor, Sanders, who had survived Bedgegood.

As to the debt of Judge Wilds, we think that the proof of the general exceeding diligence of the executor, (who is only charged with having lost two debts out of a very great number,) together with the fact that Wilds had performed much professional business for Smith, affords fair ground to presume that one demand was intended to be set off against and extinguished by the other. Cited Tol. Law of Ex. 428, 1 Pr. Wms. 141.

Ervin, *contra*. As to the duty and liability of executors, cited Tol. Law of Ex. 426. Whatever may have been the general diligence of the executors, it is clear that they were not diligent in the particular instances now in question.

DE SAUSSURE, Ch.—In this case the Commissioner, by his report, charged the estates of John Lide and Malachi Bedgegood, who were the first acting executors of Smith, with certain debts due to Smith at the time of his death, on the ground of laches in recovering them. The debts were, one against Fields, on judgment, two on judgments against McNeill and Cook, and McNeill and Miles King, and one against the late Judge Wilds and Elisha Parker, on open account.

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\*The executor, Lide, was proved to have acted with great diligence in his executorship; he ordered a levy to be made upon the property of Fields; which was done; and he then granted a stay of execution. The debtor, Fields, was then solvent. Judge Wilds, was appointed executor in the will, but did not act; and he had demands against Smith for professional services performed while he was at the bar. Under this consideration, and the general wish to indulge the estate of Judge Wilds, Lide did not have the debt liquidated. It appears that Lide proceeded to obtain judgments in the other cases, and died in about eighteen months after he qualified and acted as executor. Bedgegood then undertook the administration; gave a stay of execution in the case of McNeill and Cook, and died in about thirteen months

after he qualified. The debtors were all then good; but have since become insolvent. The concern of Smith was extensive; was carried on in the country for about fifteen years. These are the only bad debts, and the application to make the estates of Lide and Bedgegood liable, comes from the legatee. Under these circumstances, I am of opinion it would be a harsh measure to make the executors liable.

They are always protected by this Court where they have acted conscientiously "and for the best." [Morton v. Smith] 1 Desaus. Eq. Rep. 123. If any one should be made liable, it was the surviving executor, Sanders, who died insolvent.

Some confusion arises in the statement of the case from blending the debts of Wilds and Parker, as if it had been a joint debt on open account; which could not well be, unless they had been engaged in a joint concern. No papers which have been brought to the view of the Court have stated the fact explicitly, and I take that to have been the case. Upon the whole, however, I do not think the executors should be made liable, as by the decree of the Circuit Court.

It is ordered and adjudged that the decree of the Circuit Court be reversed.

GAILLARD, WATTES, and JAMES, CC., concurred.

Harp. Eq. \*281

\*THOMAS ELLIOTT v. LEWIS MORRIS et al.

(Columbia. Dec. Term, 1824.)

[Trusts  $\S$  17, 18.]

In 1738 W. E. devised the land in question to his three sons, and their heirs. Some years after testator's death, the Attorney General of the province filed an information against the eldest son, to which the executors of the other sons (then dead) were made parties, charging that the devise was under a secret trust for a religious association; the matter was referred to arbitration, under a rule of Court, and an award made directing a conveyance, and it appeared that the eldest son did convey. The association took and held possession of the land till its dissolution, in 1796, when defendants took possession, claiming the reversion as heirs of the testator, through his oldest son and heir-at-law. Complainant claimed partition under the second son and devisee. It was held that: Though a trust of lands cannot be established by parol, yet if the trustee execute the trust, he is bound by his act:

[Ed. Note.—For other cases, see Trusts, Cent. Dig.  $\S$  15-24; Dec. Dig.  $\S$  17, 18.]

[Tenancy in Common  $\S$  14; Wills  $\S$  677.]

If there was no trust, the possession of the society was adverse, and the defendants protected by lapse of time and the Statute of Limitations:

[Ed. Note.—Cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 314.

For other cases, see Tenancy in Common, Cent. Dig.  $\S$  39; Dec. Dig.  $\S$  14; Wills, Cent. Dig.  $\S$  1590; Dec. Dig.  $\S$  677.]



## [Descent and Distribution ⇨17.]

If there was a trust, the reversion was in the right heirs of the testator, and not of the devisees in trust.

[Ed. Note.—Cited in *St. Philip's Church v. Zion Presbyterian Church*, 23 S. C. 314.]

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 51, 52; Dec. Dig. ⇨17.]

## [Trusts ⇨365.]

[Cited in *Reid v. Reid*, 12 Rich. Eq. 217, to the point that, where land had been occupied 60 years by persons claiming under a secret trust in a will, the court refused to relieve the devisees against the claimant under the trust.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 568–573; Dec. Dig. ⇨365; *Equity*, Cent. Dig. § 211.]

## [Wills ⇨688.]

[Cited in *McAlhany v. Murray*, 89 S. C. 448, 71 S. E. 1025, 35 L. R. A. (N. S.) 895, Ann. Cas. 1913A, 1008, to the point that where a trust in land, under a will, is so expressed as to fail of its object altogether, the land goes to the heir of the testator, instead of the devisee.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1648; Dec. Dig. ⇨688.]

Heard at Charleston, February, 1824.

De Saussure, Ch. The complainants' right to a partition rests solely on the devise of an undivided third part of the lands to Thomas Elliott, his grandfather. The will of William Elliott, of Berkley, is dated 15th June, 1728, and he devised as follows: "I give, devise and bequeath to my three sons, William Elliott, Thomas Elliott and Joseph Elliott, all that my plantation or tract of land on Charleston Neck, containing fifteen and three-quarter acres; I also give and bequeath to my said three sons, William, Thomas and Joseph, ten thousand pounds, current money of the province, to have and to hold the said fifteen and three-quarter acres of land and the said sum of ten thousand pounds, unto my said three sons William Elliott, Thomas Elliott, and Joseph Elliott, their heirs, executors, administrators and assigns, for ever." On the face of the will, there can be no doubt that an individual third part of the land vested in Thomas Elliott and by his will passed to his devisees, under whom the complainant claims.

But it is alleged that there was a secret trust in favor of the general Baptists; and

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the defendants claim the reversion as \*heirs of the donor, on the extinction of the society. Evidence has been read to prove a trust and possession of the general Baptists. The defendants also rely on their own possession since 1796, to 1808, when the bill was filed, on the Statute of Limitations and the length of time. These grounds will be considered in their order.

The first question is, whether the trust on which the defendants rely is not within the Statute of Frauds, and if so, whether parol evidence is admissible to prove it? And I am of opinion on this ground that the trust is within the statute. The case of *Adlington v. Caun*, 3 Atk. 143, is so similar in

circumstances as to be a direct authority on the point, and if the case depended merely on this question, I should follow without hesitation the judgment of Lord Hardwicke in rejecting parol evidence of the trust.

But it appears that an information was filed some years after the testator's death, by Sir James Wright, Attorney-General of the province, against William Elliott, of Accabee, and the executors of Thomas and Joseph Elliott, the other devisees, that the cause was referred to arbitration and the reference made a rule of Court, that the arbitrators made their award directing a conveyance to be executed; and there is the strongest presumption that Wm. Elliott did, in compliance with the award, execute a conveyance in the year 1819. For although the original deed is not produced, the release of Sir James Wright grounded wholly on such conveyance, the entries in the Register's book and the marks of authenticity on the ancient paper which is produced as a copy, satisfy my mind of its existence. It seems from the case of *Adlington v. Caun*, as well as *Muckleston v. Brown*, 6 Ves. 52, and *Paine and Hall*, 18 Ves. 475, that if the trustee will confess the trust by his answer, that will take it out of the Statute of Frauds. The declaration of trust therefore must be considered good as to the part of William Elliott; but the question still remains, whether there is any declaration of trust as to the part of Thomas Elliott, the complainant's ancestor. I do not think that the deed of William Elliott or his answer, could take out of the operation of the Statute of Frauds

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anything \*more than his own part; and if it were a recent transaction, I should hold that the devisees of Thomas Elliott might keep for themselves one third of the land, notwithstanding the declaration of William Elliott and his conveyance.

This leads us to the consideration of the next ground, viz: the length of time. And in this view, the case differs widely from *Adlington v. Caun*. In that case, the bill was filed by the heir-at-law to compel a discovery, in order to defeat the trust and prevent the execution of it, as within the Statute of Mortmain. The will of Lawrence Hollister, on which that case arose, and William Elliott's will, which is now before us, were executed in the same year, and within a few weeks of the same day, and it is probable that the same "horror of the Mortmain Act" of which Lord Hardwicke speaks, led them both to adopt the same contrivance of a secret trust. In both cases they adopted the form of a joint devise; and it is a little singular that each of them acted under a groundless apprehension; for the will of Lawrence Hollister, which he revoked in order to effect the same object by a secret trust, would have stood, as if it was made

before the Statute of Mortmain; and the devise of William Elliott would have been good if he had expressed the trust in the will, because the Statute of Mortmain was never extended to this country: but here the resemblance between the two cases ends. The devisees in *Adlington v. Caun*, pleaded the Statute of Frauds to maintain their possession and keep the estate to themselves: but here, one of the devisees, after a very long acquiescence, relies on the Statute of Frauds to get back the estate from those into whose hands it has passed, by the execution of the trust manifested in various ways. Now although it would be against the statute to admit parol evidence to establish a trust of lands, yet it is a distinct question whether a confirmation or acquiescence by the devisees or heirs of Thomas Elliott may not and ought not to be presumed from the great length of time. The executors of Thomas Elliott were parties to the information filed by Sir James Wright; and although the conveyance was executed in pursuance of an award, instead of a de-

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cree, yet this award, if not a direct judgment of the Court on the point, was at least referred to by the subsequent orders that were made in this cause as a good and valid act. At this distance of time, every presumption is to be made in favor of the proceedings of the Court, that every thing was done regularly. The acquiescence of the parties for about sixty years, without a single step against it, strengthens this presumption—is equal to a confirmation, and renders the conveyance of William Elliott a valid declaration of trust.

If length of time, however, could not give validity to this conveyance, by raising a presumption that the parties have confirmed the act of William Elliott, or that they were bound by the decree of the Court, it would be necessary to consider the effect of the Statute of Limitations: (It was my desire to have directed an issue at law to try whether the possession in this case was adverse; but the counsel on both sides wished this Court to decide at once on the case—I now therefore proceed to discuss it.) And here it was contended that the statute will not run in favor of the defendants, because they cannot connect their possession with the possession of the Baptists, and because they are tenants in common with the plaintiffs. But the Baptists held under the deed of William Elliott, and by that deed, the reversion was in the defendants. The estate was one; the reversion was connected with the particular estate; and the possession of the reversioner is not to be separated from the possession of those who enjoyed the preceding estate. The other objection is, that the statute will not run in favor of one tenant in common against his companions. These objections have great weight, but the distinc-

tion is between that which is positive and that which is presumptive.

An adverse possession will bar in any case; and when the party in possession holds, by a title in opposition to the title of plaintiff, the possession is adverse, of course. A tenant in common holds by a title consistent with the title of his companions, and the possession of such a person is not necessarily adverse. But if a person has taken open possession, enclosed and improved at his own expense, and received and appropriated to his own use the rents for many

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years, without any acknowledgment of his companions' claims, which have never been asserted, it is good ground to presume that his possession was adverse. An actual ouster need not be proved, it will be presumed, after long possession. This is the doctrine of Lord Mansfield in *Doe v. Prosser*, Cow. 217, and is not to be overturned. I am therefore against the plaintiff on the Statute of Limitations; the possession of the defendant from 1796 to 1808 having been fully proved, and no claim set up by complainant, who resided in the same house till 1808.

Another view of the subject remains to be taken. It has been argued that even if it be admitted that there was a secret trust for the Baptists, there is a resulting trust in favor of the three sons of William Elliott, of Berkley; because the estate is devised to them subject to the claim of the Baptists, under the secret trust; and that as the society has become extinct, the estate reverts to their heirs, and not to the heirs of the testator. But I take the rule to be, that where there is a trust, though a secret one, and even if the trust be so expressed as to fail of its object altogether, the heir-at-law, and not the trustee will take. *Bishop of Cloyne v. Young*, 2 Ves. 91; *Lord Guilford v. Pierdon*, 2 Ves. 495; *Morris v. Bishop of Durham*, 9 Ves. 399.

In this case, the Lord Chancellor says, "the object of the trust, being too indefinite, has failed; the consequence is that trustee took the property in trust to dispose of it as the law will dispose of it, and not for his own benefit." And so is the rule as to personalty, 1 Ves. 475, 1 Bro. Ch. Cas. 201. This argument supposes that there was a trust, and when we have got so far as to concede that, we must admit a resulting trust in favor of the heirs-at-law of the testator. And as the estate of the Baptists terminated before the abolition of the rights of primogeniture, the reversion vested in Mrs. Morris and Mrs. Huger, the heirs of Wm. Elliott, of Berkley.

Another argument was insisted on, viz.: that the defendants were trustees for the devisees of Thomas Elliott, and a paper signed by William Elliott, of Accabee, and dated in 1739, in which he acknowledges having received one-third of the lands in question, as one of the executors of Thomas Elliott,



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\*"for the orphans' part," is produced for that purpose.

But I cannot admit that William Elliott of Accabee was a trustee for Thomas Elliott's devisees, in the proper sense of the term. The estate of Thomas Elliott was not vested in him, and at all events, the conveyance of 1749, of the legal estate which had been vested in him, would have destroyed the trust. From the best consideration of the subject, on the grounds that this was a trust which has been performed, and which the plaintiff's ancestors by their long acquiescence have confirmed, and on the Statute of Limitations, my opinion is that the complainant is not entitled to recover.

It is therefore ordered and decreed that the bill be dismissed with costs.

The complainant appealed on the several grounds involved in the decree of the Circuit Court.

In the Court of Appeals, Charleston, March, 1834.

DE SAUSSURE, Ch.—We have considered the case with the attention which its difficulty and importance required. It involves questions of much nicety, and we have been long in coming to a conclusion entirely satisfactory to ourselves; but upon a full examination of the Circuit Court decree, we do not perceive that we can come to any other conclusion than has been done in that decree.

The great lapse of time which has taken place since the proceedings on which the title depends, we consider conclusive, independently of the others, which are in themselves very strong.

It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed.

WATIES and JAMES, CC., concurred.

THOMPSON, Ch., dissenting.—William Elliott, of Berkley, by his will, bearing date 15th June, 1738, devised as follows:—"I give, devise and bequeath to my three sons, William Elliott, Thomas Elliott and Joseph Elliott, all that, my plantation or tract of land, on Charleston Neck, containing fifteen and three-fourth acres; I also give and bequeath to my said three sons, William, Thomas and Joseph, ten thousand pounds current money of the province—to have and to hold the said fifteen and three-fourth acres of land,

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and the said sum of \*ten thousand pounds, unto my said three sons, William Elliott, Thomas Elliott and Joseph Elliott, their heirs, executors, administrators and assigns forever." Thomas Elliott, one of the devisees, by his last will and testament, bearing date the 6 June, 1767, devised his whole real estate, whatsoever and wheresoever, to his wife, Sarah Elliott, the mother of the complainant, who, by her last will and tes-

tament, bearing date September 7, 1774, (without taking any notice of the aforesaid undivided tract of land) directed her executors to sell her real estate; but owing to the peculiar circumstances of the case, her will could not be complied with; by reason whereof, all the right and title of the said Sarah, to the aforesaid fifteen and three-fourth acres of land, vested in William Elliott, who was her eldest son and heir-at-law, she having died in 1774, before the passing the Act abolishing the rights of primogeniture. William Elliott, by his will bearing date February 24, 1775, devised all his estate, real and personal, whatsoever and wheresoever, to the complainant; whereby it appears there is a clear and indisputable deduction of title from William Elliott, of Berkley, down to the complainant, unfettered with any trust, restriction or limitation whatsoever.

The defendants resist this claim on several grounds: The first is, that there is a secret trust in the will of William Elliott, of Berkley, in favor of an association under the denomination of the Antipædo-Baptists, and they claim the reversion upon the extinction of that society, as heirs-at-law of William Elliott, of Accabee, eldest son and heir-at-law of William Elliott, of Berkley. It appears that William Elliott did make a declaration of trust of his undivided share of the said fifteen and three-fourth acres of land, but that neither Thomas Elliott or any other person under whom the complainant claims, ever did, and, consequently, his right remains unimpaired. But admitting there was a declaration of trust by the three sons of Thomas Elliott, to wit: William, Thomas and Joseph, upon the extinction of the society, the trust would have resulted to them, and not to the heirs of the testator of William Elliott, of Berkley. But there is no evidence, either intrinsic or extrinsic, to show that Thomas Elliott ever executed a trust, except by parol testimony, which is

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\*totally inadmissible, it being directly in the teeth of the Statute of Frauds. There are a few cases where parol evidence has been admitted to establish a secret trust, but they were decided under peculiar circumstances.

The next defence relied on, is lapse of time. It will be observed that the title of the parties to this land never accrued until the year 1796, and the action was commenced in 1808, a period of twelve years; which has never been considered long enough to raise a presumption against a right.

The last ground of defence relied on, is the Statute of Limitations.

I hold it to be clear and undeniable law, that the statute will not run in favor of one tenant in common against another. The seisin of one is considered in law as the seisin of the other. There is no definite part belonging to either; each is seized per mie et

per tout, there can exist no hostile possession until a severance is made, nor can an action be maintained by one tenant in common against his co-tenant, in any other case than that of ouster. I am therefore of opinion that the decree of the Circuit Court is erroneous upon every point of the case.

### Harp. Eq. 288

SUSANNA LYLES ads. EPHRAIM LYLES et al.

(Columbia. Dec. Term, 1824.)

[Action  $\hookrightarrow$  64.]

A. L. deceased caused portions of his land to be surveyed and marked, which he gave verbally to his sons, and put them respectively in possession. They made improvements and continued in possession long enough for the Statute of Limitations to run. Their titles were held to be valid.<sup>1</sup>

[Ed. Note.—Cited in *Lyles v. Lyles*, 1 Hill, Eq. 83.

For other cases, see Action, Cent. Dig. §§ 725-734; Dec. Dig.  $\hookrightarrow$  64.]

[*Husband and Wife*  $\hookrightarrow$  29.]

Deceased, previously to his marriage, prepared a deed or instrument, in contemplation of its being executed by himself and his intended wife, reciting his wish that his children by a former marriage should inherit his whole estate, renouncing any claim or interest which he might acquire by the marriage in or to the estate of the intended wife, and barring her of any claim to any part of his estate. This was executed by the deceased alone. *Held*, not to operate as a settlement of the estate of deceased in favor of his children, so as to bar the wife of her distributive share.

[Ed. Note.—Cited in *Jones v. Cole*, 2 Bailey, 333; *Lyles v. Lyles*, 1 Hill, Eq. 83; *Ramsay v. Joyce*, McMul. Eq. 251, 37 Am. Dec. 550.

For other cases, see *Husband and Wife*, Cent. Dig. § 159; Dec. Dig.  $\hookrightarrow$  29.]

Susanna Lyles filed her bill for partition

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of the estate of \*Aromanus Lyles; of which she claimed one-third as widow. The defendants, the children of Aromanus Lyles by his first marriage, resisted her claims upon these grounds:

1. That she had another husband alive at the time she married deceased:

2. Because Aromanus Lyles, when about to marry her, executed a paper by which he declared his intention not to interfere with her estate; and that she should not, upon his death, be entitled to any part of his; expressly barring her rights, and giving his estate to his children. This was a deed under seal, and did not require the assent of his intended wife to give it validity, nor that she should join in it.

3. That he had divided his plantation into three parts long before his marriage with complainant, and had a plat made by a surveyor, designating the three divisions: that he gave one third to James Lyles, and one

third to Aromanus Lyles, his sons, and put them in possession, and that they held possession more than five years before the marriage; that as to the other third part, upon which the dwelling-house was, he meant that for his youngest son, Thomas; but meant to live there himself during his life, and let his son have it after his death. After this, Thomas lived with his father for many years.

Waties, Ch.—The complainant claims, as the widow of Aromanus Lyles, who died intestate, a distributive share of his estate, and prays for a writ of partition:

The defendants opposed her claim on several grounds: 1. That at the time of the complainant's marriage with their father, A. Lyles, she was the lawful wife of a person by the name of Philip James, who was then living. 2. That she had, by a marriage contract with their father, precluded herself from any share in his estate, in consideration of his relinquishing all claim to the separate estate of which she was possessed; and 3. That their father had, many years before his marriage with her, divided the whole of his real estate among his sons, James, Aromanus and Thomas Lyles, and put them in possession of their respective shares.

The first objection to the claim of the com-

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plainant must \*depend on the truth of the fact on which it rests: and, after a careful and repeated consideration of the testimony produced on both sides, my mind has been filled with so much doubt by the contradictions of the witnesses, of whose credibility I cannot judge without knowing their character, that I find it impossible to determine, satisfactorily, on which side the truth is. I feel bound, therefore, in justice to the parties, to refer this fact to the trial of a jury, whose personal acquaintance with the witnesses may enable them to form a more correct judgment upon it.

I have no difficulty as to the second objection to the complainant's claim. The written instrument which has been relied on as the evidence of a mutual agreement between her and A. Lyles, to renounce all claim to each other's estates, was signed by him alone, and she cannot be bound by it. He must himself have considered it of no effect, as it appears that a short time before he died, he said to one of the witnesses, that his wife would be entitled at his death to a third part of the plantation and negroes, which he had reserved for himself after providing for his children. It appears, also, that the defendants did not regard this instrument as a marriage contract, for they endeavored to establish it as a testamentary paper: but the Court of Law determined that this character did not belong to it.

The counsel for the defendants now contend, that it may be construed a covenant to stand seized to uses; that is, a covenant of

<sup>1</sup>Hunter v. Parsons, 2 Bail. 59.



Aromanus Lyles, to hold his estate for the exclusive use of his children, the defendants. There is no ground for this construction; the paper purports to be a mutual agreement between the parties for a mutual purpose, which cannot be carried into effect for such purpose, because both parties have not executed it. Such a paper cannot afterwards be converted into the independent covenant of one party, and be operative for a different purpose.

The third ground insisted on by the defendants has, I think, been fully supported, as far as it respects the claims of James and Aromanus Lyles to their shares of the real estate given to them by their father. Although the gifts were only verbal, yet the quantity of land given to each was surveyed

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and ascertained \*by marked lines; each of them was put into the possession of his share, and made considerable clearings and improvements. The possession of James had continued for nine or ten years before the death of his father, and that of Aromanus for thirteen or fourteen years, during which time their rights were constantly recognized by him as absolute. Such a possession would give them perfect titles under the Act of Limitations, and should have a peculiar claim to its protection, as it has been obtained with the express consent of their father, and not by a mere constructive acquiescence. The claim of Thomas Lyles to his share of the real estate has not the same unequivocal support. It appears that his father (although certainly intending it for him) continued to hold the possession of it until his death, and it must have been the same land to which he alluded, when he said that his wife would be entitled to a third part of it; for he had given all the rest of his real estate to his other sons. The claim, then, of Thomas Lyles cannot be allowed, because the gift to him has not been executed.

It is therefore ordered and decreed, that an issue be made up between the parties to try the fact, whether Philip James, the former husband of the complainant, was living at the time of her marriage with Aromanus Lyles, and that the bill be retained until the verdict on such issue be found and certified. It is further ordered, that the defendants be enjoined from setting up the written instrument, purporting to be a marriage contract between A. Lyles and the complainant against her claim to a distributive share of his estate, if the verdict on the said issue shall find that she was the lawful wife of the said A. Lyles; and, in that event, it is also ordered, that the complainant be perpetually enjoined from prosecuting her claim to a share of such parts of the real estate of the said A. Lyles as were given by him to his sons, James and Aromanus Lyles. The costs to await the final decree in the cause.

The defendants appealed, and moved to reverse the decree, on the grounds:

1. Because effect ought to have been given to the deed or written instrument, the execution of which was fully proved, and not contested.

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\*2. That the written instrument relied on by defendants might well be construed a covenant to stand seized to uses, and ought to have been so construed.

3. That the claim of Thomas Lyles to one-third of the land was well sustained, and ought to have been allowed. The gift was complete, and executed as far as the nature of it would permit.

De Saussure, for the motion. The questions are, whether the written instrument was intended by the deceased to operate, and whether the law will permit it to have effect?

It is sufficient evidence of his intending it to operate, that it was found duly executed in the possession of one of the parties intended to be benefited by it. The parol testimony confirms the presumption of its having been solemnly executed. He offered the paper to his intended wife to sign; but she refused. But he had a right to dispose of his property without her concurrence; and, though he may have thought otherwise, his misconception of his rights will not alter the effect of his act.

The intention that she should have no part of his estate after his death, but that the whole should go to his children, is clearly expressed; and as it is a rule of law, applicable to deeds and other instruments, as well as to wills, that the intention of parties, so expressed, shall have effect, unless there be something in the law to forbid it. This may be construed a covenant to stand seized to uses. The objection to the paper is technical; but technical objections shall not defeat the legal intentions of parties. Any words which sufficiently explain the intention, with a good consideration will be sufficient to raise a use. (Cowp. 600; Shep. Touches, 82; 2 Wils. 75; 5 T. R. 129; 2 Fonb. 44, 47; 4 Eq. Rep. 521, *Mitledge v. Lamar*.)

A secret conveyance by a woman of all her property on the eve of marriage, would be void as a fraud on the marital rights; yet she may make provision for her children by a former marriage. It has never been questioned that a man, under the same circumstances, may convey property. The wife, by marriage, acquires no rights in the husband's property. After the marriage he may convey away his whole personal estate, and his whole real estate, subject only to the

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claim of dower, which \*is a mere contingency, and not regarded as a vested right. (4 Eq. Rep. 139, referring to 2 Eq. Rep. 79, *Hamilton v. Pearce*.)

As to the claim of the defendant, Thomas, under the gift from his father, cited *Lessee of*

Tyler v. Peter and Frederic Eckhardt, 1 Bin. 378.

DE SAUSSURE, Ch.—In this case the complainant claimed as the widow of Aromanus Lyles, a distributive share of his estate, and prayed a writ of partition. Her claim was opposed on these grounds, one of which only is necessary to be discussed, as I concur with the decree on the others.

This ground of objection was, that there was an instrument of writing, signed by Aromanus Lyles, executed before the marriage, which renounced all rights in the estate of the intended wife and precluded her from any share of his estate. The circuit judge states that on the original argument before him, the objection was put on the ground that the woman whom Aromanus Lyles intended to marry, had by a marriage contract with him, precluded herself from any share of his estate in consideration of his relinquishing all claim to the separate estate of which she was possessed; and he decided that the instrument signed by Aromanus Lyles alone, could not be binding on her, as an act of hers, and in this I concur with the Circuit Judge.

It was also contended for the defendants, that the instrument executed before the solemnization of the marriage by Aromanus Lyles, was such an instrument as could be supported as a covenant, to hold his estate for the exclusive use of his children the defendants. But the Circuit Judge was of opinion that there was no ground for this construction, as the paper purported to be a mutual agreement between the parties, for a mutual purpose, which cannot be carried into effect for such purpose, because both parties have not executed it.

I have revolved this point a good deal in my mind, and have had considerable difficulty in forming an opinion. The instrument is executed by Aromanus Lyles on the 6 of February, 1817. It is in substance as follows:—"Whereas I, Aromanus Lyles, Sr., do

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intend to intermarry with \*Susannah Fennell, or otherwise Susannah Fannell, of Lexington district, having a desire that my children by a former marriage, should after my decease inherit my whole estate, both real and personal, clear of any incumbrance by my intended marriage with the above-mentioned Susannah Fennell, I hereby bar her the said Susannah of any claim to any part of my estate, both real and personal, and I the said Aromanus Lyles, do hereby renounce and bar myself and my heirs of any claim, right or title I may acquire to the estate of the said Susannah, be the same real or personal, by intermarriage with her the said Susannah; reserving to myself and my intended wife Susannah, during my life, a joint support out of the two estates, and at the death of either myself or Susannah

above-mentioned, the interest hereby intended to be secured in each other's estates to be severed, and the estate of the deceased to be freely possessed and enjoyed by the heirs of the said deceased, without the interference or control of the survivor, witness my hand and seal, the 6 February, 1817." On examining this instrument carefully, I do not perceive any intention that it should be a deed executed by both parties. It professes to be an instrument by Aromanus Lyles alone. The principal question which arises is, can a man about to marry, convey his property in such a manner that his intended wife shall not be entitled to have any interest therein on the marriage taking place. It is settled law, that if a woman be about to marry, and in contemplation of that marriage, executes deeds<sup>2</sup> conveying away her estate, and so as to prevent the marital rights attaching, such a deed is considered as a fraud on the marital rights and is void, except in the case of the deed being in favor of children by a former marriage.<sup>3</sup> But this has never been considered as applicable to a man pursuing the same course. It may be unequal and therefore unjust, but still it is the law. And indeed the case we are considering has the excuse, which would give validity to such a deed by the wife, to wit: The provision for children by a former marriage. If the instrument therefore really conveys the husband's estate in such a manner that the wife cannot have an interest therein, I do not perceive that there is any legal objection to this

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act of \*the husband. The only question then is, does the deed in question convey away the property of the husband, in such a manner as to be effectual for the benefit of the children and take away the rights of the wife? Of this there is reason to be doubtful. It is a most imperfect instrument. It is not a deed making any conveyance of the property, directly or indirectly, to the children, but it does distinctly state that his property is to go to his children, clear of the claims of his wife. The expression of this intention, however imperfect in the wording, seems to us to be clear, and I think upon the whole it is conclusive as to any right except that of dower in the land, which would remain because the legal estate is not conveyed out of the testator: so that if she should be proved on the trial of the issue at law, on the question of marriage, to have been the lawful wife of Lyles, she would be entitled to that. Upon the whole therefore, I cannot concur with the decree on this part of the case.

<sup>2</sup>(i. e., without the knowledge and assent of her intended husband.)

<sup>3</sup>As to this supposed exception. See Bail. 109. Ramsay v. Joyce, McM. Eq. 249 [37 Am. Dec. 550]. Manes v. Durant, 2 Rich. Eq. 404 [46 Am. Dec. 65]. Terry v. Hopkins, 1 Hill, Eq. 1.



Ordered and adjudged that the decree of the Circuit Court be affirmed.

WATIES, GAILLARD and JAMES, CC., concurred.

This case is further reported, 1 Hill, Eq. 76.

Harp. Eq. 295

JOHN ILEY and Wife, and Others, v. JACOB NISWANGER.

(Columbia. Dec. Term, 1824.)

[*Fraudulent Conveyances* 54.]

Voluntary conveyances of a man's whole property, made when he was largely indebted, were held void as to a subsequent creditor, though he had notice of the conveyances.<sup>1</sup>

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 129; Dec. Dig. 54.]

Heard at Laurens, June, 1824, before Chancellor De Saussure.

The complainants in this case allege in their bill that their father, Richard Hodges, by several deeds of gift executed on 24 December, 1819, gave to them certain negroes, the subject of the present suit, which deeds were recorded in the register's office, on the 22 January following. That some time afterwards, Mr. Richard Hodges sold all the negroes to the defendant Niswanger, who bought with a full knowledge of the existence of the deeds, and without the privity or consent of any of the complainants. That the defendant according to agreement with the said Hodges discharged the debts then due by him, amounting to about twelve hun-

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dred dollars, and agreed to pay \*him one thousand and ninety-two dollars at a future period. They pray that the defendant may be ordered to deliver up the negroes, upon being reimbursed all that he paid out in discharging such debts of Hodges as existed at the time of the gift, with interest.

The defendant in his answer admits the facts alleged by complainants, does not deny his knowledge of the existence of the deeds at the time of his purchase, but contends that Hodges being indebted at the time, the gift was void, and he therefore claims not only what he paid out in discharging such debts as existed at the time of the gift, but also all debts paid by him for Hodges, which were contracted after the execution of the deeds, together with a large store account made afterwards by Hodges with himself.

It was ordered at February Term, 1824, by the consent of the parties, that the negroes should be sold, and that the commissioner should ascertain and report the amount paid by defendant for Hodges, in discharge of debts which existed at the time of the gift,

and also the amount paid by defendant for and settled with Hodges, for debts contracted after the gift.

The commissioner reported at June Term, 1824, that the debts due by Hodges at the time of the gift, with interest up to the time the money becomes due for the negroes, amounted to the sum of one thousand seven hundred and eighteen dollars eighty-seven and three-quarter cents. That the debts contracted since amounted to four hundred and eighty-one dollars and three cents.

It appeared from the report that as much as three hundred and forty dollars ninety-three cents of the latter sum was on a book account contracted by Hodges with the defendant after his purchase.

De Saussure, Ch. The only question in this case is as to four hundred and eighty-one dollars. Richard Hodges made certain voluntary deeds of gift to his daughters, bearing date 24 December, 1819. There were certain debts contracted by him prior to these deeds, which it is admitted must be paid out of the property so given by deed, as there is not sufficient without resorting to that. The sum of four hundred and eighty-one dollars it appears was contracted subsequent to the deeds to Niswanger the defendant, who claims to be paid.

It is objected that the deeds though voluntary will take precedence. The rule on

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the subject generally is that voluntary \*deeds made bona fide of a moderate share of man's estate, and made without contemplation or probability of insolvency, shall be permitted to take effect, in preference to debts contracted subsequent to such deeds. If the subsequent creditor however can show antecedent debts, sufficient in amount to afford reasonable evidence of a fraudulent intent, that will so far defeat the voluntary settlement or deed, as to let in the subsequent creditors for payment out of the settled property. See 2 Madd. 501. In the case we are considering, the donor made voluntary gifts of the greater part of his personal property to his daughters, and he was indebted at the time very largely. I think then that these deeds cannot stand against subsequent debts.

But it is said that the defendant Niswanger knew of these deeds before he gave the credit. If he did, he knew that they were voluntary and void as to creditors, if the donor was considerably indebted, as he really was. It is further urged that the debt was contracted for whiskey, tobacco, &c., and ought not to be allowed. That objection does not come under the present investigation. If it be an unjust demand, it must be contested in another way. The Commissioner has reported it to be due, and it must be paid out of the proceeds of sales of the negroes included in the deeds. Costs to be paid out of the sales of the property, so however that each

<sup>1</sup>Ante, 72 and n. 2. This case again heard and affirmed, 1 McC. Eq. 518; recognized *Rivers v. Thayer*, 7 Rich. Eq. 147.

party, complainant and defendant, shall bear one moiety of the costs.

The complainants appealed on the grounds:

That the gift ought not to be considered fraudulent and void as to subsequent creditors; or if void as to subsequent creditors generally, it ought not to be so considered as to this particular defendant and his account.

P. Farrow, for appellants, admitted that the debts due at the time of the conveyance must be paid out of the property, but contended that the voluntary conveyances could not be considered fraudulent as to the defendant, regarded either as a subsequent purchaser or subsequent creditor, he having full notice of them. Cited 5 Ves. 386, 12 Ves. 155, 2 Eq. Rep. 264, 1 N. & M'C. 340.

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\*DE SAUSSURE, Ch.—The appeal in this case is brought up on two grounds; first, because the gifts made by Iley to his children ought not to be considered fraudulent and void as to the subsequent creditors; second, if the gift should be considered fraudulent and void as to subsequent creditors generally, the defendant himself, under the circumstances is not entitled to protection as to his own account of three hundred and forty dollars, it being of an improper nature. On the first ground, we are of opinion that the voluntary gift of the whole of his estate by Iley to his children, when he was indebted to the amount of the value of his property, cannot be sustained, even against subsequent bona fide creditors, see 3 John C. C., 481, a most clear and important case on this subject. On the second, we think there is reason to doubt the fairness and correctness of Niswanger's account. It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed, so far as regards the voluntary deeds in question. But that it be referred to the Commissioner to examine and report particularly as to the nature and extent of the account of Niswanger against the complainant Iley.<sup>2</sup>

GAILLARD, WATIES, THOMPSON and JAMES, CC., concurred.

<sup>2</sup>Defendant's account was finally allowed, 1 McC. Eq. 523.

## Harp. Eq. 298

B. CHICK, Guardian, v. SMITH, CATHCART, and Others.

(Columbia. Dec. Term, 1824.)

[*Executors and Administrators* ⚡421.]

Bill to set aside the sale of two slaves, sold under execution as the property of defendant, S. to defendant C. The slaves were bequeathed, with others, to defendant L. (wife of S.) and her brother, on certain contingencies, and no partition had been made between them. Bill charged that complainant, as guardian of L. and her brother, on the marriage of S. and L. had hired

the slaves to S. and that C. purchased with notice of S.'s want of title. Complainant claimed a lien on the slaves, for advances on account of his wards, and prayed that S. might be compelled to settle on his wife her contingent interest in the property. Bill sustained, and the slaves ordered to be delivered.<sup>1</sup>

[Ed. Note.—Cited in *Young v. Burton*, McMul. Eq. 260.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 1663; Dec. Dig. ⚡421.]

Heard at Union, June, 1824.

WATIES, Ch.—The bill in this case is brought to set aside a sale made by the sher-

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iff of Fairfield district, of cer\*tain negroes which had been allotted to William and Lucy Liles the grandchildren of David Henderson, deceased, as a part of his estate, bequeathed to them. The bequest is on conditions with limitations over. It is alleged by the complainant that he being executor of David Henderson, and the guardian of W. and L. Liles took possession of the negroes, and hired them out from year to year for their benefit; that he hired some of them to the defendant, Smith, on his marriage with his ward, Lucy Liles, which have been levied on and sold, to satisfy a copartnership debt due by Smith and others, and which was contracted before his marriage; that there has been no division made of the negroes between the said William and Lucy because the conditions required by the will of David Henderson have not yet been performed. The bill further alleges that the defendant Cathcart purchased the negroes with an express notice that they were held by Smith on hire only; and it also states that the complainant has made considerable advances for the education of his ward Lucy Smith, for a reimbursement of which he has a right to look to her share of the negroes.

The defendants Smith and wife, and William Liles admit all the allegations in the bill, but the defendant Cathcart denies that the negroes were held by Smith on hire, and insists that they were delivered to him by the complainant, as the share of his wife; he admits, however that the complainant had forbid the sale while it was going on.

It has been proved that the complainant had regularly hired out the negroes and accounted for the proceeds thereof with the Ordinary of Newberry district, from the years 1817 to 1821, when they were sold by the sheriff, and the hiring of them to the defendant Smith has been specially proved.

I have no doubt then as to the right of the complainant to recover the negroes, for they had never been divided between his wards, and cannot be so (according to the bequest to them) until certain contingencies are determined; they could not therefore be sold as the property of Smith. The only serious ob-

<sup>1</sup>*Verdier v. Hyrne*, 4 Strob. L. 463, (Errors.)



jection to the claim of the complainant is that he might have a remedy at law, and I confess that I have had some difficulty on

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\*this point; but it appears to me after full reflection on it, that the complainant can only have complete relief in this Court. His bill is brought for a discovery, and he has obtained from the defendant, Cathcart, the acknowledgment that he had notice at the sale of the complainant's claim, without which fact he might not have been able to recover at law; another object of the bill is to compel the defendant, Smith, to make a settlement on his wife of her contingent interest in the negroes; and a further object is to preserve to the complainant his lien on the negroes, for the advances alleged by him to have been made for the education of the wife of the defendant, Smith. These are all objects of equitable cognizance and will authorize the Court in taking jurisdiction.

It is therefore ordered and decreed, that the sale of the negroes be declared void, and that the defendant, Cathcart, do deliver them up to the complainant, and account to him for their hire since he has had possession of them; that it be referred to the commissioner to report what settlement ought to be made by the defendant, Smith, of the contingent interest of his wife; and that the complainant be allowed to establish before the commissioner, by legal vouchers, the balance which may be due him for his advances for the education of his ward, Lucy Smith, and that the same shall be a charge on her share of the said negroes, when a division of them shall be made under the directions of the will of David Henderson.

The costs to be paid by the defendant Cathcart.

The defendant Cathcart appealed on the grounds, that the Court had not jurisdiction; that the complainant being the executor of David Henderson, as well as guardian of the infant legatees, might have recovered at law, if he was entitled to recover; that the bill did not call for a discovery of notice on the part of defendant Cathcart, as necessary to the sustaining of complainant's suit; that the notice was in fact proved by other testimony; that a partition between the defendant, Mrs. Smith, and the assent of the complainant to the bequest to her ought to be

presumed from the complainant's suffering two, out of four slaves bequeathed, to go into

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her possession; that the suit \*was manifestly intended for the benefit of the other defendants who were in collusion with the complainant, and that permitting the slaves to go into the possession of Smith and wife under the pretext of hiring, was intended as a fraud on creditors.

Clendenen and Pearson, for appellant, argued that the complainant, being executor as well as guardian, had a legal title, if any title, to the slaves in question, and might have recovered at law. Proof of notice would not have been necessary to his recovery; and if it were, he might have established it by other testimony than the defendant's answer. Complainant did not show any thing due to him from his wards on account of maintenance and education; on the contrary, his accounts filed with the Ordinary prove him to have been in arrear with them. It was unnecessary to come into this Court to compel a settlement by Smith, who, by his answer, shows himself willing to settle; and if a suit for that purpose might be sustained against him, it affords no ground of jurisdiction against Cathcart. There is the strongest reason to believe that the whole proceeding has been an after thought, contrived between the complainant and Smith and wife, to protect the property against creditors. The purchaser has all the rights of the creditor under whose judgment and execution the slaves were sold.

A. W. Thomson, contra. The complainant, as executor and guardian, was trustee for his wards. The defendant purchased with notice of his trust, and between such parties, a suit will always be entertained in this Court. The decree is founded on acknowledged principles of the equity jurisdiction. Equity will entertain a suit for compelling the specific delivery of particular slaves; *Wamburzie v. Kennedy*, 4 Eq. Rep. 474. Fraud on the defendant, Cathcart, is out of the question; he purchased with full knowledge of the circumstances, and of the defect of his title, and took the property at his own risk. Cited, 1 Johns. Ch. Ca. 111; 1 Ves. & B. 555.

Decree affirmed by the whole Court.

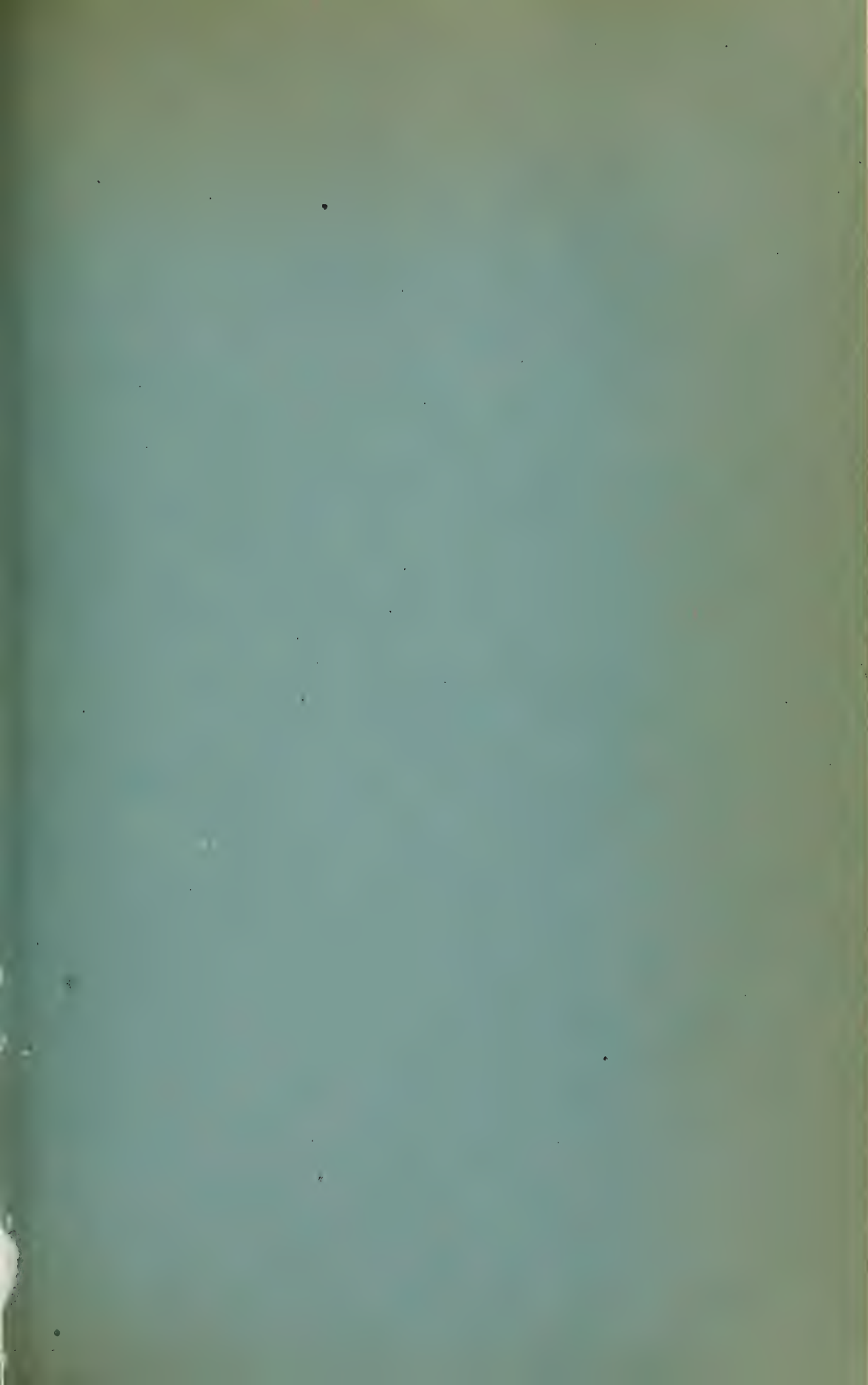
















REPORTS  
OF  
EQUITY CASES  
DETERMINED IN THE COURT OF APPEALS OF  
THE STATE OF SOUTH CAROLINA

By WILLIAM HARPER  
STATE REPORTER

SECOND EDITION, WITH NOTES, ETC.

CHARLESTON, S. C.  
M'CARTER & DAWSON  
116 Meeting Street  
1860

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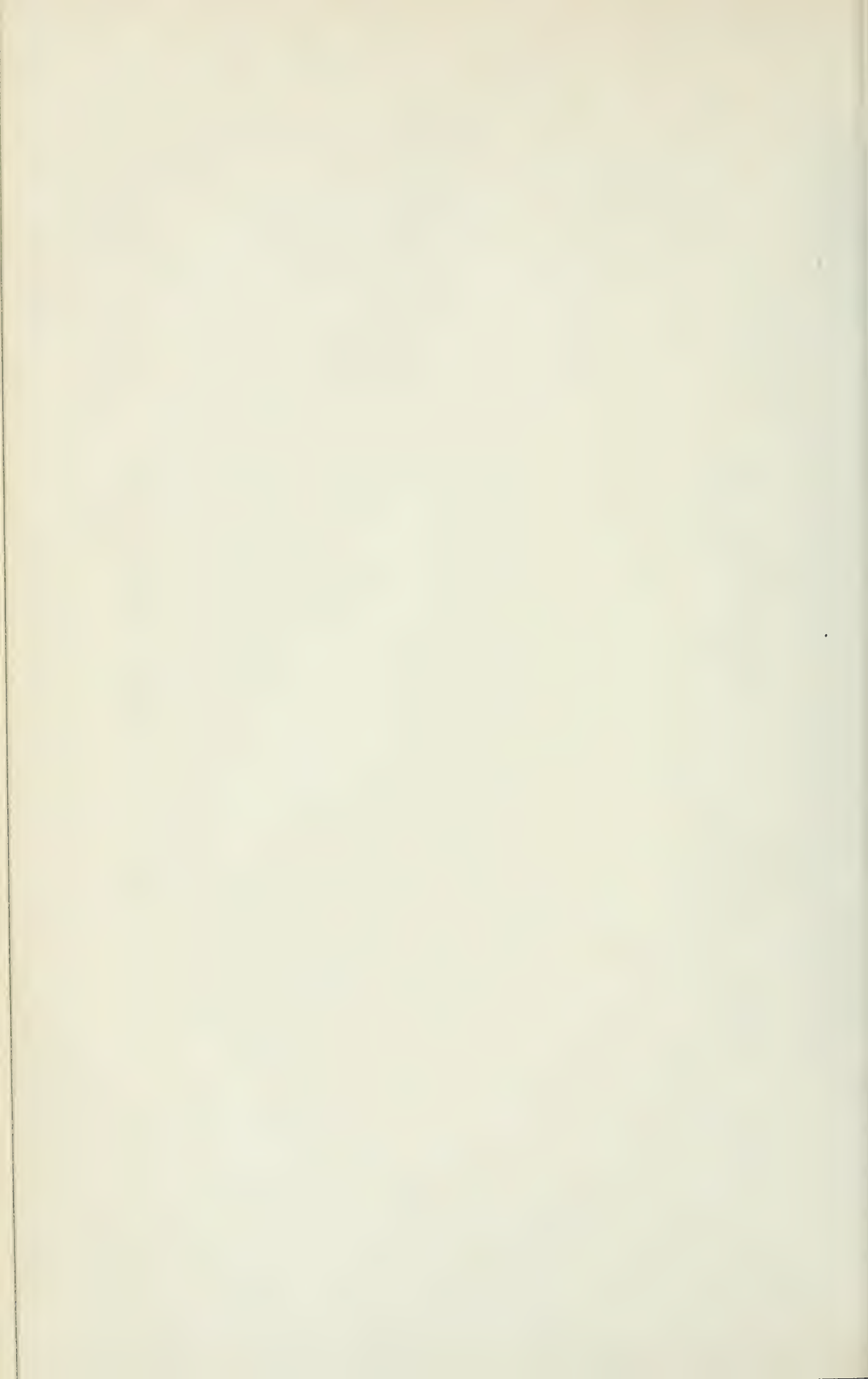
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# CHANCERY CASES

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

IN APRIL TERM, 1825.

### JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

#### I McCord, Eq. \*1

\*JOHN C. LOGAN v. CATHERINE LOGAN,  
Executrix of John Logan.  
(Charleston. April Term, 1825.)

[*Executors and Administrators* ⚡501.]

Executor cannot retain more than  $2\frac{1}{2}$  per cent. for receiving, and  $2\frac{1}{2}$  for paying moneys of an estate. If he claim any further compensation for extra care and trouble it must be assessed by a jury.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2140; Dec. Dig. ⚡501.]

[*Executors and Administrators* ⚡501.]

No difference between services rendered and money paid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. ⚡501.]

[*Executors and Administrators* ⚡487.]

The executor's commissions cover the ordinary expenses, and he will not be allowed for money paid to an accountant for adjusting his own accounts as executor.

[Ed. Note.—Cited in *Jenkins v. Hanahan*, Cheves, Eq. 137.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2259; Dec. Dig. ⚡487.]

[*Executors and Administrators* ⚡501.]

But, it seems, a Court of Equity, without referring it to a jury, may permit an executor to retain for money allowed to agents for adjusting difficult and complicated accounts of the estate, which come not within the pale of his office; as counsel fees, overseer's wages, &c.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. ⚡501.]

[*Executors and Administrators* ⚡459.]

An executor should make his annual return of his accounts, which will prevent their being complicated.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1973, 1974; Dec. Dig. ⚡459.]

[This case is also cited in *Jones v. Jones*, 39 S. C. 251, 253, 17 S. E. 587, 802, regarding compensation of executors.]

The Reporter has not been able to procure any statement of facts in this case. There were however two questions submitted to the consideration of the Court:

First, Whether the executrix was entitled to charge the estate of her testator with her travelling expenses?

Second, Whether she was authorized to charge the estate with money paid to accountants and agents employed in keeping and adjusting her accounts. The Chancellor allowed them, and this was an appeal to set aside his decree?

#### \*2

\*Henry De Saussure, against the appeal. An executor cannot be allowed travelling expenses; for he is not even allowed compensation for services rendered the estate, except the commissions which are allowed by the act of assembly. Pub. Laws, 495, sec. 29. 1 Brev. Dig. tit. Exec. and Adm. The point was expressly decided in *Snow v. Callum*, 1 Desaus. Rep. 542, by Chancellors Mathews and Rutledge. That case, as well as *Ruff v. Summers*, 4 Desaus. Rep. 529, has decided that nothing can be allowed an executor beyond the commissions given by the act, unless assessed by a jury on an issue made up for that purpose. There was no criterion by which to decide whether these expenses were necessary.

Petigru, Att. Gen. contra. The executrix asked for nothing more than to have money refunded to her. Executors were generally entitled to have money refunded them necessarily expended in the execution of their trust. There was a difference between expenses and compensation. In a note to *Snow v. Callum*, the Chancellor, who reports that case, states, that there was a difference between allowing an executor his expenses for employing an

overseer, and allowing him compensation for acting as such himself. In the former case it was allowable, in the latter not; and he presumed that was the proper distinction. *Green v. Winter*, 1 Johns. C. Rep. 37. In *Caffrey v. Darby*, 6 Ves. 497, the Master of the Rolls allowed the expenses incurred in the execution of the trust, though the trustees were guilty of laches and were made to pay the costs. In *Shaftesbury v. Arrowsmith*, 7 Ves. 481, though the executor was allowed five per cent. by the will, yet Lord Eldon suffered him to take allowances under a general trust to sell and manage as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of

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repairs, steward's, bailiff's and game keepers' salaries and expenses, and all other charges and expenses as he should think proper. In *Scott v. Nesbitt*, 14 Ves. 438, an allowance for the expenses of supplies furnished a West India estate was permitted by the Lord Chancellor. In this country it was more necessary than in any other; for executors generally, here, had the management of plantations, which were to be kept up, at considerable expense and trouble. Here the will directs the children to receive their shares on coming of age. The estate would have to be kept up for twenty years, and the executrix must undertake to defray all the expenses of management. It was admitted that an agent might be employed and compensation paid him. What difference was there between allowing the executor his expenses, and allowing him compensation for the agent? Why not defray the expenses of the principal, if the agent is to be compensated? 2 Mad. Ch. 132. The issue at law was only allowable for extraordinary services, but as he only claimed for money laid out, he had no right to such an issue. As to accountants' bills, there is a case in point, *Henderson v. M'Iver*, 3 Mad. Ch. Rep. 275. Could the testator have intended to impose on his wife the necessity of settling complicated accounts at her own expense? It was to the interest of the estate that competent persons were employed to keep the accounts.

Martin, in reply. Executors in England were not entitled to commissions, and therefore it was that expenses were allowed them. Persons who assume such trusts know the compensation allowed by law, and that some expenses and trouble are incident to their engagements, and therefore it is to be presumed that they undertake to discharge them; which is a full answer to the English and New York cases. In the case of *Shaftesbury v. Arrowsmith*, the English Court had allow-

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ed compensation, and expenses besides, which was not pretended here. The distinction is, that where it is necessary to perform a duty by an agent, there compensation is allowed to the agents, because such duties

are not undertaken by the trustee. The case of *Snow v. Callum*, however, settled the question. If such a charge were allowed, it would at once subject the estate to pay all the executor's travelling expenses; for no matter what journey was undertaken, the business of the estate would come in incidentally or otherwise, and the estate would be charged with all. As to an accountant, if the executrix had kept her accounts regularly from the commencement of her duties, there would have been no necessity for one, and this was one of the duties she had assumed to perform.

*Curia per* NOTT, J. Our act of assembly allows an executor to retain out of the funds of the estate two and a half per cent. for receiving and two and a half per cent. on all moneys paid away, as a compensation for his trouble, care and pains in and about his administration. It also provides, that a further allowance may be made for any extraordinary care and trouble; but when a claim shall be made for such further compensation the question must be tried by a jury in the Court of Common Pleas. It is not to be left to the discretion of a Judge or Chancellor. It is now contended that there is a difference between services rendered and money paid for the estate; that the defendant does not ask a compensation for the extraordinary care and trouble, but merely that she may be remunerated the expenses she has actually incurred in the course of her administration. And, although it is admitted that the amount of compensation for extraordinary services can only be ascertained by the verdict of a jury, yet it is contended that a Court of Chancery is competent to decree

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the reimbursement of money actually expended. The distinction is very obvious; and if the question had now for the first time occurred, it might perhaps have been considered as not without its difficulties; but in the case of *Snow* and others v. *Callum*, Exec. of *Snow*, 1 Desaus. Rep. 542, Chancellor Rutledge, who delivered the opinion of the Court, says, "upon considering the Master's report and on examination of the defendant's accounts, the Court are of opinion, that the charges for travelling expenses, overseer's wages, &c. which he has allowed to the executor should be struck out; as they are not warranted by the act of the assembly which regulates the allowance therein given to executors, and this Court has uniformly in such cases referred them, for recovery of such charges, to their actions at law on a quantum meruit."

That case was determined in the year 1797, and the question appears not then to have been decided for the first time; for it is said, that it had always been the uniform practice of the Court to refer the parties to their action at law. It appears, therefore, to settle the first question now submitted to this



Court: for we have reason to believe that the practice has been uniform ever since, and it would be dangerous to innovate upon a practice so long and so well established. I think farther, that the only conclusion that can be drawn from the decision is, that the ordinary expenses of an executor, such as are necessarily incident to his office, are covered by his commissions, and are not to be charged to the estate; and that it is only those expenses which have been occasioned by some extraordinary care and trouble which he is entitled to recover even at law; for it is in those extraordinary cases only that the law allows him the additional compensation. This conclusion, I think, is also to be drawn from the English practice.

In England the Court of Equity allows an executor all his necessary expenses; and the

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reason is, because \*the law allows him nothing for his services. And it would be most unreasonable that he should be required to render his services for nothing, and bear his own expenses. Now it must have been the opinion of our Court of Equity that the commissions allowed to an executor were intended as well to defray his expenses as to reward him for his trouble, otherwise (possessing the same power as the Chancellors in England) his expenses might be allowed without referring him to a Court of Law. And the same reason applies here as in England, because by such an allowance the estate might be loaded and rendered of little value.

The same course of reasoning will lead us to a similar result on the other point made in this case. If the five per cent. commissions are intended to cover the ordinary expenses, they must also be intended as a compensation for the ordinary care and trouble of an executor. He cannot be permitted to accumulate expense by employing an agent to perform the most simple and ordinary duties of his office. Where he performs duties not necessarily incident to his office, such for instance as the duties of an overseer, or performs any other extraordinary services, he may recover compensation by referring his claim to a Court of Law. So where he pays money to agents for the performance of duties which do not come within the pale of his office, such as counsel fees, overseer's wages, and the like, I presume that such charges might be allowed by a Court of Equity. I have no doubt but that an executor might be allowed by a Court of Law, and perhaps by a Court of Equity, to retain money allowed to agents or accountants for adjusting difficult and complicated accounts of the estate. But I should not think him entitled either in law or equity to retain for money paid an accountant for settling and adjusting his own accounts. The present demand is for the adjustment of the defendant's own accounts, and not those of the estate.

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\*The accounts of an executor can never become complicated where he does his duty. He is required to render an annual return to the ordinary of his administration, and if he suffers them to become entangled by his own delay or neglect, he must unravel them at his own expense.

It is the opinion of this Court that the order of the Chancellor on the two points above made should be reversed, and that that part of the Master's report be confirmed. If the defendant thinks that the nature of the estate was such as to require of her duties which entitled her to further compensation, an issue may be directed to try the question.

Motion allowed. <sup>1</sup>

<sup>1</sup>See the cases collected by Mr. Ingraham in the note to the case of *Fountaine v. Pellet*, 1 Ves. Jun. 339, Am. Edition.

#### I McCord, Eq. 7

AUGUSTUS TAVEAU and Wife v. JOHN BALL and ISAAC BALL, Executors of John Ball.

(Charleston. April Term, 1825.)

[Wills  $\S$  630, 728.]

A devise "to and amongst all my sons, born or to be born."—"the division not to take place until the youngest of my said sons shall attain the age of 21,"—vests the estate in those living at the death of the testator, and does not postpone the vesting till the youngest becomes 21. The additional words, "to be equally divided amongst them, their heirs, &c. and in case any of such sons shall die before me, leaving a child or children surviving, such child shall take its parent's share," (no son dying before the parent) do not create survivorship among the sons, where one dies after the testator; but the estate being vested in him, his share was distributable among his next of kin, when the youngest son arrived at 21. But the rents and profits of his share were distributable immediately, the mother's share given to her and the shares of the minors vested in stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig.  $\S$  1469, 1766; Dec. Dig.  $\S$  630, 728.]

[Wills  $\S$  630.]

Where the time of the division is not connected with the substance of the gift, the vesting is not postponed to the period for division.

[Ed. Note.—Cited in *Bryson v. Nickols*, 2 Hill, Eq. 119, 120.

For other cases, see Wills, Cent. Dig.  $\S$  1464-1480, 1486, 1487; Dec. Dig.  $\S$  630.]

[Wills  $\S$  595.]

To raise an estate by implication, it must be by a plain and necessary implication.

[Ed. Note.—Cited in *Vaughan v. Bridges*, 61 S. C. 162, 39 S. E. 347.

For other cases, see Wills, Cent. Dig.  $\S$  1300; Dec. Dig.  $\S$  595.]

The late Mr. John Ball made and duly

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executed his \*last will and testament on the 22d day of May 1816, wherein he did, among other things, devise and bequeath as follows: "Item, I give, devise and bequeath my plan-

tations called Pimlico, Mepsham and Kicklico, left to me by my brother Elias Ball deceased, and all the negroes and slaves which shall be on or belonging to the said plantations at the time of my decease, together with all the stock, plantation, tools and implements on or belonging to the same, to and amongst all my sons, born or to be born by my said wife Martha Caroline, to be equally divided amongst them, their heirs, executors, administrators and assigns, for ever; and in case any of such sons shall depart this life before me, leaving a child or children surviving, such child or children shall take the share intended for the deceased parent or parents for ever, to be equally divided between or amongst them if more than one. And it is my will that the divisions of the said plantations, slaves, stock and other articles, shall not take place until the youngest of my said sons shall attain the age of twenty-one years."

Mr. John Ball, the testator, died leaving the said will and testament in full force and virtue. Since his death, on the 29th of June 1822, Alphonso Comyns Ball, one of the sons of the testator, entitled to a share in the estate so devised, departed this life unmarried and without issue. The widow of the testator and mother of the said Alphonso, after his death, intermarried with Augustus Taveau, and they have filed their bill, claiming a share in that part of the above estates to which Alphonso was entitled under his father's will. The claim was resisted, on the ground that the devise of the plantations, Pimlico, Mepsham and Kicklico, and the slaves thereon, to the sons of the testator, by his wife Martha Caroline, did not give them any present or vested estate, but was contingent, and depended on their severally being alive and in a capacity to take, at the

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time fixed for the division of the estate; to wit, on the attainment of the age of 21 years by the youngest son. It was admitted by the defendants that there was no express survivorship created by the will among the sons to whom these estates were devised. But it was contended, that survivorship was implied among the sons of the testator by his then wife.

DE SAUSSURE, Chancellor. This case has been well argued and many authorities cited by the counsel. The cases on this subject are multifarious, and the shades of distinction are very nice, owing, without doubt, to the endless variety of expressions used in last wills and testaments. But, after all, we must endeavour to find the meaning of the testator by the words he uses, and by giving them a natural and reasonable construction.

In the case we are considering, the testator makes an absolute, unequivocal, devise of the estates in question, to be equally divided among all his sons by his wife Martha Caroline, their heirs, executors, &c. for ever. This devise carries as plain a vested estate

amongst these sons of the testator as tenants in common as can well be expressed; and I think that no question could be raised upon it, if the testator had stopped there; but he has added two other clauses which, it is argued, give a different character to the devise. The first is a provision, that if any of his said sons should die before the testator, leaving a child or children surviving, "such child or children shall take the share intended for the deceased parent or parents for ever, to be equally divided amongst them, if more than one." Now it is evident, that this provision was intended merely for the case of one of the sons dying before the testator, and then his share in the legacy becoming lapsed, though he might have left children. This case has not occurred, and the clause can have no bearing on the question before us. The next clause relied upon is as fol-

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lows: "It is my will that the division of my said plantations, slaves, &c. shall not take place until the youngest of my said sons shall attain the age of 21 years." It is argued for the defendants, that the postponement of the division of the estate prevents its vesting until the appointed period; or rather operates to divest what was previously given absolutely as a vested interest. On the best consideration I have been able to give this will, it does not appear to me that the clause in question produces that effect. The time of the division is not at all connected with the substance of the gift. The preceding clause had given these estates, absolutely and unequivocally to the sons, and gave a plain vested interest. The postponement of the division (which was manifestly a matter of convenience, on account of the nature of the property,) will not in my judgment divest that interest. To be sure, the testator might have used words which would have produced that effect, but he has not used them. Even in cases where the bequest is coupled closely in the same sentence with the time of the division, it by no means follows that the bequest does not give a vested interest. For, in some of them, where legacies are given to children, to be equally divided between them when they arrive at a certain age, the legacies have been held to vest immediately, and only the time of payment postponed. The cases decided by our own Courts have conformed to this doctrine. But it is argued that though there is no express provision for survivorship in the case we are considering, there may be survivorship by implication, and authorities were cited to prove this. There is no doubt of that; but it must be a plain and indeed a necessary implication. Now I do not perceive, on close examination of the will in question, either a plain or necessary implication of survivorship among the devisees.

It is quite possible that if the testator had anticipated the event which has occurred, he



## \*11

might have provided against it, and given the right of survivorship; but he has not done so.

There is one view of the question also, which should make us cautious of creating the right of survivorship among the devisees by ingenious and astute reasoning. If survivorships were given, and one of the elder of these devisees should grow up to maturity and have children, and then die before the time of division, to wit, the attainment of the age of twenty-one years by the youngest son, which may yet happen, this right of survivorship, now so eagerly contended for, would carry away the rights of his children to the survivors. Upon the whole, I am of opinion, that the interest given by the will to these devisees was a vested interest, and transmissible to the representatives of any of them who might die before the time of division, and that no right of survivorship is expressly given, and there is none by plain or necessary implication. With respect to the time of division, I am clearly of opinion that it is definitely fixed by the will, and that we cannot alter that. Mrs. Taveau, and the other representatives of Alphonso Ball, must be contented to wait till the arrival of the period appointed by the testator for the division.

It was contended for Mrs. Taveau, and the other representatives of Alphonso Ball, that if they were not entitled to an immediate division, they were entitled at least to an account of the rents and profits, past and future, of his share of the devised estates, and to receive them annually. The testator has directed accumulations as to other parts of his estate, but he has not made any provision for accumulation as to this part of his estate; and though it will be the duty of the executors and guardians of these devisees to invest the surplus income in productive property, that does not take away the right of complainants to an account, and to receive their share of the rents and profits till the division.

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\*It is therefore ordered and decreed, that the complainants, and other representatives of Alphonso Ball, are entitled to his share of the devised estates now in question, and to have a division thereof when the youngest son of Mr. Ball the testator comes of age.

It is further ordered and decreed, that the executors do account for the rents and profits of the devised estates, and pay over to the representatives of Alphonso Ball, who are now before the Court and claiming, their share of such rents and profits as have already accrued or may hereafter accrue. The mother of the said Alphonso Ball to be entitled to a child's share, and all the brothers and sisters of the said Alphonso, of the whole blood, to be entitled to equal shares of the remainder of the rents and profits, which should be invested for their benefit.

From this decree there was an appeal taken up by the defendants, on the ground that the will did not create a vested interest in Alphonso Ball.

J. E. Holmes, for the appellant. This is a case *sui generis*. The intention can only be gathered from a construction of the different clauses of the will. When the devise appoints a time for the division of the estate, those who are then in esse, alone, can take. 2 Mad. Ch. 17. *Hawes v. Hawes*, 1 Ves. Sen. 14, S. C. 3 Atk. 524. The words, "to be equally divided," do not create a tenancy in common, and destroy the idea of a survivorship. 3 Bac. 679. The testator clearly intended only those should take who were alive at the time the youngest came of age, by the terms used in the will, which amounted to a *descriptio personæ* at that particular time. *Godfrey v. Davis*, 6 Ves. 49.<sup>2</sup>

## \*13

\*Hugh S. Legaré, contra. The words, "to be equally divided," created a tenancy in common, and vested the estate. They did not permit of survivorship. The will provided for the case of a lapsed legacy, but said nothing of survivorship. The maxim, *expressio unius exclusio alterius*, applied. The Court have always been very much opposed to establishing survivorships. *Drayton v. Drayton*, 1 Desaus. Rep. 324. *Montgomerie v. Woodley*, 5 Ves. 522. *Russell v. Long*, 4 Ves. 551.

Grimké, same side. All of our laws look rather to the distribution of property than its accumulation. Real and personal property are governed by the same rules when they are mentioned together. The general intention of the testator is to govern. The circumstances which gave rise to this suit were not foreseen by the testator, and have produced *casus omnisus*, not affecting the general intent. The will provided for contingencies as regarded the legacies to the daughters, but not those to the sons; therefore it appeared that the testator intended the legacies to the sons to vest immediately. The words, "equally to be divided," make a tenancy in common. *Drayton v. Drayton*, 1 Desaus. Rep. 324. 3 Bac. 680. The legacy vested at the death of the testator. The time only referred to the payment. 4 Bac. 393. If the time of division be not the substance of the gift, it is only matter of regulation. 4 Bac. 394, 396. In the case of *Cochran v. Cochran*, 3 Desaus. Rep. 186, a survivorship was created. The case of *Drayton v. Drayton* was a much stronger case for survivorship than the present. *Cro. Jac.* 448. *Sansbury v. Read*, 12 Ves. 75. *Wadley v. North*, 3 Ves. 364. *Cowper*, 777. 3 Atk. 524.

<sup>2</sup>See on this subject the cases collected by Mr. Eden, in his edition of Bro. C. C. (3d Volume, 404.) in a note to *Andrews v. Partington*, a leading case on this subject.

Holmes, in reply. In the case of *Drayton v. Drayton* the persons were named, and therefore it made a clear case of descriptio

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personæ. He relied upon the case \*of *Cochran v. Cochran*, 3 Desaus. Rep. 186, which decided that the legacy did not vest but upon the contingency.

On the 28th of March the Court gave the following certificate: "The Court concur in opinion with the Chancellor in this case, and the decree is therefore affirmed."

Decree affirmed.

#### I McCord, Eq. 14

TAVEAU and Wife v. The Executors of  
JOHN BALL.

(Charleston. April Term, 1825.)

[Wills  $\hookrightarrow$  730.]

The testator, by his will, set apart a particular fund to pay the board of his children while with their mother, to whom he gave his mansion house during her widowhood, and as the children arrived at 21, or married, the principal of the fund to be paid to them. The wife married, and was deprived of the mansion; the Court refused to allow her an additional sum per annum for the board of the two children, although some of the witnesses thought it but reasonable, the children having a large estate, and the wife then having house rent to pay.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1787; Dec. Dig.  $\hookrightarrow$  730.]

This case came before the Court on a petition of Mr. and Mrs. Taveau, setting forth substantially, that John Ball, Sen. departed this life on the 29th day of October, Anno Domini 1817, leaving his widow, at present Mrs. Taveau, and eight children, having previously made and executed his last will and testament, dated 22d May 1816, wherein he nominated and appointed his sons John Ball, Jun. and Isaac Ball, and his nephew John Bryan, executors, the two former of whom had alone qualified and assumed upon themselves the execution of his said will. That in and by the said will, the testator, John Ball, Sen. made a liberal provision for his widow, to be enjoyed by her during widowhood, and that in consequence of the intermarriage of the petitioners, she has been deprived of a very considerable part of the provision and especially of the mansion house. That the testator also made, in and by the said will,

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large and liberal \*devises and bequests to his children respectively; and moreover provided a common fund for the maintenance of his said children by the following clause, viz. "It is my will that the dividends on my Bank stock and the quarterly payments of my Six per cent. stock, which I at present hold, shall be applied in payment for the board of my children by my present wife whilst they remain with their mother; the principal of

which shall be kept together for that express purpose, whilst they are all minors and unmarried; and as they severally arrive at age, or are married, their shares of the principal to be allotted, assigned and transferred to them respectively." That the amount of each child's proportion of the dividend and interest aforesaid was, on an average of years, about \$250 per annum; and that in consequence of the death of one of the children and the marriage of another, and the absence of the remaining sons of the testator, who had been sent to the north by the executors for their education, only three of the children were now residing with the petitioners. That in consequence of these circumstances, the petitioners had been deprived of the shares of the allowance of the said children so dead, absent and married as aforesaid, which in the aggregate was, formerly, sufficient for their common boarding and lodging; and that they found it now more difficult to support the children remaining with them, out of their shares, than it was to support them all out of the aggregate sum of their allowances. And they therefore prayed that the same may be referred to the Commissioner, to report what additional allowance should be made by the executors for the maintenance of the said children.

Whereupon the petition was referred to the Commissioner to report thereon under an order of Court, and upon the reference before him it appeared, by the testimony of Mrs. Stafford and Mr. E. S. Courtney, that \$250 per annum was sufficient; as they themselves

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had \*furnished children of the same age with board at that price, and that the rate of board had diminished. Major Laval and Mr. James Mathews, who, from having families, were regarded as competent to estimate domestic expenses, stated as their opinion, that \$400 for each would be reasonable and not extravagant. It also appeared by the statement of the executor, that the proportion of the estate of the testator to which Mrs. Taveau was entitled, excluding what she had lost by her marriage, amounted to about \$30,000, and that the annual income of each child's share of said estate was \$2,500. It also appeared that the board of the children had been abundant, comfortable and elegant. The Commissioner (Elliot) upon the foregoing testimony reported, that, "However much disposed to increase the appropriation, from the liberal manner in which Mrs. Taveau has fulfilled her part, yet the solemn testament of Mr. Ball must be complied with, unless opposed by urgent circumstances. That strong case of necessity which would induce the Court to alter and amend a will does not appear to have been established. I therefore cannot recommend that the prayer of the applicants be granted." To this report the following exceptions were filed.



1st. That the Commissioner had erred in his construction of the will, which clearly intended Mrs. Taveau to have the income from the stock to provide only for the board of the children, and that upon the loss of the large provision made her in the will, and especially of the mansion house, she was entitled to an additional allowance, on account of her being obliged to pay house rent.

2dly. That according to the testimony, the allowance per annum that ought to be allowed, to cover board and lodging, should be at least \$400, the average upon the testimony of all the witnesses being \$325.

James, Chancellor. The will in this case

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directs that \*the principal of the Bank and Six per cent. stock shall be kept together for the express purpose of paying the board of the children of the testator's last wife. By this clause it appears that this was the only fund intended by the testator for that pur-

pose. Good judges of the price of boarding think it enough, and I am not inclined to extend the allowance further than the will permits me to go. Therefore the report is confirmed. Each party to pay their own costs.

From this decree there was an appeal, on the grounds taken in the exceptions.

Grimke, for the complainants. The will only provides for boarding the children. The widow had a house during widowhood, and upon losing that an allowance must be made for lodging the children or, in other words, for house rent. The will only provides for board, not for lodging.

J. E. Holmes, for the executors. The will was explicit and must control the question. Board and lodging are the same thing.

*Curia, per* NOTT, J. The Court concur in opinion with the Chancellor in this case, and his decree is therefore affirmed.

Decree affirmed.

# CHANCERY CASES

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

IN MAY 1825.

JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

I McCord, Eq. \*18

\*GEORGE POOSER and Others v. THOMAS TYLER and Others.

(Columbia. May, 1825.)

[Deeds  $\hookrightarrow$ 124.]

A limitation in a deed, of negroes and their issue, to W. T. and his heirs lawfully begotten in wedlock with E. T. (his wife) for ever, vests an absolute estate in W. T.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 346; Dec. Dig.  $\hookrightarrow$ 124.]

[Evidence  $\hookrightarrow$ 461.]

The gift being by deed, parol evidence is inadmissible to give it a different construction from that apparent on the face of the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1725, 2129–2133; Dec. Dig.  $\hookrightarrow$ 461.]

The bill in this case charged, that Rebecca Minnick gave to William Tyler, the father of the defendants, sundry negroes and their increase, by deed which was in these words: "to him and his heirs lawfully begotten in wedlock with Elizabeth Tyler, formerly Elizabeth Young," to have and to hold to the use of the said William Tyler and his lawfully begotten heirs for ever. That the said William Tyler in his life time divided the said negroes among his children, the de-

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fendants, and great \*grand children of the said Rebecca, and alleged that the defendants were bound to bring the said negroes into hotchpot with the complainants, who were children of William Tyler by a second wife, or consider the division as void, and make a legal distribution of them with the second wife, and her children, of the said William Tyler.

The answer admitted the execution of the said deed by the said Rebecca Minnick, but charged that the negroes, thereby given, were, after the death of their mother, vested in them by the terms of the deed. That if not vested, yet such was the meaning and intent of the said Rebecca as understood both by herself and William Tyler, their, the defendants, father. That in pursuance of such intent, the said William Tyler made the division complained of in the bill. That if the deed did not vest in the defendants the negroes in question after the death of their mother, yet as such was the intent and understanding of all the parties to the deed, and the division made in pursuance of such understanding, the partition of the negroes in question would not only be suffered to remain undisturbed, but the Court would refuse to order the negroes to be brought into hotchpot. Testimony was offered to prove the meaning and intent of the deed by the parties, and rejected.

Thompson, Chancellor. Rebecca Minnick, by deed duly executed, bearing date the 15th of November 1792, gave to her grandson, William Tyler, the negroes mentioned in the deed, with a remainder over to his lawful heirs, "lawfully begotten in wedlock with his wife Elizabeth Tyler, formerly Elizabeth Young," with an habendum to the said William Tyler and his lawfully begotten heirs for ever; absolutely, without any manner of condition, for ever. Elizabeth Tyler departed this life in the month of July 1813,

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leaving her said husband and six \*children surviving: to wit, Henry Tyler, Thomas Tyler, William Tyler, Elizabeth Tyler now the wife of John Sanford, Ann Tyler now the



wife of James Simmons, and Elisha Tyler. Henry Tyler departed this life in the year 1815, leaving a widow, who has since intermarried with William Riley, and three children, named in the bill. William Tyler, the donee, had possession of the negroes, from the date of the deed until the month of March 1818, when he intermarried with the oratrix. On the 15th of October 1811 he made a division of the said negroes with his children by his first wife, who was the grand daughter of the donor, Rebecca Minnick, which children are the defendants in the present suit, and gave them possession thereof, which they have since held. William Tyler departed this life in the year —, leaving a widow, the present complainant, and a minor son, also complainant by his guardian.

The object of the bill had a double aspect: The first was to set aside the division made between the said William Tyler and the defendants, which has been abandoned; the second was to compel the defendants, in the event of their claiming a division and partition of the estate of the intestate William Tyler, to bring into hotchpot the advancement made to them by virtue of the said division. Upon a scrupulous examination of the deed, it will be found to be absolute, unconditional and unfettered with any limitation, to William Tyler. He had a right to dispose of the negroes in whatever way he thought proper. He did exercise that right, and with more discretion than men generally do in similar cases. He was about to enter into a second marriage, and inasmuch as these negroes came to him by the grandmother of his first wife, he divided them among her descendants. The undisposed property of which William Tyler, intestate, died possessed, will have to be divided between the oratrix and her son, according to the act of the legislature in such case made and provided.

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\*But should the defendants claim any part or proportion thereof, they will have to bring into hotchpot the advancement made to them by their father in his lifetime: but should they choose not to come in for a division of the residue of their father's estate, the share which they have received under the aforesaid division is hereby ordered and adjudged to be absolutely vested in them respectively.

It is further ordered, that a writ of partition do issue to divide the intestate's property according to the intention and meaning of this decree, and that all matters of account be referred to the Commissioner: the costs to be paid out of the estate.

From this decree Felder, for the defendants, appealed.

1. Because the deed vested the negroes in the defendants after the death of their father and mother.

2. That as it was the intent and meaning

both of the donor and donee, that the negroes should be vested in the defendants, and the division made in pursuance of such meaning and intent, the Court would neither disturb such division, nor decree the property thus divided to be brought into hotchpot.

3. That his Honour the Chancellor erred, in rejecting testimony to prove the true meaning and intent of the said deed, as understood by all the parties concerned.

4. That the reservation and conditions in the deed rendered it void, and William Tyler, the father of the defendants, received the negroes as a gift by parol, the conditions of which it was competent to prove by parol testimony.

Stark, for the complainants.

*Curia, per* NOTT, J. There are but two questions for the consideration of the Court in this case.

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\*First, it is contended that the deed gave a life estate to the donee, with a limitation to the defendants.

Secondly, That the Chancellor erred in rejecting parol evidence, to prove the true intent and meaning of the deed as understood by all the parties concerned.

By the deed the property is given to "William Tyler and his heirs lawfully begotten in wedlock with Elizabeth Tyler formerly Elizabeth Young." These words would limit the property, in perpetual succession, to the lineal descendants of the donee, which the law will not allow. The limitation is too remote and therefore void, and the estate became absolute in the first taker, William Tyler: And the gift being by deed, no parol evidence could be admitted to give it a different operation from that appearing on the face of the instrument. The decree must therefore be supported.

Decree affirmed.

### I McCord, Eq. 22

HASKELL et al. v. RAOUL et ux., Executor and Executrix of Paul Thomson, who was Executor of Colonel Thomson.

(Columbia. May, 1825.)

[*Appeal and Error* ⇐1199.]

A Chancellor cannot enlarge or modify a decree of the Appeal Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4674; Dec. Dig. ⇐1199.]

[*Appeal and Error* ⇐1217; *Equity* ⇐446, 447.]

Bills of review granted for the discovery of new matter, which had come to the knowledge of the party after the determination of the cause, and for error in the decree itself, being error of law; but quære, if a bill of review will lie in England, after a decree of the House of Lords.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4718; Dec. Dig. ⇐1217; *Equity*, Cent. Dig. §§ 1079, 1091; Dec. Dig. ⇐446, 447.]

[Equity ⚡445.]

Bills of review, it seems, will lie in this state for the same causes that they are allowed in England.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. ⚡445.]

[Equity ⚡422.]

A decretal order upon which execution may be taken out is a final decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 947; Dec. Dig. ⚡422.]

[This case is also cited in *Manigault v. Deas*, Bailey, Eq. 296; *Jeannerett v. Radford*, Rich. Eq. Cas. 472; *Price v. Nesbit*, 1 Hill, Eq. 458; *Hinson v. Pickett*, 2 Hill, Eq. 355; *Ex parte Vandersmissen*, 5 Rich. Eq. 526; *Hill v. Watson*, 10 S. C. 276, 277; *Ex parte Farrars*, 13 S. C. 259; *Ex parte Knox*, 17 S. C. 209, 212; *Cook v. Jennings*, 40 S. C. 212, 18 S. E. 640; *Bankhead v. Good*, 56 S. C. 394, 34 S. E. 689, on the allowance of bills of review.]

The bill was filed in this case by creditors, for payment of their demands out of the estate of Colonel Thomson.

Major Haskell's demand was on a covenant of warranty in a conveyance of Colonel Thomson, dated 11th of May 1793, by which,

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in consideration of £2,200, he \*conveyed to Major Haskell five tracts of land on High-hill Creek, containing 1240 acres, and known as Mount Thomson. Before the date of this deed, viz. 10th of May 1786, Colonel Thomson had mortgaged three of these tracts to the commissioners of the Paper Medium Loan Office, to secure the payment of a bond of him, the said Colonel Thomson. William R. Thomson and Derrill Hart conditioned for £750. On the 30th of March 1814 the three tracts mortgaged to the Loan Office were sold, under the mortgage, to satisfy the balance of the bond.

Fisher and Edwards were bond creditors of Colonel Thomson, and assigned their bond to Bourdieu, Chollet and Bourdieu, complainants in the bill.

Another party to the bill, Colonel Cochran, claimed a balance due him for his services, as an assignee of Colonel Thomson, in settling his affairs. Major Haskell claimed a small balance in the same right. As this claim had been disposed of and was now abandoned, it is unnecessary to go into the particulars of it.

The defendants relied on length of time as presumption of satisfaction. They contended also, by their answer, that the estate of Colonel Thomson had been settled by Paul Thomson, and the residue paid over to the legatees. Against the demand of Major Haskell they relied on the fact, that before the date of his deed, the same plantation, with other property, had been conveyed to him and two other trustees (Colonel Cochran and J. P. Thomson) in trust to pay Colonel Thomson's debts; and contended, that the conveyance afterwards of the same plantation to him was fraudulent and void. They

contended also, that he took the plantation subject to the mortgage.

At the hearing, the conveyance of Mount Thomson and the covenant of warranty were proved; also the sale of the same plantation

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by the state, under Colonel Thom\*son's mortgage. It was further proved, that the interest on the loan office debt had been regularly paid by John Paul Thomson since his father's death. That Colonel Thomson died in 1796 possessed of a great estate. That John Paul Thomson was his principal legatee and executor. That he made a contract with the residuary legatees, and purchased their shares; by which means he became sole owner of the testator's estate, except some pine barren land, which was to be divided among the legatees according to the agreement between them and Mr. Thomson. By his will J. P. Thomson, in 1812, devised his estate to his widow and executrix, who paid the interest on the Loan Office debt for one year, and intermarried with Dr. Raoul, who refused to pay further, and in consequence the plantation was sold, as already stated.

In support of the claim of the assignees, they produced the deed of assignment, and gave evidence of the trustee's acts and of a statement signed by J. P. Thomson in 1797, stating the amount due the assignees for their services at £743; and proof that J. P. Thomson received towards that sum £236, while Major Haskell received only £197, and Colonel Cochran £100. Evidence was also given that £720 came to the hands of J. P. Thomson in 1794, for which he did not account to the other assignees. But the defendants here proved, that there was a final settlement between the assignees in 1797 and mutual releases.

Fisher and Edwards' bond, and the assignment to Bourdieu, were regularly proved, and that in 1810 or 1811 J. P. Thomson acknowledged this debt and promised to pay it.

The decree rejected the claim of the trustees, and ordered the land sold, which, by the agreement between J. P. Thomson and the legatees of Colonel Thomson, was to be divided among those legatees. The sale was ordered to raise money to pay Bourdieu.

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\*As to Major Haskell's demand, the Judge directed the bill to be amended, so as to make the co-obligors in the Loan Office bond defendants.

From this decree all parties appealed to the late Court of Appeals in Equity, and the Court of Appeals, after hearing the case, by their decree of 17th December 1822, declared, that the debt of Bourdieu should be satisfied, and rescinded the order to amend the bill. But in lieu of amending the bill, declared Haskell and Cochran accountable for the moneys they received in 1797 for their services, and interest from that time. Declared Raoul to be accountable as the repre-



sentative of J. P. Thomson for the sum he received, deducting what he might have paid towards Colonel Thomson's debts, and if this fund should not be sufficient to pay Bourdieu and Major Haskell, then the deficiency should be paid by the defendants out of Colonel Thomson's estate; and ordered a reference on these points.

Mr. Jones, Commissioner at Orangeburg, by his report dated the 19th of February 1824, found the amount then due Bourdieu \$2,511.85. To Major Haskell \$4,012.77. And the amount of principal and interest on the sum received by Major Haskell in 1797, for his compensation as an assignee, \$2,423. The amount on the sum received by Colonel Cochran \$1,242.57.

In January 1825 the cause was heard by Chancellor Thompson on the report and exceptions, who made the following order: "It is ordered and decreed, that the report of the Commissioner relative to the matters of account be confirmed. The other parts of the case have been already adjudicated."

From this decree the complainants now appealed to this Court, established in December 1824, and moved to have the decree enlarged and modified, for the following among other reasons.

1. That the decree left every thing at

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large; without \*determining the sums to be paid, or the parties who were to pay or the parties to whom payment was to be made.

2. Major Haskell and Col. Cochran submitted that the decree of the Court of Appeals was interlocutory only, and still under the control of this Court. But as the same could not be acted on without giving to Bourdieu an execution against his co-plaintiffs, and to Haskell, also, an execution against his co-plaintiff, which was unprecedented, the Court should now make a final decree and reject so much of the decree of the Court of Appeals as was repugnant, and order the debts that have been proved, paid out of the estate of Col. Thomson.

But should the Court be of opinion not to grant such an order for payment out of the estate of Col. Thomson, they prayed that a rehearing might be granted them, on the following grounds:

First. That the decree in the points complained of, viz. in the declaration that Haskell and Cochran were accountable for the sums they received, for their services, was extra-judicial; as being made on matters not in issue.

Second. That it was unjust; because Major Haskell and Col. Cochran never were heard against the claim for the sums received by them in 1797, nor ever heard of such a claim before the decree was pronounced.

Third. That it was erroneous, because it was legal for them, with the consent of those concerned, to receive the money; and even if it had not been legal, the defendants or

representatives of J. P. Thomson could not complain, as he was a party to the act, and, whoever might have been injured he was not injured by it. And even if the act was not legal, and if in fact John P. Thomson had been injured, the defendants could not have such a claim at this day, because their testator confirmed this act by acquiescence of almost twenty years, by his solemn deed and by many other acts of confirmation.

Lastly, by rehearing the case the interests

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of all parties would be promoted, and would render a bill of review unnecessary, which would otherwise lie in favour of the residuary legatees, whose land had been sold, inasmuch as they were not parties to this suit, and had a right to contest the decree by a bill in nature of a bill of review.

The complainants for the foregoing reasons prayed that the cause might be reheard, and that the same might be taken as a part of their petition.

Petigru, for the appellants, cited 4 Johns. Cha. Rep. 619. A person may go into a Court of Equity when he wants a discovery of assets, and relief is incident to discovery. The question of commissions was not in issue. One complainant cannot have a decree against another. The rights of a plaintiff are to be protected by his oath. 6 Ves. 174. 7 Wheat. 528. 2 Atk. 333. Mitford. 77. 78. 3 Mad. Rep. 174. 452. 474. Trustees are entitled to commissions by the act of assembly. Public Laws, 202. The cestui que trust may, if he pleases, allow commissions, and Paul Thompson has done so. Granting a rehearing is in the sound discretion of the Court. 1 Johns. Cha. Rep. 48. 2 Johns. Cha. Rep. 317. Mad. Chan. 483, 484. 3 P. Wms. 442. Har. 622, 624. 2 Atk. 384. A decree to refer matters to the Commissioner for his report is only an interlocutory decree. 10 Ves. 34. 1 Munf. Rep. 507. Gilb. For. Roman. 182. 2 Cranch, 33. The object of the appeal is to render a rehearing unnecessary. 9 Wheat. 859. 16 Johns. 415. 2 Atk. Rep. 439. Courts will sometimes not enforce a decree. Mitford, 87.

Harper, contra, cited Dormer v. Fortescue, 2 Atk. 282. A decree is considered final which settles any principle except equities reserved. A decree at the Rolls confirmed

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shall not be reheard. 2 Mad. Ch. 371. \*413. 423. 3 Desaus. Rep. 536. Aliffe v. Murray, 2 Atk. 59. Defendant may have a decree without a cross bill. 2 Mad. 327. 13 Ves. 546. 15 Ves. 525. If one trustee permit another to waste the property, they shall both be liable. 3 Bro. C. C. 112. 7 Ves. 186. 2 Bro. C. C. 114. 9 Ves. 103.

*Curia, per COLCOCK, J.* From the view which is presented to us of this case, we are first to determine, whether there are any grounds for an appeal from the late decree

of Chancellor Thompson, at the sitting in Orangeburg, in January 1825.

It appears that this case was first heard by Chancellor Gaillard, in September 1822, who made a decree thereon, from which decree an appeal was taken to the Court of Appeals in Equity, at their sitting in December 1822, which Court entered into the consideration of all the matters and things presented by the pleadings of the parties, and made a full and final decree thereon, referring it to the Commissioner to ascertain the amount of the demands of the complainants, and the amount of the commissions received by the trustees of Colonel William Thomson for their services, which commissions were to be refunded by them, and to constitute a fund, so far as it would go, out of which to pay the complainant's demands: ordering and decreeing that the said demands should be paid, so soon as the Commissioner's report was confirmed. At the last sitting of the Court of Equity, at Orangeburg, this report was made. No exceptions to it were taken; and the Chancellor proceeded to order and decree a confirmation of the said report; observing "that the other parts of the case had been adjudicated." No arguments were used, nor authority adduced, to shew that the Chancellor had the power to enlarge or modify the decree made by the Appeal Court. Nor indeed can any be conceived; for, if he had the power to alter, in the smallest particular, the decree, the same power would

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\*have authorized him to reverse it entirely; which would involve a manifest absurdity. The Chancellor, under the circumstances, could have made no other decree than that which he has made; and had no power, if it had been necessary, to alter the decree of the Appeal Court. This appeal is therefore dismissed.

The next subject for the consideration of the Court is, whether the petition for a bill of review shall be granted? And had it been as well understood at the commencement, as it was at the conclusion, of the argument that this application had been rejected by the Court of Appeals of Equity, the argument would not have been heard. But it was contended that the motion was not refused, because argument was not heard on the application for the bill of review. A refusal to hear the argument was a refusal to grant the motion: so the Court refused to hear the argument, because they had solemnly determined the point in the case of *Burn v. Poaug*, 3 Desaus. Rep. 610. But, in effect, argument was heard, as will appear by a reference to the case in the Constitutional Reports, Tread. Ed. On the argument of the motion to be heard, the counsel went into all the grounds which have now been presented. This Court consider the point as settled, and have no disposition to disturb the decision, being well satisfied that it is

a judicious decision, and in furtherance of the views of the legislature, in the organization of that Court, and well calculated to remove some of the most serious and well founded objections to the exercise of the Chancery jurisdiction. In England bills of review are granted for two causes—1st. The discovery of new matter, which had come to the knowledge of the party, after the determination of the cause. 2d. For error in the decree itself, which must be error in law. And it is, at least, doubtful in England, whether a bill of review would be granted, after an affirmance of a decree by the House of Lords. It is certainly the usual course of the Court to refuse them.

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\*While it is of the utmost importance that proper tribunals of justice should be established in every well regulated community for the determination of the rights of its citizens, it is of still greater importance that a speedy determination of those rights should be had. The delay of justice is often a denial and, in some cases, worse than a denial of justice. Interest reipublicæ ut sit finis litium has grown into a maxim; and in the frequent discussions which have taken place, as well in this state as elsewhere, on the propriety or necessity of this jurisdiction, it has always been urged as one objection to it, that it is attended with enormous expenses and great delay. And why, it might be asked, should greater opportunities be offered to parties litigant in this Court to prosecute their rights than are offered to them in other Courts? The manner of conducting the business of the Court by reference to the subordinate officers of the Court affords facilities not to be met with in other Courts; and as to the determination of principles, why should more time be allowed in one Court than in another. An appeal in England being attended with an expense which few can bear, a rehearing or review may be necessary. But here the Court of Appeals is accessible to all and, in the exercise of its legitimate powers, can and does answer all the beneficial purposes which can arise from bills of review for error in the decree; for we are not to be understood as saying that a bill of review for newly discovered evidence (subject to all the conditions and regulations prescribed on those occasions) may not be granted; as, it appears, was done by the Court of Appeals of Equity in the case of *Lang and Perkins*.<sup>1</sup>

<sup>1</sup>PERKINS v. LANG, (Columbia, 12 December 1818.)

[This case is also cited in *Manigault v. Holmes*, Bailey, Eq. 296; *Carr v. Green*, Rich. Eq. Cas. 408; *Price v. Nesbit*, 1 Hill, Eq. 458; *Edgerton v. Muse*, 2 Hill, Eq. 52; *Hinson v. Pickett*, 2 Hill, Eq. 355; *Hill v. Watson*, 10 S. C. 277; *Ex parte Knox*, 17 S. C. 209, 215; *State v. Turner*, 39 S. C. 425, 17 S. E. 885, on the allowance of bills of review.]

Chancellor GAILLARD. "This case brings before the Court the question whether, under our present system, a bill of review will lie? The act



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\*A further view of the subject was presented to the Court by the counsel for the appellants. He contended that although a bill of review may not be had in the case of a final decree by the Court of Appeals of Equity, yet that this was only an interlocutory decree, and consequently subject to review. A brief review of the matter submitted to the Court, and their decree, will shew that the decree is final.

But it is not necessary to determine this point more than any other in the case; for the whole matter was before the Court of Appeals as before observed, and the motion was refused by them, which is enough for this Court. I cannot forbear, however, a single remark on the authorities referred to by the counsel in support of his position.

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The first case, *Smith v. Eyles*, 2 Atk. \*Rep. 384, was an attempt to make a decree to account so far final as to take preference to a judgment. The marginal note is, "a decree quod computet makes no variation as to an executor; for before a final decree he may confess judgment, and it does not at all alter the nature of the demand." In the argument of the counsel, it is put on the footing of a mutual account between the parties; and

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\*of 1808 declares that the decrees of the Court of Appeals shall be final and conclusive, and it would be manifestly contrary to its intention to allow bills of review for error on the face of them; and it would also involve this inconsistency, that after a case has been solemnly determined by this Court in the last resort, a single Judge on the Circuit might cause this decision to be again brought into question. This cannot be. The Court, on a former occasion, has said that, on fresh application, it would correct any gross errors or mistakes in a decree, obvious on a mere statement, when the correction can be made consistently with the principles of the decree itself. Under our former equity system bills of review lay. The act of 1808 is silent respecting them, and there is nothing either in its words or spirit to deprive this Court of its power to grant them, on the discovery of new matter, made since the decree, which matter the party applying for the bill could not have the benefit of in the first instance; making a new case, and one proper for equity jurisdiction. The application in this case is of this description; and I think the Circuit Judge was right in over ruling the demurrer. It is therefore ordered and adjudged that the decree of the Circuit Court be affirmed. "Chancellors DE SAUSSURE, WATIES and JAMES concurred."

[Ex parte MURRELL.]

[This case is also cited in *Carr v. Green*, Rich. Eq. Cas. 408, on allowance of bill of review.]

In a subsequent case *Ex parte John R. Murrell*, Mr. Green of Georgetown presented a petition to the late Appeal Court in Equity at Columbia, May Term 1824, for leave to file a bill of review. I find the following entry on the docket by the Court: "The petition neither granted nor refused; but Mr. Green left to pursue his own course by bill of review in the Circuit Court."

so the Chancellor considers it. He begins by saying "he thought the question settled, but that he finds ingenious men make distinctions, where the thing itself will not admit of them." And he concludes that, in such cases of account, the words that "each party do pay" do not amount to a final decree; but have been properly compared to interlocutory judgments. The next is the case of *Perry and Philips*, 10 Ves. 34, (which was a reference of mutual accounts) is not final. And in that case the Chancellor also puts it on that footing; and the counsel Mr. Romilly properly observes, that execution could not be taken out without some further order. Now in this case, there is nothing to prevent the parties from taking out their executions for the amount of their demands, as ascertained by the Commissioner, against the property pointed out as liable for them. The motion is dismissed.

## I McCord, Eq. 32

HEZEKIAH THOMSON v. WILLIAM SCOTT and JOHN BOSTICK et al.

(Columbia. May, 1825.)

[Wills ⇨482.]

A testator must have a legal or equitable title in lands devised, at the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1011; Dec. Dig. ⇨482.]

[Specific Performance ⇨39.]

Quære, Whether a parol agreement for the sale of lands, even when so far executed that equity would decree a specific performance, conveys a devisable interest

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 114–119; Dec. Dig. ⇨39.]

[Specific Performance ⇨28.]

To obtain a specific performance of a parol contract for the sale of lands, it must be clearly shewn what the agreement was.

[Ed. Note.—Cited in *Massey v. McIlwain*, 2 Hill, Eq. 426; *Lyles v. Kirkpatrick*, 9 S. C. 268.

For other cases, see Specific Performance, Cent. Dig. §§ 61–68; Dec. Dig. ⇨28.]

[Specific Performance ⇨41.]

That it has been partly carried into execution on the one side, with the approbation of the other.

[Ed. Note.—Cited in *Massey v. McIlwain*, 2 Hill, Eq. 426; *Lyles v. Kirkpatrick*, 9 S. C. 268.

For other cases, see Specific Performance, Cent. Dig. §§ 120–123; Dec. Dig. ⇨41.]

[Specific Performance ⇨94.]

The party who comes to compel performance must shew that he has performed on his part, or that he has been able and willing, and still was ready to perform his part of the contract.

[Ed. Note.—Cited in *Massey v. McIlwain*, 2 Hill, Eq. 426; *Lyles v. Kirkpatrick*, 9 S. C. 268.

For other cases, see Specific Performance, Cent. Dig. §§ 249–256; Dec. Dig. ⇨94.]

[*Specific Performance* ⇨41.]

Part execution must be by mutual consent.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 120–123; Dec. Dig. ⇨41.]

[*Specific Performance* ⇨47.]

Where a purchaser is suffered to continue in possession and to make improvements with the knowledge of the vendor, consent may be inferred.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 132; Dec. Dig. ⇨47.]

[*Specific Performance* ⇨46.]

It seems actual possession is necessary.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 128; Dec. Dig. ⇨46.]

[*Specific Performance* ⇨41.]

The Court acts upon the ground of fraud in refusing to perform, after performance by the other party.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 120–123; Dec. Dig. ⇨41.]

[*Specific Performance* ⇨66.]

He who asks equity must shew that he has done equity.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 197; Dec. Dig. ⇨66.]

[*Specific Performance* ⇨43.]

Performance will be compelled when the vendee has performed his part, and gone into possession with consent of vendor.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 125, 130, 131, 134–139; Dec. Dig. ⇨43.]

[*Specific Performance* ⇨102.]

It must be a strong case to induce the Court to determine the question of specific performance in a collateral way.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 318, 319; Dec. Dig. ⇨102.]

William Scott died in January 1823, seised

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and pos\*essed of several tracts of land set forth in the bill and answer. He left neither wife nor child, but several sisters, of whom complainant, Thomson, married one, and the following nephews and nieces, children of his deceased brother Samuel Scott, his heirs at law: to wit, Joseph Scott, William, John, Samuel, James, Sarah, Mary and Jane Scott. The bill was filed for partition of the above lands, to which William Scott acquired a legal title after the date of his will. Partition of these lands was not resisted by the defendants, except of the tract conveyed to William Scott by William Watts, as to which the following facts were proved. In February 1820 the testator purchased this tract from Watts, and received possession; but no titles were executed at the time. The testator put John Bostick in possession as his tenant. In June 1820 the testator executed his last will and testament, by which, after giving some pecuniary legacies to his sisters, he devised the whole of his estate, real and personal, to his nephews and nieces above named. On the 24th of November 1820 William Watts executed ti-

ties for the lands in question to the testator.

The complainant contended, that the testator was not seised of the Watts' tract at the date of his will, and that the same did not pass under it, but was subject to partition among his heirs at law.

Isham Woodward, the only witness examined, said that Scott took possession immediately after the 7th of February 1820. He rented it out, the same year, 1820, in February or March, to John Bostick; and he knew that Bostick made a crop on it that year.

Thompson, Chancellor. The bill charges that the late William Scott made his will on the 28th of June 1820. That subsequently to the execution of his will he purchased several tracts of land, all of which, the defendants admit, are liable to distribution, ex-

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cept one tract of \*six hundred acres purchased of Thomas Watts. Woodward, a witness on this part of the case, states that William Scott purchased the land of Thomas Watts prior to the 20th of February 1820; that John Bostick purchased for Scott, but he does not know why a deed was not made for it at the time of the purchase. Titles were not executed, however, until about the 24th of November 1820. The defendants resist the partition of this tract of land, contending that this tract was purchased previously to making the will, but it no where appears that the contract made between Bostick and Watts was ever reduced to writing until the making of the titles in November 1820. This conveyance must be considered as the only evidence of the purchase. It is therefore ordered and decreed that a writ of partition do issue, to be directed to ———, to divide the said tract of land, as well as the other tracts mentioned in the answer, between and among the several parties in the will named, according to their several rights and interests.

A motion was now made to reverse the decree of the Chancellor, on the ground that as the purchaser had taken possession, it was such an execution of the contract as gave him an equitable title, and therefore the land passed under the residuary clause of the will.

W. F. De Saussure, for the appellants. The heirs at law of William Scott seek partition of several tracts of land acquired by the testator after the making of his will; and, among others, of a tract which he had contracted to purchase, had received possession of and rented out, anterior to the execution of his will. Some of the defendants, who are general residuary legatees of the testator, resist the partition of the last tract among all the heirs at law, upon the ground that the testator had a devisable interest

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therein, and that it \*passed to them under



the general residuary clause. The testator might have enforced specific performance. Possession given and received, in reference to a contract, is sufficient part performance. It has been denied, that payment of the purchase money is part performance, but where possession has been given and received in pursuance of the contract, it has always been deemed part performance. *Clinan v. Cook*, 1 Scho. & Lefr. 41, and *Foxcraft v. Lister* there cited.

The rule stated most strongly against the legatees amounts to this, "That no act shall be considered such a part performance as will take the case out of the statute, but one which would render a refusal to perform on the other side a fraud." Apply the rule to this case. If the seller denies that a contract is made, Scott becomes a trespasser. He received possession, and leased out the land, acting upon the faith of the contract, and the lessee, upon eviction, would have a right to sue him. *Ambler*, 586. If the testator could have enforced specific performance at the date of his will, had he a devisable interest?

In *Roberts on Wills*, 296, it is said, the testator must be seised in fee. The word "having" in the English statute is so construed; but if the land would descend to the heirs, no disposition being made by will, it is surely subject to be devised by the testator. The one is the disposition of the law, and the other of the party. To this effect are the later cases: *Roe v. Jones*, 1 H. Black. 30. And Lord Kenyon says, 3 T. R. 88, that "having," in the statute, means "having an interest," and that the distinction is between such a contingent interest and a mere possibility or hope of succession, as that of an heir from his ancestor; between a bare possibility and a possibility coupled with an interest. Real estate, contracted for, is in the purchaser from the date of the contract, and is devisable. See *Attorney General v.*

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*Vigors*, 8 Ves. 256. *Roberts on Wills*, \*297. And if the contract fails, the devisee shall have either money or land. 4 Bro. C. C. 31. He cited *Cruger v. Heyward*, 2 Desaus. Rep. 422, to shew that contingencies and remainders are devisable. Does not the title, which was executed after the date of the will, have relation back to the time of the contract, which was before?

The words of our statute are, "any person having right or title to any lands, tenements or hereditaments, &c. may dispose thereof by will." Pub. Laws, 491. The testator had a right to the land, though he had not the title at the date of the will. These words do not mean the same thing, and effect must be given to every word.

Stark, contra. Bostick was tenant of Watts. He purchased for Scott, and continued in possession under Scott. Watts had done no act in part performance. The title

in the testator must be more than an equitable one, to be devisable. The act of 1789 says, any person having "right or title," using the words as synonymous. Under the English statute it must be a seisin. 1 *Roberts on Wills*. *Bunter v. Cook*, 1 Salk. 237. *Brydges v. Chandos*, 2 Ves. Jun. 427.

Miller, on the same side. The statute of distributions of this state says, expressly, that real property acquired after making a will shall not pass. By the statute of frauds, all contracts for the sale of lands are void, unless in writing. A man cannot convey what he has not. A will is a common law conveyance. In this way, a residuary legatee might always defeat the heir at law; and a legal estate might thus be defeated by parol. No matter, whether it would have been a fraud in Watts, or whether Scott could have enforced performance or not. Parol evidence was not admissible against the heir at law.

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\*De Saussure in reply. Whatever evidence would have been admissible between the original parties was admissible between their representatives.

*Curia, per NOTT, J.* That land acquired after the execution of a will does not pass under it is a position not denied by the defendants. It is conceded, on the other side, that lands to which a testator has only an equitable title may be devised. *Langford v. Pitt*, 2 P. Wms. 630. *M'Kinnon v. Thompson*, 3 John. Cha. Rep. 307. So that the only question is, whether the testator had such an equitable title to the land in question as qualified it to pass under the residuary clause of his will? By the statute of frauds it is declared, that no parol contract, for the sale of land, &c. shall convey any greater estate therein than an estate at will; nor shall any action be brought upon any agreement for the sale of lands, &c. unless the same be in writing, &c. But it is contended that, in equity, where a parol contract has been partly executed on one side, the performance of it, on the other, will be enforced. And that as the testator went into possession of the land in this case, it was such a part performance, on his part, as would have authorized him to compel a specific performance on the other side. And therefore he had such an equitable title as rendered the land capable of passing by devise. I do not know that it has ever been held that a parol agreement for the sale of land, even when it had been so far executed that a Court of Equity would decree a specific performance of it, would convey a devisable interest. Neither do I think it necessary to look into the question, as I do not consider this case as coming within the principle. I admit that it is now a settled equity doctrine, that when the parol contract is admitted or proved, and has been

carried into execution, on one part, as far as the party claiming the benefit of it can

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carry it into effect, that a Court of Equity may compel a performance of it on the other side. But this doctrine is directly in the face of the statute of frauds, and ought not to be extended by judicial legislation. I concur in the opinions expressed by Lord Eldon and Lord Redesdale, that we ought not to go further on that subject than we are compelled by former decisions. *Cooth v. Jackson*, 6 Vesey, Jun. 37. *Lyndsay v. Lynch*, 2 Scho. & Lefr. 4. The ground upon which Courts of Equity thought themselves authorized to compel the performance of a parol contract for the sale of lands is, that the object of the statute was to prevent fraud, and they would not give it such a construction as to enable a person to effect the very object which the statute was intended to prevent. The cases on this subject are somewhat contradictory, and do not appear to me to define, with the precision which is desirable, the rule by which the Courts ought to be governed. But I think from the spirit of them, as far as they have come within my observation, the following requisites will be found necessary to authorize the interposition of a Court of Equity to compel a specific performance.

1st. That it must be clearly shewn what the agreement was.

2d. That it has been partly carried into execution on one side, with the approbation of the other. And

3d. That the party, who comes to compel a performance, must shew that he has performed on his part, or that he has been, and still is, able and willing to perform his part of, the contract. 1 Maddock's Ch. 377, 8, 9.

With regard to the first, we have only heard that a parol contract respecting the sale of the land had been made, but the terms of that contract we have not learned. We know not the price to have been given for the land, nor the terms of payment. We

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know not, "whether it was a lease for years, for life, or a fee." With regard to the part execution of the contract, we must not be led away by the sound of words, without giving them some rational construction. By part execution must be understood that, by mutual consent, some part of the contract has been carried into effect. Now it is proved, that the purchaser took possession; but there is no evidence, that he was put into possession by the vendor, or that he went in by his consent. His entry, therefore, partook more of the nature of a trespass than a part execution of the contract. I admit that when a purchaser is suffered to continue in possession, and to make improvements, with the knowledge of the vendor, consent may be inferred; but the purchaser, in this case, was never in actual possession. It is said, he had a tenant there, who made one crop. Titles were

afterwards made, but whether in pursuance of that contract or another does not appear.

Lastly, we have no evidence, that any part of the contract was performed on the part of the purchaser. How then could he ask performance on the other side. The ground, Mr. Maddock observes, on which the Court acts, in these cases, is fraud, in refusing to perform, after performance by the other party. 1 Mad. 379.

He, who asks equity, must shew, that he has done every thing, on his part, to entitle him to it. When the purchaser has done every thing, on his part, which, by the contract, he was bound to perform, and has gone into possession with the consent of the vendor, a Court of Equity will compel titles to be made, because a vendor shall not be permitted to convert into a trespasser one who has gone into possession under a contract, and with his own consent. The case therefore is not such that the Court would have decreed a specific performance of the contract, if that were now the question before us. I do not say that such a case might not have

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\*been made out, if all the parties had been brought before the Court for that purpose. But such a case has not been made out. It must be a very strong case indeed, which would induce the Court to determine the question in this collateral way. I do not think that the testator had any such title, either legal or equitable, at the time of making the will, as that the land would pass under it. He must be considered as having died intestate, as to this land, and the heirs at law are entitled to a partition, according to the act.

JOHNSON, J., concurred.

COLCOCK, J., dissentiente. I am constrained, though with great reluctance, to differ from my brethren in this case. I had endeavoured to reconcile the decision on the ground that it is in accordance with the provision of the statute of frauds, which, I feel satisfied, never should have been departed from. But when I reflect that it is of more importance to a community that the rules of law should be settled than that they should be, in all respects, in accordance with the abstract principles of justice; that in fact, the established rule of law becomes, in such cases as the present, the rule of justice; I cannot subscribe to the opinion.

I take it to be the settled doctrine of the Court of Equity that possession, given with reference to a contract, is such part performance of it as will authorize the Court to compel a complete and specific performance. This doctrine is broadly laid down by Mr. Maddock in his *Treatise on Equity*, p. 377, 80, and supported by cases almost innumerable. The case of *Foxcraft and Lyster* is considered the leading case, but some other ground, it is said,



was introduced into that case. The case, however, of the Earl of Aylesford, in *Strange*, 771, Geo. I. rested solely on that ground, and it is recognized, in at least five cases, by Lord

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Redesdale, in *the Reports of Schoales and Lefroy*. And, in the case of *Clinan and Cook*, he goes into a parallel between possession and payment of the consideration money or part of it, in which he assigns some reasons why possession ought to be considered as more conclusive of part performance than the payment of money. But the state of our country, and the various changes which the law on the subject of real estate has undergone, as well as the fact, well understood here, that personal property is as valuable as real, and that possession gives a title to the one almost as soon as to the other, furnish, in my judgment, strong additional reasons why it should be so considered. The Court of Equity, in the case of *Boykin v. Cantey*, took this ground and, on the possession alone, decreed a specific performance.

If then there was an absolute right in the testator at the time of making his will, what is there to prevent such right from passing under the will? I am aware of the old doctrine founded on the word "having" in the British statute, and that the cotemporaneous expositors of that statute have said it means nothing less than being seised in fee; and this may be granted without affecting the case: for we have two statutes of our own on the subject; the latter of which, from its phraseology, was, as I believe, expressly intended to avoid all the difficulty which has arisen in England from the technical construction of their statute. But even in England the rigid rule of construction has been relaxed, and the later cases expressly say, an equitable interest may be devised; and in our own Court of Equity, in the case of *Cruger and Heyward* [2 Desaus. 422], the Judge says, that it is now agreed that a mere possibility may pass by will.

The words of the act of 1789 are, when any one has "any right or title," he may devise; meaning, beyond all doubt, something less than a fee simple estate. I would ask, can it be said that the deviser had no

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"right," because he had no "title"? Why did the legislature put the words in the disjunctive, if they did not mean a right without a title? If Scott had died before the titles were made, could Watts or his heirs have taken the land? Would they not have been compelled to make titles; and what would then have become of the land, if Scott has not made a will? Would it not have gone to his heirs? It surely would. It was then a right, which might accrue to the benefit of his heirs, and could not pass to his devisees. With all the evils of having departed from the plain meaning of the statute of

frauds staring me in the face, I cannot think of departing from the plain meaning of the act of 1798; and I am constrained to think that the testator had a right in this land which was devisable. If it were necessary to the support of this opinion, I think I am warranted, from the testimony, to conclude that the consideration money was paid when the possession was given; for the witness says, "I do not know why the deed was not executed at that time." Now, if he knew that the consideration money was not paid, he would have known why the deed was not made; and it was made in a short time after, and the title completed in the testator before he died.

Decree affirmed.

#### I McCord, Eq. \*43

\*EPHRAIM PEEK v. D. L. WAKELY and LEVERETT HUBBARD.

(Columbia. May, 1825.)

[*Bills and Notes* ⚡318.]

P. and H. entered into co-partnership. H. put in \$2000, the whole stock, and P. gave H. his note for one half, \$1000. They failed and assigned to creditors. H. notwithstanding retaining P.'s note, which he afterwards (after it was due) assigned to W. with a full knowledge of all the circumstances. *Held*, that W. took the note subject to all the equities, and to an account, between P. and H.

[*Ed. Note*.—For other cases, see *Bills and Notes*, Cent. Dig. § 754; Dec. Dig. ⚡318.]

[*Injunction* ⚡26.]

[A. and B. entered into partnership, and A. having advanced the capital, B. gave his note for his share. The firm afterwards became insolvent, and surrendered the partnership effects to assignees; but A. retained B.'s note, which he afterwards transferred overdue. *Held*, that the transferee took the note subject to an account between A. and B., and B. having paid more than his share of the partnership debts, and A. being insolvent, the collection of the note was enjoined.]

[*Ed. Note*.—For other cases, see *Injunction*, Cent. Dig. § 47; Dec. Dig. ⚡26.]

Ephraim Peek and Leverett Hubbard entered into copartnership, as merchant tailors, in New Haven in the year 1815. The capital stock of the firm was \$2000, of which Peek advanced nothing, Hubbard the whole; and Peek gave Hubbard his note for \$1000. The firm became insolvent, and surrendered, in 1816, all their goods, &c. to assignees; and Hubbard's private property was sold. Wakely lived within a few doors of Hubbard and Peek; and for the last fortnight before the final dissolution was in the shop, in employment of the firm. The assignees placed a part of the goods in the hands of Peek, to be carried to the south and disposed of for their benefit. Wakely was placed in charge of them by Peek, and brought them to Columbia. Soon after, Wakely bought from Peek the whole stock, and gave his note for them. Upon which Peek had to sue, and obtained

judgment. Hubbard, in the mean time, had been arrested for a private debt in New Haven, and took the benefit of the poor prisoners' law of Connecticut. He came on to Columbia, and Wakely, dreading the judgment which Peek was about to obtain upon his notes, purchased from Hubbard Peek's note for \$1000, then past due two years, with a knowledge that Hubbard had been and then was insolvent, and that Peek was doing a good business and was paying off the debts of the firm. Wakely was to pay Hubbard for the note \$550 out of the proceeds, when recovered; but, in fact, never paid but \$35, in a suit of clothes. They entered into some written agreement about it which was not

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exhibited. The note was \*endorsed by Hubbard to Wakely. Wakely sued Peek upon the note, and obtained judgment. Peek filed this bill to enjoin him; and alleged that he had paid, beyond his own proportion of the debts of the firm, a sum more than sufficient to extinguish his note to Hubbard; and this too after accounting to the assignees for the goods brought on by him to the south.

On the first argument of this cause, Chancellor Gaillard, by a decree of February 1824, directed that the assignees should be made parties. The decree was as follows: Peek's note was not included in the assignment made by Hubbard and Peek to their assignees, in trust for the creditors. Nor did Hubbard give it up when he took the benefit of the poor debtor's law of Connecticut. After it became due, it was assigned to Wakely, who had sued and obtained judgment on it. Peek is looked to, being the solvent partner, for payment of the debts of Hubbard and Peek; and if he had paid or ultimately should pay more than his proportion of their debts, Hubbard will be accountable to him for the difference. But Hubbard is insolvent. By an account taken between Hubbard and Peek, it is insisted that Hubbard has paid to the assignees more than Peek. The accounts are disputed, and I will not go into them: because supposing them now to be in favour of Hubbard, we do not know how they will be at the winding up of the concern; because the assignees of Hubbard and Peek not being parties to this suit, they will not be bound by any thing done in it. Neither Hubbard, nor Wakely who holds this note with the equity attached to it growing out of the circumstances, can insist on its payment, until an account is taken between Hubbard and Peek. Their assignees should be made parties to the bill. It is ordered and decreed that the injunction, restraining the defendant proceeding on his judgment, be continued until an account shall be taken be-

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tween Hubbard and Peek, \*and their assignees; and that the complainant do amend his bill, by making the assignees parties to it. The assignees were accordingly made parties,

but never answered nor appeared; and an examination of the accounts was gone into, before the Commissioner, who reported that Peek had not paid at the time of the transfer of the note, over and above his share of the debts of the firm, a sufficient amount to discharge him from his liability to pay the amount of the judgment recovered at law by Wakely against Peek, or to entitle him to a credit on the said note, Peek being then indebted to the firm of Hubbard and Peek. But that if the complainant was at liberty to set off any of the debts due by Hubbard and Peek, which he had paid between the date of the transfer of the note to Wakely and the commencement of this suit up to 1824, Peek had either actually paid on obtained discharges in favour of the firm, by private arrangements with the creditor or his individual responsibility, an amount over and above his share of the debts of the firm sufficient to discharge him from the payment of the note in question.

The complainant excepted to so much of this report as questioned the propriety of admitting the discounts or credits set up by complainant, which arose by payments made by him after the transfer of Peek's note by Hubbard to Wakely, for the reasons,

1. That the equities set up by complainant did actually exist at the time of the transfer of the note.

2. That the payments made by complainant after the transfer of the note, were compulsory; and only in consequence of the liabilities incurred before the transfer.

The case came on again, to be argued on the exceptions to the report of the commissioner.

De Saussure, M'Cord and Preston, for the complainant.

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\*Gregg and Harper, contra.

THOMPSON, Chancellor. There have been several interlocutory orders made in this case, and two Chancellors, whose opinions are entitled to great weight and respect, have decreed, that Peek has the same equity against Wakely which he had against Hubbard. It is not now important for me to examine into the correctness of those decisions. I am well apprized, that the general rule of law is as has been declared; but this case does not come within that rule. The question submitted to me is altogether of a different nature; it is simply (admitting the doctrine as laid down to be correct) what equity Peek had against Hubbard? Hubbard loaned him \$1000, for which he had taken his note of hand. This was his individual and private property, not at all involved in the copartnership transactions. The copartnership funds were all which their creditors looked to for satisfaction of their demands against them. These funds were assigned to their creditors, and not a word



said in the schedule, respecting the note. They were satisfied with the fairness of the return, and never refused to resort to either, for a further compensation for their demands. Hubbard, being in very distressed circumstances, sold to Wakely the note for \$35. It is contended for the complainant, Peek, that he had an equity against Hubbard's private property for the copartnership debts. Whatever right the creditors might have had, it assuredly does not extend to Peek. What sum or sums of money he had loaned him he was morally and legally bound to repay to him or his assignee: Wakely was this assignee, and entitled to recover the money of Peek.

It is ordered and decreed, that the bill be dismissed with costs.

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\*From this decree the complainant appealed, and made the following:

1. That the equities, set up by the complainant, existed at the date of the transfer of the note.

2. That the payments made by the complainant, after the transfer of the note, were compulsory; and to meet the liabilities incurred before the transfer.

3. That Wakely and Hubbard, the parties to the transfer of the note, were now before the Court; and Wakely having paid but \$35 of the amount he agreed to pay, the note ought to be decreed to be cancelled, upon the repayment to him of that sum.

W. F. De Saussure, for the motion. Where a person takes a note after it is due, he takes it subject to all the equities existing between the original parties, and he is presumed to know all the equities which may subsist. 1 Johns. Cha. Rep. 54. 12 Johns. Rep. 345. 3 Term Rep. 82. Chitty on Bills, 144. If Hubbard had sued Peek, the Court would not have suffered him to recover this money until the copartnership concerns had been settled. The defendant stands in the relation of trustee to Hubbard, at least so far as relates to the sum which he owes him. 4 Desaus. Rep. 48. 4 Mass. Rep. 372.

Gregg, contra. It was not important whether Peek had taken up the copartnership paper, and had given his own, for he was liable. Peek stated in his bill that he had paid \$6000, and it had turned out that he had only assumed to pay that much himself. These subsequent payments and assumptions could not affect the previous transfer of the note. The complainant must not only be able to do it, but he must state in his bill every thing he relies upon, and every thing which he intends to prove or put in

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issue. Coop. Eq. Plead. 7. The equities between the parties must have relation back to the time of filing the bill. At that time Hubbard was in advance to the firm \$6000, and Peek only \$2000. The assignee of a chose in

action takes it subject to all the equities of the obligor, but not to a latent equity of a third person. 2 Johns. Cha. Rep. 443, 480. The bill does not allege, nor had it been proved, that Wakely knew of the payments made by Peek subsequent to the transfer of the note to him. An assignee without notice is preferred to third persons who set up a latent equity. 1 Dow's Rep. 65. 1 Ves. 123.

Harper, on the same side. First. Was there any thing existing, at the time of the transfer, on which Peek could have defended himself against Wakely as assignee of Hubbard?

Second. Were there any particular circumstances in the case, giving the complainant a ground for relief?

The opinion delivered by Chancellor Gaillard was not intended to be final. The order was only for a reference, and to make additional parties. Allan v. Bower, 3 Bro. C. C. 149.

The assignee of a chose in action not negotiable takes it subject to all the equity of the obligor, and so of negotiable papers if the assignee has notice, but not if he had no notice. 2 Wash. Rep. 248. One who takes a note after it is due takes it subject to all the legal defences that it would have been subject to in the hands of the payee; all the defences which then existed might have been set up; but that on which the complainant relied was a discount arising subsequently thereto. Eden on Injunctions, 24. 2 Johns. Cha. Rep. 144.

M'Cord submitted the following argument in reply.

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\*The partnership between Peek and Hubbard was dissolved in 1816, and three years afterwards this note was assigned by Hubbard to Wakely, two years after the note was due. This note, if not assigned to the creditors in Connecticut, should bona fide, have been assigned. And what ought to have been done by Hubbard, as between Hubbard and Peek, will be considered in equity as done. As to Hubbard then this note was to be considered as assigned to the creditors of the firm, and it was a fraud in Hubbard to conceal it. The bill charged that Wakely had notice of the whole transactions, and the allegation was proved. Wakely then stood in the same situation as Hubbard stood. They were to be regarded as one. The indorsement to him was two years after the bill was due. Chitty on Bills, 144. O'Callaghan v. Sawyer, 5 Johns. Rep. 118. 12 Johns. 345. 1 Dall. 444. Furman v. Haskin, 2 Caines' Rep. 372. If the rule of law were otherwise, the contract between the parties was in the nature of copartnership, and therefore made Wakely's rights and Hubbard's identified. "Hubbard was to receive \$550 out of the proceeds of the note when recovered." That rendered Wakely and Hubbard jointly interested.

Wakely was only to get half for recovering it. Wakely then made himself an agent of Hubbard, and as such was liable with Hubbard to account for the proceeds of this note to Peek, he having notice, and taking the note after due. Peek was liable for the whole debts of the firm of Hubbard and Peek, and this note operated as a security from Hubbard to Peek for his responsibility for the whole debts of the firm. To suffer Hubbard to trade it off, or to collect it out of Peek, without coming to a settlement, would be depriving Peek of an equity which he possessed at the time of the failure. It would be a fraud by Hubbard on Peek, in which

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Wakely participated. After a failure it is doubtful whether, in equity, all partial assignments of property, or preferences, made by the insolvent debtor were not fraudulent and void in equity. There is no doubt they are good in law, but the reasons urged by Lord Kames in his *Principles of Equity*, Book III. Ch. V. for the application, by the Courts of Equity, of the principles adopted by the English bankrupt laws, in this connection, had great force, viz. That a creditor, knowing the insolvency, could not be innocent, who would be accessory to an act of injustice on the part of the debtor, by taking more than his proportion of the effects, in consequence of such preference given to him by the debtor; and that the equitable right to the debtor's effects, which upon his insolvency (in equity) accrue to his creditors, makes it a wrong in him to sell any of his effects privately without their consent. The sale indeed was effectual at common law; but the purchaser, supposing his knowledge of the insolvency, was accessory to the wrong, and the sale is voidable upon that ground. 4 Desaus. Rep. 227. Suppose there was a judgment against Hubbard in his own private case, Peek could enjoin that judgment until the whole of the copartnership debts were paid, and why not restrain the asportation, or fraudulent destruction of his equitable security in this note for his responsibility to pay Hubbard's share of the debts. 1 Mad. Ch. 76. He cited also Cullen's Bank. Laws, 192. 197.

Blanding, on the same side. It was not pretended that at the time of the agreement of Hubbard to transfer the note to Wakely, the complainant had any legal right: but it was contended that, at that time he had an equitable right to have this note impounded, until it should be ascertained whether, on the liabilities he had incurred for Hubbard, he would be compelled to pay the share of the copartnership debts for which Hubbard was

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liable; and finally to have the note discharged in the event of his making such payments. These were the facts on which this liability arose. Hubbard and Peek had been equal partners of a dissolved concern which

was clearly insolvent, and the debts to which each partner was liable were greater than the present note, after exhausting all the copartnership effects. Hubbard was also insolvent. Peek (quoad this transaction) was perfectly solvent to the belief of Hubbard, as he states in his answer, and to the certain knowledge of Wakely, who then owed Peek between \$2,000 and \$3,000. What was Hubbard then bound to do with this note? Certainly not to collect or enforce it. When he surrendered his property his conduct shewed what his views then were. He did not assign it, because Peek was equally responsible to the creditors of Hubbard and Peek without, as with, such an assignment. Peek was charged in the account with Hubbard and Peek with the sum of \$2,000, because Hubbard had put \$2,000 into the concern. But if this note were still outstanding, Hubbard had advanced but \$1,000, and Peek the same; and instead of Peek being charged with \$2,000, he would have been credited with \$1,000. According then to Hubbard's shewing and the evidence, the note was actually merged in the copartnership transactions, and had no legal obligation in the hands of Hubbard. But without this evidence Peek's evidence was complete the moment of the dissolution of the insolvent copartnership. He was then Hubbard's security, both in law and equity, for all the debts of the concern beyond his own proportion of them. The amount of these debts has been established; and after Hubbard and the assignees of Hubbard and Peek have been made parties to these proceedings, it does not lie with any one to say, that there are other debts which Hubbard may hereafter be compelled to pay. Was the liability of Peek at the time of the trans-

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fer of the \$1,000 note to Wakely an equity? To this point he cited *Nesbit v. Smith*, 2 Brown's C. C. 581, and *Taylor v. Herriot*, 4 Desaus. Rep. 227. The case of *Wiggins v. Armstrong*, 2 Johns. Cha. Rep. 144, had been relied on to prove the contrary. That case proved, that a simple contract creditor could not before judgment restrain the fraudulent disposal of his debtor's effects. Here the case was different. Peek asks that Hubbard should not be permitted to draw out of his hands \$1,000 while he is liable to pay for Hubbard, as his security, a much larger sum. If Hubbard would not be permitted to do this, then Peek's equity at the time of the agreement to transfer the note to Wakely was unquestionable.

After the argument Mr. Justice JOHN-SON delivered the opinion of the Court at length, which has been mislaid; and the Reporter has not been able to recover it. However the Court held that Wakely took, subject to all the equities subsisting between Peek and Hubbard. The following certificate was given.



"It is ordered and decreed, that a perpetual injunction do issue, to restrain defendant, Wakely, from proceeding on his recovery, at law, against the complainant, in the case stated in the bill, except as to thirty-five dollars, paid by Wakely to Hubbard, and the costs at law: and that each party pay their own costs in this case."

Decree reversed.

### I McCord, Eq. \*53

\*SIMS et al., Creditors of Rochelle, v. CAMPBELL and CHAMBERS.

(Columbia. May, 1825.)

In Equity.

[*Sheriffs and Constables* ⇨97.]

The sheriff is the agent of the plaintiff in an execution, for certain purposes; but he is an agent created by the law, and the plaintiff is no further bound by his acts than as they come within the pale of his authority.

[Ed. Note.—Cited in *Chalmers v. Turnipseed*, 21 S. C. 141.

For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 137–141; Dec. Dig. ⇨97.]

[*Evidence* ⇨83.]

Whatever is done in the sheriff's office, bearing the marks of official authority, will be presumed to have been done by his authority; but, like all other presumptions, may be rebutted by stronger evidence. Mistakes may be corrected there as elsewhere.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. ⇨83.]

[*Execution* ⇨112.]

An execution marked "satisfied" may be shewn not to be satisfied, and the execution still maintain its lien among creditors.

[Ed. Note.—Cited in *Moore v. Edwards' Ex'rs*, 1 Bailey, 24; *Sartor v. McJunkin*, 8 Rich. 454; *Daniels v. Moses*, 12 S. C. 139.

For other cases, see *Execution*, Cent. Dig. § 226; Dec. Dig. ⇨112.]

[*Judgment* ⇨754.]

The lien of a judgment is good for the interest which may accrue on it, as for the principal debt.

[Ed. Note.—Cited in *Winslow v. Ancrum's Assignees*, 1 McCord, Eq. 105.

For other cases, see *Judgment*, Cent. Dig. § 1313; Dec. Dig. ⇨754.]

This appeal came up on a motion to set aside an order of the Chancellor. The defendants in this motion had recovered a judgment against John Rochelle. After the judgment was obtained, Rochelle mortgaged all his property, both real and personal, to Colonel Gist. Gist being about to sell the property to satisfy his mortgage, several junior creditors applied to the Court of Equity, to direct the property to be sold on a credit, alleging, that if it should be sold for cash, it would be sacrificed to the great prejudice of the younger creditors. Colonel Gist consented that it might be sold upon such terms as the Court of Equity should prescribe. The defendants were no farther parties to those proceedings, than that the plaintiffs applied in behalf of themselves and the

other creditors of Rochelle. After the property was sold the defendants applied for the money due on their judgments, to be paid over to them out of the first money arising from the sale. Upon inspecting the execution which had been issued on their judgment, it appeared, that a payment of five hundred dollars had been paid to the sheriff, and that the word "satisfied" was written upon it. The defendants admitted that they had received five hundred dollars, and only claimed the balance which appeared to be due, and denied that it had been satisfied. Sheriff, being called upon, said he had received only five hundred dollars, and that the entry of satisfaction was not in his hand writing. The deputy sheriff said it was in his hand

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writing, but he did not now \*recollect by what authority he had done it. He presumed it must have been by order of the sheriff by mistake. The defendant admitted he had paid only five hundred dollars, and that the balance was still due. The other creditors however contended, that as the execution was found in the sheriff's office with an entry of satisfaction upon it, must be presumed to have been done by the authority of the sheriff. At all events that he must be answerable for it, and as he was the agent of the plaintiffs in the execution, it was binding on them, and they must look to the sheriff for their money, and could not now come in and take these funds out of the hands of junior creditors. The Court, however, ordered the money to be paid over to the plaintiffs in the execution, the now defendants, with interest thereon, and this was an appeal from that order for the reasons above stated.

W. Thomson, for the appellant.

J. Johnston, contra.

The case of *Codwise v. Gelston*, 10 Johns. Rep. 522, was cited.

*Curia, per NOTT, J.* This question appears to me as plain as a self evident proposition. It is admitted that the plaintiff in the execution has the oldest claim; that he had indeed the first lien on the property. A lien which even the sale under the mortgage could not defeat. It is not pretended that it has been actually paid. The debtor himself acknowledges that the balance now claimed is still due. No fraud is alleged against the party or the sheriff. But some technical rules are attempted to be set up as a bar to the plaintiff's acknowledged right. First, it is said that the sheriff is the agent of the plaintiff, and therefore he must be bound by

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his \*acts. Secondly, this act having been done in the sheriff's office, it must be presumed to be done by his authority. The sheriff is for certain purposes the agent of the plaintiff, but he is not an agent of his own appointment. He is the agent of the law and

the party is no farther bound by his acts than as they come within the pale of his authority. If he recover money on an execution it will discharge the debtor, because the law has reposed that confidence in him, and not because he is the agent of the creditor. But he can make no contract or compromise to the prejudice of the plaintiff. Nothing but actual payment will discharge the debt, because his authority extends only to making of the money. It is true that whatever is done in his office bearing the marks of official authority will be presumed to have been done by his orders or approbation. But like every other presumption it may be rebutted by stronger evidence. Mistakes may be explained and errors corrected in a sheriff's office as well as elsewhere. Now, what is the fact in the present instance? The word "satisfied" is found written on an execution. It is equivocal at best because it does not shew in what manner it has been satisfied. It is not pretended to be in the hand writing of the sheriff, nor does it appear to be by his authority. It was therefore open to explanation. Suppose the sheriff had actually received the money and entered satisfaction in due form, and it had afterwards turned out that the money was counterfeit, or had been taken away by an older execution. Would it have been a bar to another execution? Most unquestionably not. There is no doubt therefore of the correctness of the order. Even if we put the parties on the ground of two innocent sufferers, as the counsel has called them, (which I do not think a correct position in this case) still he who has the legal priority will be entitled to hold it. It has been contended farther that if they were enti-

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tled to receive the debt they were not entitled to interest. To that part of the case it is sufficient to say, that the confession of judgment contains an agreement to pay interest.<sup>1</sup> The debtor makes no objections and it does not belong to third persons to say that they may not contract for themselves. The motion must be refused.

Decree affirmed.

<sup>1</sup>See post, the case of Winslow v. The Assignees of Ancrum.

#### I McCord, Eq. 56

REBECCA REES and Others v. ROGER PARISH, THOMAS SUMTER, THOMAS PAWLEY and JOHN R. CARTER.

(Columbia. May, 1825.)

[Equity ⇐43.]

It is the rule of the Court of Equity not to entertain jurisdiction where there is plain and adequate remedy at law; and the rule is confirmed by the act of 1791.

[Ed. Note.—Cited in Young v. Burton, McMul. Eq. 260, 267.

For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. ⇐43.]

[Equity ⇐43.]

Where a party could obtain plain and adequate remedy by an action of trover and detinue for slaves, equity will not entertain jurisdiction.

[Ed. Note.—Cited in Young v. Burton, McMul. Eq. 260, 267.

For other cases, see Equity, Cent. Dig. § 137; Dec. Dig. ⇐43.]

[Discovery ⇐4.]

If there be issue of the slaves, and the party is really ignorant of their number and names, equity will compel a discovery as ancillary to a suit at law.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 5; Dec. Dig. ⇐4.]

[Discovery ⇐1.]

To be entitled to a discovery a clear right must be shewn and that suit is brought, or that the discovery is necessary to the bringing of the action.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[Appeal and Error ⇐1194.]

[A decree sustaining a demurrer for want of jurisdiction was reversed on appeal, and leave was granted to amend the bill. *Held*, that this was not a final decision upon the question of jurisdiction, it not appearing to have been so intended.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4652; Dec. Dig. ⇐1194.]

[Discovery ⇐22.]

[Where a bill is filed for discovery and relief, and the relief is not within the jurisdiction of equity, and the answer denies the facts sought to be discovered, the bill will be dismissed.]

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 33; Dec. Dig. ⇐22.]

This bill was filed by the children of John W. Rees claiming certain negroes under the will of their grand father Hubbard Rees.

The defendants demurred for want of jurisdiction, on the ground that there was plain and adequate remedy at law, by an action of trover or detinue, and the Circuit Court sustained the demurrer. There was an appeal, and the Circuit decree was reversed in May 1822 by the following decree of the late Appeal Court in Equity.

"This case comes before the Court of Appeals, upon a demurrer to the jurisdiction of the Court, which has been sustained by the Judge before whom the case was tried. Upon a review of the original bill and amended bills, in the case, it appears, that it is only stated in one of the amended bills, that com-

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plainants have no knowledge of the issue of the female slaves. But as there are females among all the slaves claimed, it is plainly to be inferred that they have no knowledge of the issue, in all these cases. Further, as the complainants have not set forth the times when the purchases were made, and whether the said slaves were a long time family negroes or lately purchased; both of which facts may be material in the final adjudication of the case. Moreover, as it may be



necessary to continue the several purchasers as parties, that the labours of the negroes (should complainants succeed) may be properly accounted for; and that they may not be passed from hand to hand, until the minors may be deprived of all effective right. It is therefore ordered that the decree of the Circuit Court be reversed, and that the complainants be permitted to amend their bill.

Wm. D. James,  
Henry W. De Saussure,  
Thomas Waties."

The defendants answered the bill on the 3d of February 1823, still protesting against the want of jurisdiction; and in June, 1824, the cause came on before Chancellor Thompson, who made an order dismissing the bill for want of jurisdiction. From that decretal order the complainants appealed, on the ground that the Court had jurisdiction, that the bill ought not to have been dismissed, and that the question of jurisdiction was settled by the appeal decree.

W. F. De Saussure, for complainants.  
S. D. Miller, contra.

*Curia, per* COLCOCK, J. Rebecca W. Rees and Ann E. Rees, by Reuben Long,

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their next friend, complain \*that Thomas Sumter and Roger Parish have in their possession certain negro slaves, which they allege they are entitled to. It is stated in their bill that their grand father gave, by his will, a life estate, in the said negroes, to their father, John W. Rees, with remainder over to his children. This bill was amended and other parties added: John R. Carter, and Thomas Pawley, a free mulatto, were made defendants. And it was further alleged by complainants in their amended bill, that there were issue of the female slaves, claimed by them and unknown to them. The defendants pleaded to the jurisdiction of the Court, and the bill was dismissed by the presiding Chancellor. An appeal was made to the Court above, where it was ordered that the bill be restored and the defendants compelled to answer, which they accordingly did, acknowledging that they had the negroes, mentioned in the bill, in their possession, and held them, by purchase, at a full and fair price. They denied all unlawful combination and every intention to remove the negroes, and stated that the only female among them was past the age of child bearing, which, they aver, was a fact well known to the complainants' *prochein amy*.

Upon a second hearing of the cause, the defendants again relied on their plea to the jurisdiction of the Court, when the presiding Chancellor Thompson again dismissed the bill for want of jurisdiction.

An appeal is now made to this Court on the following grounds:

1. That the Appeal Court of Equity had decided that the court had jurisdiction, and

that therefore it was not competent for the Chancellor to reverse their decision.

2. That if the said Appeal Court did decide on the question of jurisdiction and the same was still open, that the case made was within the Equity jurisdiction, and the Chancellor should have sustained the bill and decided on the merits.

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\*3. That by the will of Hubbard Rees, the grand father of the complainants, they were entitled to the negroes named in their said bill.

Had the question of jurisdiction been determined by the decree of the Court of Appeals, that decree would have been supported by this Court, for the reasons stated in the case of Raoul and Haskell [1 McCord, Eq. 22]; but it is apparent that the Court only decided that the defendants should answer, in order the better to enable them to decide on the question of jurisdiction: and we cannot conceive that if the case had been again carried to them, with the answers, as exhibited to us, there would have been a doubt entertained on the subject.

It has long been the rule of the Court of Equity, that they would not entertain jurisdiction of a case, where there was a plain and adequate remedy at law. But this will has here become the positive law of the land. The legislature, in the re-organization of this Court in 1791, enacted, "That suits in equity shall not be sustained, in any case where plain and adequate remedy can be had at the common law." 1 Faust. 34.

We are then to inquire whether such remedy could be had at law in the case before us? What is the object of complainant's bill? 1st. To recover certain negroes and the value of their service. And it does not admit of a doubt, that by an action of detinue this object might have been effected, or by an action of trover. For what in most instances is a more adequate remedy than the full value of the negroes, with a reasonable compensation for their labours. The next was to ascertain, if any and what was, the issue of the females; and here it will be admitted, if there had been any issue, and the complainants were really ignorant as to the number and names of the children, that the aid of the court might have been necessary. But in such case, it would only have been required as ancillary to the Court of

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Law: for \*one may be entitled to a discovery, and not to relief, in a Court of Equity: and where one has a right to a discovery, he must shew that right clearly, and also shew that he has brought suit, or that the discovery is necessary to the commencement of his suit. 1 Madd. 214-216. In this case, however, every pretext to the aid of the Court, in this particular, is removed; for there is no issue, and, indeed, no possibility of issue; as appears by the uncontradicted answer of

the defendants. From this view of the case, it is unnecessary to consider the last ground. The motion is dismissed, and the decree of the Chancellor affirmed.

Decree affirmed.

### I McCord, Eq. 60

ISAAC CARR and Wife v. JOHN PORTER and Others.

(Columbia. May, 1825.)

[Wills 595.]

A devise of "the rest and residue of my estate to be divided between my grand sons Willson and Thomas, and delivered to them at the age of twenty-one; but should they die leaving no lawful issue, in that case I give the whole of my estate, real and personal, to R. G." Held, that Thomas took a fee, and his issue could only take by descent from him and not as purchasers. But he having sold they took nothing.

[Ed. Note.—Cited in *Bedon v. Bedon*, 2 Bailey, 248; *Williams v. Caston*, 1 Strob. 134; *Curry v. Sims*, 11 Rich. 490, 491; *Manigault v. Holmes*, Bailey, Eq. 303; *Henry v. Archer*, Bailey, Eq. 553, 558, 559, 563, 564, 565; *Dunlap v. Garlington*, 17 S. C. 572; *Shaw v. Erwin*, 41 S. C. 214, 19 S. E. 499.

For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. 595.]

[Pleading 290.]

In a bill for partition and to stay waste, the complainant must swear to the act of waste and to the want of title deeds.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. 290.]

[Wills 439.]

How far intention is to govern in wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. 439.]

[Courts 90.]

The authority of former decisions in the construction of wills.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. 90.]

[Wills 595.]

An estate may be enlarged, controlled, and even destroyed by implication; but the principle must be taken subject to certain other well established rules, as that where an instrument is reduced to writing, nothing is to be implied which does not arise from the face of the writing.

[Ed. Note.—Cited in *Henry v. Archer*, Bailey, Eq. 559; *Shaw v. Erwin*, 41 S. C. 215, 19 S. E. 499; *Vaughn v. Bridges*, 61 S. C. 162, 39 S. E. 347.

For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. 595.]

[Wills 595.]

An estate by implication cannot be raised in direct contradiction to and denial of an express estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. 595.]

[Wills 595.]

An estate is never implied to issue as purchasers.

[Ed. Note.—Cited in *McLure v. Young*, 3 Rich. Eq. 578; *Addison v. Addison*, 9 Rich. Eq. 61; *Shaw v. Erwin*, 41 S. C. 212, 214, 19 S. E. 499.

For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. 595.]

[Wills 478.]

An estate by implication can only arise by a necessary implication, and the necessity must appear on the face of the will. Such implication is inadmissible where the provisions of the will can otherwise be carried into effect.

[Ed. Note.—Cited in *Bedon v. Bedon*, 2 Bailey, 247; *Henry v. Stewart*, 2 Hill. 332; *Henry v. Archer*, Bailey, Eq. 559; *Addison v. Addison*, 9 Rich. Eq. 64; *Mendenhall v. Mower*, 16 S. C. 315; *Nicholson v. Drennan*, 35 S. C. 339, 14 S. E. 719; *Shaw v. Erwin*, 41 S. C. 212, 215, 19 S. E. 499; *Vaughn v. Bridges*, 61 S. E. 162, 39 S. E. 347; *Adams v. Verner*, 102 S. C. 11, 86 S. E. 212; *Burriss v. Burriss*, 104 S. C. 444, 89 S. E. 406.

For other cases, see Wills, Cent. Dig. § 999; Dec. Dig. 478.]

[Wills 595.]

Implication is stronger in favour of an heir than a stranger.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. 595.]

[Wills 610.]

The same words in many instances have a different meaning when applied to real and personal estate. Words, which convey only a life estate or conditional fee in lands, give an absolute estate in personal property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. 610.]

This cause arose under a clause in a will, which had given rise to three or four suits of great importance and interest.

The present Court of Appeals was established in December, 1824, and commenced its sittings in January, 1825. Previous to that time, all the Law Judges at the end of their circuits held a Court of Appeals for law cases; and the Chancellors, there being then five, did the same for equity cases. These two Courts differed in opinion on this clause of the will. The Court of Appeals in Equity supported the limitation over; and the Law Court held it too remote and void: so that the

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parties gained or lost accordingly as their cause was entertained by the different jurisdictions. This difference of opinion in the two Courts, which occurred in several other cases of equal magnitude, was a great reason urged for the abolition of those Courts, and for the establishment of the present Court of Appeals for the final hearing of all causes, law and equity: and, on this alteration being made, instead of five, but two Chancellors were retained. The report of the cases [*Carr v. Jeannerett* and *Carr v. Green*] wherein the Courts differed may be found in the second volume of McCord's Law Reports, 66 to 104.

This bill stated that William Willson of Georgetown devised to his grand sons Thomas and Willson Willson in the following words, "The rest and residue of my estate, both real and personal, to be equally divided between my grand sons Willson and Thomas, and delivered to them at the age of twenty-one years; but should they die, leaving no lawful issue, in that case, I give and be-



queath the whole of my estate both real and personal to Richard," &c. And that the said Willson died under age without issue, and by reason whereof, the said Thomas became entitled as survivor, subject to the limitation contained in the said will; and soon after the death of Thomas Willson, Eleanor Grant and others filed their bill against William Thompson and others, the representatives, for the payment of debts; and upon the hearing of that case the Court of Appeals decreed that the said Thomas took only a life estate in the will, and the complainant Mrs. Carr, who was one of Thomas Willson's children, to take the remainder; which decree was made an exhibit. That Thomas Willson in his life time conveyed to John Porter a tract of land, and in the deed the aforesaid devises were recited, which deed also was made an exhibit; and the bill stated that John Porter finding himself likely

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to be dispossessed was about to \*commit waste. That complainants had applied to the said Porter to account for rents and profits, and to permit a division among the children of Thomas Willson. There was a charge of confederacy among the defendants, &c. The bill prayed an account of rents and profits, and that a writ of partition might issue, and that possession might be decreed under the said partition, and in the mean time an injunction to issue to stay waste.

Hannah and William Willson, infants, answered by guardian.

John Porter demurred, because there was no affidavit of waste or want of title deeds, and that the complainants had their remedy at law.

De Saussure, Chancellor. It was my intention to have given an opinion at length in this important cause; but unavoidable circumstances have prevented it. That there may not be further delay, I now deliver the opinion I have formed, briefly, but sufficient to enable the party to make an appeal in the cause.

The merits of this cause are stated to be the same as in the case of Carr v. Green; and it was contended that the decision must be the same in both cases to be consistent. I believe this is correct, and were I now called on to decide on the merits, I should adhere to the opinion formed with great deliberation by the Court of Appeals. But that is not now my duty. I am to decide on a demurrer on the following grounds.

1st. That the complainants ought to have made affidavit, that they had not in their custody or power the deeds of which they seek a discovery, and for want whereof they pray the relief of the Court.

2d. That they ought also to have made affidavit of the waste, from the commission of which they pray to restrain the defendant. And

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\*3d. That all the matters in complainant's bill mentioned and complained of are matters which may be tried at law; and that the complainants have plain and adequate remedy at law, and are therefore not entitled to relief in this Court.

On the argument of the case, these grounds were expanded, so as to embrace other, but subordinate, subjects, which went to shew the substantial differences existing between this case and Carr v. Green.

These were, chiefly, but briefly, these: that in Carr v. Green fraud was alleged; not so in the case Carr v. Porter. That in the former there was an exchange of property, and Green was apprized of the doubt as to Willson's title and right to sell the land; not so in the latter case. That in the former a trust was alleged; not so in the latter. That in the former there were several minors whose interests were involved; not so in the latter. And that the defendant, Porter, has tendered the title deeds to complainants, to enable him to proceed at law; and there is no affidavit, filed with the bill, of the want of the title deeds, which, by the authorities, is indispensable to give jurisdiction. Upon consideration of the arguments of counsel, in this difficult and well argued case, I have formed an opinion, that this demurrer must be sustained on the principal grounds alleged and urged. I state generally that the demurrer must be supported on these grounds, that the whole may be brought to the view of the Court of Appeals.

It is therefore ordered and decreed, that the demurrer be sustained, and the bill dismissed.

This was a motion to reverse the decree on the following points.

That the Court had jurisdiction to direct an account of mesne profits; and that as Porter purchased with notice, he was trustee and liable to account in equity.

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\*That the Court had jurisdiction to award a writ of partition.

The cause was very ably argued by S. D. Miller for the appellants, and Harper for the appellee. We can only furnish the following brief notes of their arguments.

Miller, for the appellants, cited 1 Mad. Chan. tit. Bills for Discovery, 160, and commented upon the cases, Anonymous, 3 Atk. 17, and Dormer and Fortescue, 3 Atk. 129, and cited 1 Vernon, 59. In a bill to stay waste an affidavit was necessary; but the waste mentioned in this case was merely incidental; and he was willing to admit the demurrer as to that part of the bill.

A court of law could not grant partition against a trespasser; he admitted it must be against a tenant in common or joint tenant. It was the same in equity? But a person, who goes into possession of a life

estate, is a trustee for the remainder man, and may be made to deliver possession as such. Besides, a party may go into equity for mesne profits. *Dormer v. Fortescue*, 3 Atk. 129. *Hawkins v. Sumter*, 4 Desaus. 102. If the children took under the will, they took by purchase. If they did not take under the will, then they took nothing unless by descent. As to the limitation, he referred to the opinion of the Court in *Carr v. Green*, 2 McCord's Rep. 75, as containing all the arguments on his side.

Harper, contra, argued the cause principally on the ground of the limitation in the will which, he contended, gave the complainants no right whatever. He said, the will granted a fee simple and cross remainders to Willson and Thomas, the grand sons. A fee might be limited on a fee; that is, a subsequent contingency might defeat the former fee. Intention must govern, unless the law was otherwise; that is, unless the mean-

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ing given to cer\*tain words lead to a different conclusion; as to a man for life and his issue, as in *Shelley's* case. In marriage settlements, to a person and his issue, will give to the issue as purchasers. *Fearne*, 106 (7th Lond. Ed.). A gift to a man and his issue, if he die without issue, &c. is an absolute estate; though the intention may be a limitation.

As to the mode of construing wills, he cited *Fearne*, 124. The cross remainder was by implication, because it was not given over, until after the death of both. An estate to A. for life, and if he die without issue, to B. is an estate tail by implication; because there can be no other intention: so a gift to a second son, on the first dying without issue, is an estate tail, by implication; otherwise the eldest would take a fee. *Fearne*, 490, et seq. There was no case where an estate was created by implication. He who takes directly is a purchaser, and he who takes, as issue, &c. takes by limitation. Issue can never take as purchasers: they take by limitation. In a will they may take as purchasers, when they are so designated that the individual may be known within a certain time: but this intention is not to prevail by implication. Issue, by that term, can never take by purchase. A devise to one after the death of the wife will not by implication give her a life estate; it only establishes the contingency on which the estate shall go to the devisees, but does not give a life estate to the first taker, any more than giving after the death of the King of England, 1 Lord Raym. 523. *Fonblanque*, 63. *Lanesborough v. Fox*, Ca. Temp. Talb. 262. *Bodens v. Watson*, Amb. 478. There was no gift to the issue in this case; they did not therefore take as purchasers by implication; but they took by limitation, and therefore the devise over was too remote. It would be an estate tail by implication. In *Luddington v. Kime*, 1 Lord Raym. 204, the heirs or issue

did take as purchasers; because there was a

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direct gift to them. *Knight v. Ellis*, 2 Bro. C. C. 578. *Forth v. Chapman*, 1 P. Wms., 667. *Jones v. Morgan*, 7 Bro. P. C. 130. The deviser might have fixed any event upon its going over; the want of issue; default of marriage; going to Rome; or any thing else. It was an executory devise on that contingency; but it gave the children nothing. Nothing is more to be guarded against than making children independent of their parents. He cited 2 Phillim. 276, note. *Pells v. Brown*, Cro. Jac. 550. 1 Wils. 105. *Porter v. Bradley*, 3 Term Rep. 143. *Roe v. Jeffery*, 7 Term Rep. 589. If Thomas took an estate tail as he did, then he might convey and bar the issue or heir.

*Curia, per NOTT, J.* The bill in this case states, that William Willson of Georgetown by the residuary clause of his will devised all that part of his estate, not otherwise disposed of, in the following manner. "The rest and residue of my real and personal estate to be divided between my grand sons Willson Willson and Thomas Willson, and delivered to them at the age of twenty-one; but should they die leaving no lawful issue, in that case I give the whole of my estate, both real and personal, to Richard Godfrey and others, &c. to be equally divided between them." Willson Willson died under age and without issue, by which his moiety went over to Thomas Willson, by way of cross remainder by implication. Thomas Willson sold the property in question to the defendant, and also disposed of other property real and personal so devised to him to other persons, and afterwards died leaving several children, of whom Sarah Carr, wife of the complainant Isaac Carr, is one. The complainants now allege that their father Thomas Willson took only a life estate under the will of their great grand father, with a remainder over to his issue, that he could convey an estate therein during his own life only, and that the title to the defend-

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ant terminated at his \*death. The prayer of the bill is, that the deed to the defendant may be set aside, that the title deeds may be delivered up, that he may be made to account for the rents and profits, &c. and that the complainants have partition of the land, &c.

The defendant has filed a special demurrer which has been sustained in the Court below; and this is a motion to reverse that decision. The defendant however, instead of relying on his special causes of demurrer, has taken the broad ground, that the complainants by their own shewing have no cause of action. He contends that the will of William Willson gave Thomas Willson a fee in the land; that no distinct interest was given to his issue; and that the subsequent limitation to the Godfreys could have no other effect than to convert what would otherwise have been a fee simple into a conditional fee, with a limita-



tion over as a contingent remainder or executory devise, dependent on the contingency of Thomas Willson dying without issue; in either of which cases he had a right to convey until the contingency happened; and as he did leave issue, the contingency never could happen, and the defendant has a good title.

On the other hand it is admitted that the words of the will, giving the estate to Thomas Willson, are sufficiently ample to carry a fee, but that by the subsequent limitation the testator has manifested a plain and obvious intention to provide for the issue, and that that intention can in no other way be effected than by construing the devise to Thomas Willson an estate for life by implication, with a remainder over to his issue as purchasers. So that the whole case depends upon the construction to be given to that part of the will of William Willson which has been above exhibited.

The doctrine of contingent remainders and executory devises is, in its various modifica-

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tions, abstruse and difficult, and a variety of circumstances combine to give to this case a degree of importance, which perhaps would not be found in the intrinsic merits of the case itself, nor in the particular question submitted to our consideration.

It has already been remarked that Thomas Willson, supposing that he was entitled to an absolute estate in all the property devised to him by his grandfather, had disposed of portions of it to several persons previous to his death. That disposition of the property has given rise to several actions since his death, which have called for a construction of the clause of the will now under consideration. The first was the case of Grant and others v. Thompson and others in the Court of Equity, in which it was held that Thomas Willson took only an estate for life, with a remainder over in fee to his issue as purchasers. The next was an action of trover, brought at law by the present complainants and others against John W. Jeannerett and others, in which it was held that Thomas Willson took an absolute estate. The first was supported by the unanimous opinion of the Court of Appeals in Equity, and the latter by the constitutional Court of Appeals at Law. The third was the case of the same complainants against James Green in Equity, 2 McCord's Reports, 75. In consequence of these conflicting decisions that Court heard another argument upon the question, and after taking time for consideration adhered to their former decision; the grounds and reasons of which will be found in the learned opinion already alluded to in 2 McCord's Reports, 75. This is therefore the fourth time that the same question arising upon the same will has been submitted to the highest tribunal to which, according to the organization of our Courts, it could be submitted. It is not extraordinary therefore that it should have excited a degree of interest which has seldom

been felt in the decision of any case in this

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state. The question how far the decision of the Court of Appeals in Equity, or of the constitutional Court, ought to have been obligatory on the other cannot now arise. For each of those Courts having maintained its own independence in this case, their decisions will be considered as of equal authority by this Court, on whom has devolved the important umpirage of deciding between them. As all the members of this Court were members of the constitutional Court at the time those decisions were made, it may be supposed that we are still under the influence of that pride of opinion which the decision of that Court might be expected to create. I feel it a duty therefore, which I owe to myself, to observe, that I was absent when the question was formerly argued in that Court; and I am sure I never went into Court with a more unbiassed mind than when I sat down to listen to the argument in this case. Being the first time I have had occasion to form an opinion on the subject, and being under no influence from either of the opinions which have been hitherto expressed, I have had none of the difficulties to encounter which would have occurred in a case which had been in some measure prejudged. I have bestowed upon it all the attention which it appeared to me its importance requires, and after the best consideration in my power I have been constrained to come to a different conclusion from the Court of Equity. But notwithstanding the perfect conviction which has been produced on my own mind, I cannot flatter myself that the same reasons will produce such conviction on the minds of others; but that a difference of opinion will still continue to exist on the subject. I will however proceed with humble deference for the learned Court, whose decision I am about to controvert, to express the grounds and the reasons on which my opinion is formed. I am not insensible of the importance of the duty which I am now about to perform. This decision must be final and conclusive of the

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question, and it is therefore of the utmost importance that it should be such as will stand the test of future investigation. Whether it will be so or not, I can only say it is the result of my best judgment.

The case has been ably argued by the counsel on the part of the defendant. On the part of the complainants the Court has been referred to the opinion of the Court of Equity in the case of Carr and others v. Green, as containing all the law upon the subject, and that opinion has been adopted as the argument in this case. So that it is really the decision in the case of Carr and others v. Green, which we are now called upon to consider, and not the case of Carr et al. v. Porter; though the fate of the latter must depend upon the opinion which we may entertain of the decision of the former. Considering the

opinion in that case, therefore, as the argument in this, I will proceed to consider the principles by which it is supposed it ought to be governed, and the authorities relied upon in support of them.

As preliminary to the question to be decided, two propositions have been laid down, the establishment of which it seems to be thought necessarily lead to the conclusion that the complainants derived a fee simple by a direct devise to them as purchasers. The first is, that in the construction of a will the intention of the testator must always prevail. The second is, that express words are not necessary to create an estate; but that an estate may arise, be enlarged, controlled and even destroyed by implication. Now I will say, in the language of the argument, that "both of those general propositions are such plain legal truths that no Judge would hesitate to assent to them." That the intention is to prevail in the construction of a will is now grown into a maxim, which seems habitually to fall from the lips of a Judge whenever such a question arises, without considering the effect which it is calculated to pro-

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duce, or the extent of \*construction of which it is susceptible. But no Judge could ever intend to carry the doctrine so far as to lay aside all the settled rules of construction, and to determine the testator's intention from his own arbitrary views of the abstract justice of the case.

It is well known that persons are many times reduced to the necessity of performing that last solemn act of their lives under circumstances that will not admit of the aid of counsel. The law therefore presumes that it may always be the case, and will not suffer the intention to be defeated merely because the testator has not clothed his ideas in technical language. And that is the whole extent of the rule. Thus if a man gives his land to one and his assigns for ever, or gives his whole estate, or couples the devise with some trust or duty which cannot be performed without taking a fee simple, in those and such like cases it will be construed into a fee without the word "heir," which is a technical word of inheritance; because the intention is plain and manifest. But we are no more permitted to enter into the mind of a testator to see what was passing there, than we are into the mind of any other man to ascertain his motive of action. It is from his words we are to ascertain his intention. And whenever a construction has been given by a competent tribunal to any form of words, such decision has always been held as obligatory on all succeeding Judges in cases of wills, as in any other cases. Fearne, speaking of the notion that we must lay aside all precedent in the construction of wills and that every Judge must be governed by his own views of the intention of the testator, remarks, "such a mode of construing wills, if

once fully established, would open an almost unlimited power to the Judge of disposing of the property of testators, and directing the circulation of it to his own mind." "If rules and maxims of law (observes the same author) were to ebb and flow with the taste of

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\*the Judge, or to assume that shape which in his fancy best becomes the times; if the decision of one case were not to be ruled by or depend at all upon former decisions in other cases of a like nature, I should be glad to know what person would venture to purchase an estate, without first having the judgment of a Court of Justice respecting the identical title under which he means to purchase?"

"Construction, depending on and guided by certain known rules, will not be liable to those various temporary influences which must necessarily have a share in directing the discretionary decision of any court upon earth. No inducement can arise, no room can be left, to dispute or litigate titles built on such a stable foundation; whereas on the other hand the implied intention is at best uncertain, frequently very doubtful. Favour, affection, caprice, nay different habits of thinking and modes of expression in different men, will occasion different constructions of the same will." 1 Fearne, 171. (7th Lond. Ed.) Lord Mansfield, speaking on the same subject, says, the great object in questions of property is certainty. And therefore, he says in the case of *Hodgson v. Ambrose*, Doug. 337, "whatever our opinion might be upon principle and authority, if the point were new, we think, as this is literally the same case as *Coulson and Coulson*, 2 Str. 1125, 2 Atk. 246, and that has stood as law for so many years, it ought not now to be litigated again." In the case of *Doe v. Wright*, 8 Term Rep. 66, Lord Kenyon laments that the same technical words are not required in wills as in deeds, "but," he says, "that some rules have been established by a series of decisions on the subject, and we should be removing land marks if we were to abandon that which has been adopted as a rule of property, in pursuit of a doubtful intention of a testator." So in the case of *Right v. Sidebotham*, Doug. 763, Lord Mans-

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field \*said "he verily believed that in almost every case where by law a general devise of land is reduced to an estate for life, the intent of the testator was thwarted," yet he considered the rule of law certain and must prevail against the intention. Judge Buller makes the same remark in the case of *Doe v. Richards*, 3 Term Rep. 358; yet he says the rule of law is settled, that unless some words are used which the law considers as sufficient to carry a fee the devisee can only take an estate for life. And I am very much mistaken if it will not be found, in every case where it is said that the intention must prevail, that



the intention is drawn from expressions in the will, and not left to mere conjecture; and wherever the observation has been made, that one case cannot be a precedent for another, it only means that such is the variety of expression by which the intention may be manifested, that it can seldom happen that two wills can be couched in terms so exactly alike, but that they will admit of a different construction by different persons; and therefore where no precedent can be found by which it can be governed each must form a law for itself. But it never can be tolerated that where the words are the same, or are calculated to convey the same meaning, the decision of one shall not be a precedent for others. And for the purpose of establishing the doctrine which I have advanced, I require no higher authority than the cases which have been relied on in the argument to support a contrary position. Indeed if those cases do not go the whole length of deciding the case now under consideration, I certainly have mistaken them. The first is the case of *Forth v. Chapman*, 1 P. Wms. 666. In that case the testator had given the residue of his estate, consisting of both freehold and leasehold, to his two brothers, and if either of them should depart this life and leave no issue of their respective bodies, then to go over to the children of

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his brother and \*sister. In principle it is the very case now under consideration. This is the case from which the opinion of Lord Mansfield is taken, to prove the influence of intention in the construction of a will; yet Lord Macclesfield says that those words, in a devise of real estate, carry a fee tail, and the reason is in favour of the issue, that they may have it, and the intent take effect. See also *Fearne*, 172, et seq. *Sheffield v. Avery*, 3 Atk. 288.

Notwithstanding the great influence therefore which Lord Macclesfield was disposed to allow to the intention, he did not feel authorized to travel out of the will in pursuit of it, nor to disregard former decisions on the construction of the same words. And the same Judge says, 1 P. Wms. 667, that where there is a devise of personal estate to one for life and if he die without issue then to another, the issue cannot by any construction take it. It would appear to me, therefore, that the decision of the Court of Equity derives but little support from the opinion of Lord Macclesfield.

The next is the case of *Hodgson v. Ambrose*, Doug. 337, in which Judge Buller is represented as saying, that intention is the rule to which all others must bend. But that intention, Judge Buller also says, must be consistent with the rules of law. A man cannot by will create a perpetuity; he can not put a freehold in abeyance; he can not limit a fee upon a fee; nor make a chattel descend to heirs. Judge Buller therefore says nothing

more than what every person will admit, that the intention must prevail where it is clearly expressed, the want of technical words to the contrary notwithstanding. He also shews his respect for decided cases, by recognizing the case of *Coulson and Coulson*, 2 Str. 1125, 2 Atk. 246, as a governing authority in the case then under consideration. In that case the testator had given his land to his grand son Robert Coulson for life, remainder to A. and B. to preserve contingent remainders during

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the \*life of Robert Coulson, remainder to the heirs of the body of Robert. It was there argued as in this case, that the devisee took only an estate for life and that the heir took as purchaser. But the Court held that the heir could not take as purchaser, and that to effect the intention of the testator the devisee, notwithstanding there was an express estate for life given to him, must take an estate tail. Now if the issue can not take as purchasers where there is an express estate for life given to the ancestor with an express devise over to them, how can they take as such where nothing is given to them, and a fee simple is given to the ancestor?

The next case cited for the same purpose is that of *Knight v. Ellis*, 2 Bro. C. C. 570, where Lord Thurlow is represented as laying down the rule, "that the Court will go every possible length to carry the intention of the testator into execution for the benefit of those to whom the testator intended a benefit." Let us now see how far Lord Thurlow felt authorized, under the rule thus laid down by himself, to go for the purpose of carrying the intention into effect. I will give the words of that learned Judge. "A man by his will devises to A. for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A. and any other gift would be effectual after his death. The testator then gives the same fund over to B. after failure of issue of A." This is the case stated by Lord Thurlow. Now let us state the case before us as the complainants would have it. William Willson gives his estate to Thomas Willson for life, he then gives the same fund over to the Godfreys, after failure of issue of Thomas Willson. The two cases are precisely alike, except as to the names of the parties. We will now see what his Lordship's opinion would be in such a case. He goes on to ask, "what is the Court to do? It is clear, that a life estate only is given to A. It is clear that no benefit is given to B. while there is

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any \*issue of A.; the consequence is, that as no interest springs to B. and no express estate is given after the death of A. the intermediate interest would be undisposed of, unless A. were considered as taking for the benefit of his issue as well as of himself; and as the words will admit of such amplification, the Court will naturally imply an in-

tention in the testator that A. should so take, that the property should be transmissible through him to his issue, and he was therefore considered as taking an estate tail." And that must be the decision in the case before us, according to the construction given to the will of William Willson, by the complainants themselves: but the case as it actually exists is still stronger against them. In the case put by Lord Thurlow, the devise was to A. for life expressly; yet it was not considered that the issue could take by purchase. In this case a fee simple is given to Thomas Willson; so that the estate is transmissible through him to his issue per formam doni, and we are not left to construction to afford them the benefit which was intended them under the will. I will here take leave of the authorities in relation to that part of the case; and if I have not succeeded in proving every thing which I undertook to prove by them, I shall despair of doing so. I mean that I have shewn that Lord Macclesfield, Lord Thurlow and Judge Buller, whose opinions have been relied on to prove that in the construction of a will the intention is to govern, have always made use of that expression with the restriction which I have laid down. That they have shewn the same respect for decisions involving the construction of wills as for any other decisions. And that, in cases exactly analogous to that now under consideration, they have come to conclusions directly the reverse of the opinion in support of which they have been quoted. I will however observe, that were I to form an opinion of the testator's intention from the

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words of the will, independently of \*authority, I should come to the same conclusion. The testator gives the whole estate to Thomas Willson, his grand son. What could we infer from such a devise, but that he intended to give him an estate transmissible to his issue by way of inheritance, and nothing more? But it is said that, by giving the estate over to remote relations, after the failure of issue, he has manifested an intention to provide a distinct benefit for the issue. Suppose he had given the property to Willson and his heirs. In such case, although the heirs were mentioned, no distinct interest would arise to them. They would have acquired no benefit, except the right of inheritance, in case the property remained undisposed of at his death. Suppose it had been limited to him and the heirs of his body, which would have been still stronger, yet the devise would have barred the descent. In this case, however, the testator has given a fee simple to his grand son. He has given nothing to his issue. How then can we suppose that he intended to give a life estate to one to whom he has expressly given a fee simple, and that he intended a fee simple to those to whom he has given nothing at all? To give it such a construction we must not

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only infer his meaning from what he has not said, but we must presume that he intended something directly contrary to what he has said.

And this brings us to the second proposition, which involves the inquiry how far an estate may arise by implication? I have already admitted the abstract proposition to the whole extent which has been contended for. I have admitted that an estate may arise, may be enlarged, may be controlled and even destroyed by implication. But the doctrine of implication must be received subject to certain established rules and principles. It is a pretty well established rule of the common law, that when a contract is reduced to writing, nothing is to be implied which does not arise from the face of the writing.

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It is \*to be presumed that when a person undertakes to express his ideas in writing, that nothing is to be left to inference. Therefore Mr. Fearne says, p. 49, "raising an estate by implication, in direct contradiction to and denial of an express estate, is irreconcilable with the idea of implication." In this case the testator has given a fee simple to his grandson; he has given nothing to the issue. Would it not be incompatible with the express intention of the testator to imply an estate for life to the grandson and a fee simple to the issue? Again, it is laid down by Mr. Fonblanque that, an estate is never implied to issue as purchasers. 2 Fonbl. 62. The same principle is recognized by Mr. Fearne. Fearne, 449. The authorities relied on are Lady Lanesborough v. Fox, Cas. Temp. Talb. 262 and Bodens v. Watson, Amb. 398. 478. It is contended that those cases do not support the position for which they are adduced. I shall not enter into a very minute examination of them, for the purpose of ascertaining whether they do or do not; for in the sequel of this opinion I shall have occasion to refer to several cases, which, although they do not expressly decide the question, are obviously bottomed on the assumption that such is the settled rule of law.

But, with regard to the first, I do not view it precisely in the same light as it has been considered in the argument. Two points appear to have been determined—1. That a devise to the male heirs for life was not such a precedent estate as would support a devise of the reversion to the heirs generally. 2. That the words "on failure of issue of the body of B." would not raise an estate tail by implication; as he took no express or particular estate at all by the will. Fearne, 446. See also Moore v. Parker, 1 Lord Raym. 37. The last is the only point in support of which the case is relied on, and the other points in the

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case are immaterial as \*they regard that question. In the case of Bodens v. Watson, Mileora Bodens, by will, directed her house and all her effects to be sold and to be laid



out in funds for Mr. George Bodens, during his life, and if he should have no "heirs" to his sister Mrs. Jane Watson. The question was whether the devise over to Mrs. Watson was too remote. The Lord Chancellor said, "I cannot imply a gift to the issue, as purchasers; for such an implication must be necessary, which is not the case here." The word "heirs" must mean heirs of the body, and the testatrix certainly intended not only that George Bodens, but also his issue, should take perferably to Mrs. Watson, and that can only be by transmissibility; for they cannot take as purchasers. It is true the remainder here is to take effect after a failure of heirs generally. But I do not see how that is to effect the question of implication. It is not, however, necessary to dwell upon the question, whether issue can in any case take as purchasers by implication: for an estate by implication can never arise to any one except from necessity. And where such implication is raised from the will, the necessity must appear on the face of the will also. And such an implication is never allowed where the provisions of the will can otherwise be carried into effect, because then no such necessity exists. In support of this position, also, I require no higher authorities than those relied on in the case of *Carr v. Green*, from which a contrary conclusion has been drawn. Mr. Fonblanque, after laying down the general principle, proceeds to illustrate his several propositions by cases which I will proceed to consider in their order. An estate may arise by implication, where a man devises an estate to his heir after the death of his wife. Here the wife shall take an estate for life by implication; for the heir is not to take until after the death of the wife, and as there is no other person who can take, it must be presumed that he intended it for

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his wife; otherwise that \*part of the estate would be undisposed of. But the case under consideration affords, perhaps, as good an example as any that can be adduced. The testator gives an estate to his two grandsons, but if they die without leaving issue, then over. Now the estate does not go over to the Godfreys until a failure of issue of both his grandsons. Of course, if one dies without issue, his estate goes over to the other, as a cross remainder by implication. Judge Blackstone, also, who says an estate may be raised by implication, gives the same example of a father devising to his heir, after the death of his wife, &c. But Christian adds, if the devise had been to a stranger, instead of the heir, it is thought no such estate would have been implied to the wife; because it might have descended to the heir in the mean time. 2 Blac. Com. 381. Fonblanque also comes to the same conclusion, after having considered all the cases on the subject. 2 Fonbl. 57-65. It is true, that Plowden, in giving an instance of an estate arising by implication,

does say that where a man devises land to one, habendum to him and his heirs, after the death of the wife of the devisor, then, although the wife is not named before the habendum, she shall take the estate thereby. This author does not distinguish between a devise to the heir and to a stranger. But he appears to rely on a case from the Year Books. 13 H. 7. And in the margin of Plowden the commentator says, this case, as it is here put, is clearly contrary to the settled rules of law at this day, and is not warranted by the book of 13 H. 7; for the case there is of a devise to the heir at law. *Throcmer-ton v. Tracy*, 1 Plowd. 145. See also *Holmes v. Meynel*, T. Raym. 454. *Phillips v. Phillips*, 1 P. Wms. 38. *Falconer v. Falconer*, 1 Vern. 21. *City of London v. Garway et al.*, 2 Vern. 571. In all of which the distinction is made between a devise to the heir and a stranger.

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And in the case of *Phillips v. Phillips*, it \*is said "this is the known case of 13 H. 7," which is the authority relied on by Plowden.

Now however high authority we may suppose Plowden to be; yet, as he is not supported by any cotemporary writer and is contradicted by all the subsequent authorities, we must suppose that he has mistaken the law in one instance, or that his reporter has mistaken him. And if we examine the cases throughout, we shall find the same rule to apply, that an estate by implication is never allowed except when it is necessary to carry some manifest intention into effect. The same rule applies where an estate is to be enlarged by implication. Thus if an estate is devised to A. generally, and for want of issue the remainder over to B., A. shall take an estate tail by implication. For though the estate to A. generally would of itself pass only a life estate, yet as no benefit is given to B. while there is any issue of A. the consequence would be that, as no interest springs to B. and no express estate is given to the issue of A., after the death of A. the intermediate estate would be undisposed of, unless A. were considered as taking as well for his issue as for himself. To effect that intention he will be considered as taking an estate tail. And in support of this position the case of *Knight v. Ellis*, 2 Bro. C. C. 570, is relied on, which is quoted on the other side and has already been referred to. But, why could it not be construed a devise to the first taker, and a remainder over to the issue as purchasers? Because, according to the rule in *Shelley's case*, a devise to one for life, with remainder to his heirs or issue, is not a direct gift to the issue; it only amounts to an enlargement of the estate in the first devisee, converting a life estate into a fee simple or fee tail, and rendering it thereby transmissible to his issue. And therefore Fonblanque observes, with reference to the case of *Knight v. Ellis*, that it is the only construction which can be given to

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such words, consistent with the intention of the testator; for it seems clear that the issue could not take as purchasers by implication. 2 Fonb. 58, 69. So where an estate is given to one coupled with some trust, which cannot be executed without construing it into a fee simple, there the law will imply such an intention. As where land is given to an executor for the purpose of paying debts, he must be presumed to take such an estate as will enable him to effect the object of the devise. Such is the case of *Oates v. Cooke*, 3 Burr. 1686, from which the words of Mr. Justice Wilmut are quoted, "that if it be necessary to imply intention it is the same thing as if it were particularly expressed." That position no one can deny. All that is contended for is, that there must be a necessity for the implication before it will be allowed.

The next and the last case relied on by the complainants which I shall notice is the case of *Robinson v. Robinson*, 1 Burr. 38, and 3 Atk. 736. In that case the testator gives his estate to Launcelot Hicks, during life "and no longer, and after his death to such son as he may have lawfully begotten, and for default of such issue then over." Here is an express estate for life given to the devisee, and no longer. There is then an express devise to such son as he may lawfully have, which is in fact a devise to his heirs male, and in default of such issue, &c.; yet the Court held, that it could not be construed a direct gift to the issue as purchasers, but that it must be construed an estate tail; and Lord Mansfield said, "by law the testator could by no words make the father tenant for life and the heirs male of his body purchasers." And that case is quoted to prove, that we must first imply a life estate, where a fee simple is expressly given, and then imply a direct gift in fee to the issue to whom nothing is given. The case of *Robinson v. Robinson* is precisely what the complainants

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wish their case to be. It is a gift to the devisee for life; there is then a devise to the issue, and for default of issue then over. Now let us imply a devise to Thomas Willson for life and no longer, and then a devise to his issue, &c. We then should have the case of *Robinson v. Robinson*, which the House of Lords held to be an estate tail. We are therefore required to imply two facts directly contrary to the express word of the testator, in order to enable us to draw a conclusion which will not follow even when the facts are admitted. That is to say, we must first imply that Thomas Willson took a life estate, and secondly that there is a direct devise to his issue; both of which are contrary to the face of the will; both of which, when admitted, would leave the parties precisely where they are, if the case of *Robinson v. Robinson* is to be received as authority.

It is therefore conclusive authority against the opinion in support of which it has been adduced. Perhaps it may be said, that the limitation in that case is after an indefinite failure of issue, but that in the principal case the word "leaving" restricts it to issue living at the time of his death. I think, however, I shall be able to show by and by, that whatever influence may be given to that word, it can have no effect in this case. At present, however, I will merely observe that, according to the English authorities, it can have none in any case of a devise of land. *Fearne*, 476, and the cases there quoted. It is true that in the case of *Porter and Bradley*, 3 Term Rep. 143, Lord Kenyon seems to intimate that there is no difference between a devise of real and personal estate in that respect. That expression has given rise to considerable discussion in the English books. *Crooke v. De Vandes*, 9 Ves. 197. 2 *Fearne*, 476, in note. The dispute is not material in this case, because the only question was, whether the words of the will carried a fee tail or a fee simple to the devisee, with an

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executory devise over. But it did not involve the question submitted in this case. If however it is important to know the extent to which Lord Kenyon intended to carry his ideas on that subject, perhaps some inference may be drawn from an opinion of his lordship in a subsequent case. In the case of *Daintry v. Daintry*, 6 Term Rep. 307, the testator had given his estate, both real and personal, to his son John and the heirs of his body; and if he should die without leaving issue of his body, then over. The case was sent by the Master of the Rolls to the King's Bench for the opinion of the Judges. Lord Kenyon observed that this was precisely like the case of *Forth and Chapman*, where Lord Macclesfield relied on the word "leaving," saying that when used in the limitation of personal property, it was confined to leaving issue at the time of the death. Therefore as to the real estate, he thought that John Daintry took an estate tail, as to the personalty he took for life, and if he had children he took absolutely; if he left no children, then it would go over to the uncle by way of executory devise. And afterwards all the Judges certified that John took an estate tail in the real estate, and an absolute estate in the personal.

The other cases relied on by the complainants relate only to the general doctrines of intention and implication, of which not one word need have been said, as they are questions about which no lawyer ever entertained a doubt. The only question is respecting the application of them; and I have referred to the authorities adduced for the purpose of shewing how far they have been applied by the Judges, whose opinions have been quoted in support of the general principle. And



if I have shewn (what I think does most manifestly appear) that their opinions are directly repugnant to the decision which is now under consideration, it will not be necessary to resort to other cases to establish the

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\*same principle. The cases however are so numerous, that we can scarcely open a book upon the subject but one presents itself to us. The case of *Barnfield v. Wetton*, 2 B. & P. 324, is so strong, that it is not attempted to be answered but by saying it was a question of intention, and therefore is no authority for another case. But as this Court professes to be governed by authority, it is only necessary to see whether the opinion is in conformity with the current of former decisions. I admit, that if it were merely the opinion of Lord Eldon, however it might be entitled to our respect, it would not necessarily be a governing authority; but if it be consistent with established law, I apprehend we must be governed by it. The testator had devised certain lands to S. S. and "her heirs and assigns for ever, but if she should die leaving no lawful issue at the time of her death then over." The Court determined that it must be construed an executory devise. It is supposed that Lord Eldon had great difficulties to struggle with in getting over the words, "if she should die leaving no issue at the time of her death." But I do not suppose he saw any difficulty in his way. It was a plain case of a devise over, after a fee given to the first devisee, depending on the contingency of her leaving issue. Suppose the contingency should be the changing one's religion, leaving the country, or accepting a commission in the army, there would then be no doubt or difficulty in the case. And it does not appear to me that the difficulty is increased by adopting some other contingency, instead of those I have mentioned. *Pells v. Brown*, Cro. Jac. 550. 1 Eq. Abr. 187. *Hanbury v. Cockerell*, 1 Roll. Abr. 836. 2 Black. Comm. 169.

But it is said it is manifest that his limiting it over upon the failure of issue was intended as a benefit to the issue. And so it was. He had given an estate to their ancestors, descendible to them, and he did not

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intend to \*deprive them of that benefit. He limited it over therefore upon the condition only that there should be no issue to take. But he intended to leave it in the power of the father to dispose of it as he thought proper for their benefit, and not to give it to them immediately, without leaving him any control over it. The decision therefore in the case of *Barnfield v. Wetton* appears to me in unison with all the decided cases, and I do not see how the Court could have come to any other conclusion. Lord Eldon does not say the issue could not take as purchasers, but he appears to assume it as a settled rule of law, and did not therefore meet

with any such difficulty as he is supposed to have had to contend with. So where an estate is controlled by implication, the same necessity must appear as where a devise is to one and his heirs; and if he die without heirs, then to one who may be his heir. This will be construed an estate tail, although the words of the will would carry a fee. It is apparent, that by the word heirs the testator meant heirs of the body, and not an indefinite failure of heirs; as the estate is ultimately limited over to one who may be his heir. See 2 Fonbl. 64, and the cases therein cited. *Walter v. Drew*, Com. Rep. 372. *Fearne*, 484, note. *Attorney General v. Bagley*, 2 Bro. C. C. 553. I think therefore the cases on which I have relied prove abundantly, that although the intention is to govern in the construction of a will, that intention must be apparent either from the words or provisions of the will, and must be consistent with the rules of law. That an estate by implication is never allowed to issue as purchasers. That an estate by implication is never allowed in any case except from necessity, which must be apparent on the face of the will, and for the purpose of carrying into effect the manifest intention of the testator. And that every case which has been relied on to prove the

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supremacy of intention, over every other consideration, shews that the Judges, whose opinions have been relied on, have never carried the doctrine so far as to break in upon any settled rule of law, or to contravene any solemnly adjudged case. These are not mere inferences, drawn from abstract principles laid down in the progress of cases quoted, but they are the decisions in those cases. And it appears to me an unauthorized method of legal reasoning, where we must necessarily be governed so much by precedent, to rely on the authority of great names for the purpose of establishing certain general principles, and then to draw inferences from those principles directly contrary to the conclusions drawn by the Judges themselves, whose opinions have thus been relied on as authority.

Having shewn the kind of necessity which alone will authorize the raising, enlarging or controlling an estate by implication, let us see whether such necessity exists in this case? The testator gives to his grand son an estate in fee simple, defeasible upon his dying without leaving issue. The devisee has an estate transmissible to his issue by descent. There is no necessity therefore of implying a direct gift to them, as they are entitled by the express terms of the devise to all the benefit which it is presumed the testator intended they should have. Without resorting to implication, all the words of the will are rendered operative, and it does not belong to the Court to give them an operation different from their natural and legal import.

I now come to the consideration of those

cases, which have been relied on to shew that the complainants are entitled by precedent as well as principle to recover. And if the complainants have succeeded any better in this part of the case than the former, the time which I have spent in investigating the subject has been most unprofitably employed.

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\*The first case relied on is *Forth v. Chapman*, 1 P. Wms, 666, which has been already referred to for another purpose. In that case the testator gave his estate, both real and personal, to his two nephews, and "if either of them should depart this life and leave no issue of their respective bodies," then a devise over.

This case is relied on to prove that Lord Macclesfield was of opinion, that the issue might take as purchasers. But it has already been remarked that Lord Macclesfield says expressly, that those "words as to the real estate carry an estate tail." As to the personal estate, he was of opinion that the words, "die without leaving issue," meant leaving issue living at the time of his death, and that the limitation over therefore was not too remote. It was not because the issue took as purchasers, but because as there was no issue living at the time of his death, the contingency happened within the time allowed by law. So far from authorizing the inference that Lord Macclesfield considered the issue as taking by purchase, he says they could not by any construction have it.

The next is the case of *Reed v. Snell*, 2 Atk. 642. The testatrix left her whole estate to her daughter and the heirs of her body, but if she should die leaving no heirs of her body, then to go over. Lord Hardwicke held that the word "leaving" meant, leaving issue at the time of her death. It might therefore be construed a direct gift to the issue, after the death of the first legatee. But in that case there is a direct gift over to the heirs of her body. It is not left to implication. Lord Hardwicke does not say that the word "leaving" may be construed into a gift, but that when the testator has given to the heir or issue it may serve to qualify the gift so that the issue may take by limitation or purchase according to the intention of the testator.

Let us remark the observations of Lord

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Thurlow in *the case of Knight v. Ellis*, 2 Bro. 570. A man devises to A. for life, he then gives the same fund over to B. after failure of issue of A. The devisees would be entitled to an estate tail in the real estate; but an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole estate to the first taker: but if the testator, without leaving it to necessary implication, give the fund expressly to the issue, they are

not driven to the former rule, but the issue may take as purchasers; and there is an end of the enlargement of any kind of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase; it no longer rests in conjecture. Here the distinction, between an express gift to the issue and leaving it to implication, is clearly pointed out. In the first they may take by purchase; in the other they cannot take at all. And those words have no other effect, than designating a contingency upon which the property is to go over.

The next is the case of *Lampley v. Bower*, 3 Atk. 397. In that case the testatrix gives to her two nieces and their issue, and if either of them die without leaving issue, &c. There it was held that the issue took as purchasers. But if the estate had been given to the nieces without naming the issue, followed by these words, if they should die "leaving" no issue, then over according to the distinction in the above cases, the issue could not have taken at all. The word "leaving," therefore, to which so much importance has been attached, has nothing to do with the case now under consideration, because nothing is given to the issue. It is further to be observed that all those cases, where the word "leaving" has been allowed such influence, are bequests of personal property.

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\*But it is said that no distinction in that respect can exist here between real and personal estate, and that Lord Kenyon has denied its existence even in England. 3 Term Rep. 146. I have already referred to cases furnishing evidence of the English law upon that subject, and of the extent of Lord Kenyon's opinion. Whether such a distinction would be recognized here or no, I shall not now stop to inquire, as I consider it wholly irrelevant to the question. I would however observe, that it had never before occurred to me that our law, with regard to real property, had undergone such a revolution by the abolition of the rights of primogeniture as seems to be imagined. It is a very well settled principle, and one I have never heard disputed before, that the same words in many instances have a different meaning when applied to real and personal estate. Words which convey only a life estate or a conditional fee in land give an absolute estate in personal property. These positions are so clear that I presume they will not be denied. It would not be extraordinary, therefore, if other words should be allowed a different operation, when applied to different species of property. But as the question is unimportant in this case, I shall express no opinion upon it. I am not aware of any case where the words "dying without leaving issue" have been construed into a direct gift either of real or personal estate. They have only been resorted to, to qualify an express gift and to determine whether



it was intended that the issue should take by limitation or purchase. And such, I think, will be found all the cases which have been referred to. From the view, therefore, which I have taken of the case, the complainants have shewn no right to the property in question, and therefore are not entitled to a decree. It is not necessary that we should determine the nature of the estate which the devise took. If he took a fee simple absolute,

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\*he had a right to convey. If he took what in England would be called an estate tail, and here a conditional fee, the condition was performed by the birth of issue, and in that event the conveyance is good. If he took a fee defeasible upon his dying without leaving issue at the time of his death, with an executory devise over, the fee would continue in the devisee, until the contingency happened, and he might sell subject to that contin-

gency. If the contingency never happened, and can never happen, then the title can never be defeated, and the purchaser is secure.

With regard to the policy of the construction which I have given to the will, whether it is the one best calculated to unfetter estates, and promote that legal distribution which it is the object of our act to effect, is a question on which I have nothing to say. I shall leave that question to take care of itself.

I have not considered the question of jurisdiction on which the bill was dismissed—whether the Court had jurisdiction or not? If the complainants had no right to recover either in that Court or any other, the decision ought not to be supported. It is the opinion of the Court, therefore, that the motion ought to be dismissed.

Motion refused.

# CHANCERY CASES

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

IN NOVEMBER 1825.

### JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

#### I McCord, Eq. \*92

\*W. SMITH v. M. V. SPENCER.

(Charleston. Nov., 1825.)

[*Arbitration and Award* ¶29.]

Arbitrators have no other powers than those conferred by the submission.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 147–154; Dec. Dig. ¶29.]

[*Arbitration and Award* ¶50.]

An award must be made within the time prescribed by the submission.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 249–253; Dec. Dig. ¶50.]

[*Arbitration and Award* ¶38.]

Quære, If an umpire may be chosen by lot?

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 191, 192, 194–197; Dec. Dig. ¶38.]

[*Arbitration and Award* ¶50.]

[Where a reference to arbitrators, under a rule of court, limits a time within which the award is to be made, the authority of the arbitrators ceases at the expiration of the time, and they have no power to enlarge the time.]

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 252; Dec. Dig. ¶50.]

This was a bill filed by M. V. Spencer, administratrix of Joseph Spencer, against William Smith, Jun., to compel the defendant to account. The complainant's solicitor moved to refer the matters of account to arbitrators, who should report their award to the Court. Arbitrators were chosen who could not agree, and thereupon chose an umpire, by putting the names of several gentlemen in a hat and drawing out the name of one of them. The person so chosen as umpire reported to the Court the award thus made,

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which was objected to by \*the complainant, on the ground that the umpire was chosen by lot. Chancellor James supported the objection.

Cogdell and Gilchrist, for the appellant, cited 6 Ves. 34, and *Harris v. Mitchell*, 2 Vern. 485, on the ground that the umpire was chosen by lot.

Another ground taken before the Chancellor was also relied on: viz. That the award was made after the period limited by the submission.

*Curia, per NOTT, J.* A rule of reference to arbitration is in the nature of a power of attorney, conferring on the arbitrators an authority to decide upon all the matters contained in the submission. The arbitrators have no power but what they derive from the rule. If there is a time limited within which the award is required to be made, the power ceases at that time; and if the arbitrators proceed afterwards they act without authority. The rule is as much a dead letter as if it had never been issued, unless an authority is given to the arbitrators to extend or enlarge the time. But the submission in this case gave no such power. The award was therefore unauthorized and void. *Davis v. Vass*, 6 Ves. 34. 15 East, 97. 8 East, 13. Com. Dig. 664, in note. This opinion supercedes the necessity of considering the other question. I would nevertheless observe that it is laid down in some of the books, that an umpire cannot be chosen by lot. *Harris v. Mitchell*, 2 Vern. 485. Yet I think that must be taken with some qualification. *Neale v. Ledger*, 16 East, 52. And although it is not



a method of choosing an umpire which I should recommend, yet if the case turned altogether upon that question, I should think it required some further consideration.

Motion granted.

I McCord, Eq. \*94

\*INGRAHAM and Wife v. POSTELL'S EXECUTORS.

(Charleston, Nov., 1825.)

[Wills ⚡733.]

Testator ordered his executors to sell his whole estate on such terms and conditions as to them should seem most advantageous, and to invest the proceeds in such stocks as they should deem most safe and productive, and to pay over to his daughter for life one half the proceeds or dividends arising on said stock, invested as above directed, as the dividends shall become due. The other half to accumulate. And then said, "The proceeds or dividends on one half of my whole property to be paid to my daughter and the other half to be added to the principal." The executors sold the estate and for a part took bonds on long credit. *Held*, that the daughter was entitled to one half of the proceeds of the whole estate, whether arising from the interest arising on the bonds or from dividends of stock purchased.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1837; Dec. Dig. ⚡733.]

[Wills ⚡734.]

The time when interest shall be allowed upon a legacy does not depend on the time when it is received, but when in law it may be received.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

[Wills ⚡734.]

General rule that a legacy carries interest from one year after testator's death, though it appear that it could not by any diligence be collected in that time. English rule.

[Ed. Note.—Cited in *Bowen v. True*, 74 S. C. 489, 54 S. E. 1018.

For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

[Wills ⚡734.]

Bonds being productive interest on them allowed legatee, being intended as a provision for maintenance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

[Wills ⚡734.]

When interest allowed on legacies out of land, or mortgages bearing interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

William Postell, late of Charleston, deceased, made his will, wherein, inter alia, he ordered his executors to sell all his estate, real and personal, in January next after his death, on such terms and conditions as to his said executors should seem most advantageous, and to invest the proceeds of the sales in such stocks as they should deem most safe and productive. Then followed the clause on which the only question in this case arose. "For and during the natural life of my daughter Mrs Joanna Ingraham (the testator's only child) my executors will pay over to her,

for her own use, behoof and benefit, and that of her family, the one half of the proceeds or dividends arising on the said stock, invested as above directed, at such times as such dividends on said stock shall be declared due and payable. Item, the other half of the proceeds or dividends of said stock is to remain, and my executors are to receive said half, and with it purchase stock, which will thus form an accumulating fund: But I wish my daughter Joanna also to receive the half of the dividends of this accumulating fund; the other portion, being the interest or dividends of this accumulating fund, to be added to the principal, so that my whole property, after providing for the legacies, &c. will be first divided into two equal parts, the proceeds or dividends on one half to be paid to my daughter, the proceeds or dividends on the other half to be added to the principal, &c."

The executors, in pursuance of the will, sold

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the whole \*estate in January next after the death of the testator; and for the greater part of the purchase money bonds were taken, payable by instalments as usual, and at a very long credit. Mrs Ingraham conceived herself entitled, not only to the dividends of the stock actually invested, but also to the interest on the bonds given for the purchase money, as above stated; but the executors, by advice of counsel, refused to pay her any part of that interest, and contended that, by the words of the will, she could only claim the dividends of stock when the funds were so invested, but not before, and those only as they were received; and this was the question in the case, the executors contending that they had a discretion when to invest in stock.

James, Chancellor. From this will may be collected, first, that the testator wished to restrict the property as much as possible to the separate use of the wife; secondly, that he wished to retain his property in his own family as long as he possibly could. He twice repeats that his daughter was to have only a life estate for the sole benefit of herself and family, and after her death her part is limited over to the grand children. It is impossible to read the will without seeing that the grand children are the peculiar objects of the testator's bounty. With this intention always in view and to make it still more effectual, he directs that, "when the proceeds of the sales are received, and as they are received, they are not to be paid away to his daughter, but to be secured still better." That is, in fact, they are to be secured and invested in stock for the benefit of a separate estate which is limited over. In this the testator speaks plainly. The other half was to be invested in a similar manner, but with still greater restrictions. This shews with what anxious care he wished to guard every

part of his property. Moreover, in reviewing

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the contest, he constantly \*speaks of his "whole estate, as at first funded," and of his "originally funded property;" which plainly indicates that he intended his executors were first to invest the proceeds of his estate in stock, which they are bound to do as fast as the interest accrues after the first year, from the sale of the estate. Costs to be paid by the complainants.

From this decree the complainants appealed.

Hugh S. Legare, for the appellant. The obvious and fair construction of the words of the will was, that Mrs Ingraham should be allowed interest on one moiety of the whole estate, as well that part of it which was still in bonds, &c. as on that part of it which had been actually vested in stock. As the view of the testator was to provide for his only daughter, the instruction as to the investment was probably designed merely to designate the kind of property which he desired his estate permanently to consist, and not that the benefit of his bequest should be delayed. His daughter would be accommodated, and therefore his views best accomplished, if one half of the income of whatever nature were paid over as received. 2 Fonbl. 59. Fearn, 200. 1 Bro. C. C. 220. Courts of Equity were astute in giving effect to a will in favour of a child. 2 Desaus. 32. 1 Ves. 89. He cited also Robinson v. Robinson. Doe v. Halley, 8 T. R. 5. Doe v. Applin, 4 T. R. 83.

But whether the first ground was tenable or not, it was a positive rule of equity, established on the soundest reasons, that all legacies or bequests, like this, should bear interest from the end of a year and a day after the death of the testator, and in the case of children sooner. The estate, being left to the discretion of the executors, would not, in the case of children, prevent the legacy from bearing interest from the death of the testator. 2 P. W. 26. A legacy, charged on a

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particular fund, would carry interest as well as where it is charged on the estate generally. 2 Roberts on Wills, 97. 3 Desaus. 387. The same rule applied where the estate was directed to be sold. The executors were to be regarded as trustees, and it was to be presumed that they had done what ought to have been done. 1 Ves. Jun. 357. 6 Ves. 534. 5 Rob. 71. 2 Atk. 143. 4 Bro. C. C. 490. 2 Ves 91.

Dawson, contra, cited 7 Ves. 368, for the rules for the construction of wills. A legacy is not said to be vested when the sum is uncertain. 1 Ves. 57. 2 Bridgman's Dig. 187. 4 Ves. 1. 1 Ves. 10. 4 Bacon, 436. If there is no fund out of which the legacy is to be paid, it will not carry interest. Pearson v. Pearson, 1 Scho. & Lef. 12. Interest was

only decreed on a legacy of stock after the expiration of a year and a day. Webster v. Hale, 8 Ves. 410.

*Curia, per NOTT, J.* The will in this case must be so construed as will best effectuate the intention of the testator, if in so doing we do not violate any established rule of law. The plain and manifest intention of the testator appears to have been to allow his daughter one half of the proceeds of his whole estate for her own use, behoof and benefit, and that of her family, during her life. He does, to be sure, point out the manner in which the money is to be raised. It is by the dividends of stock, to be purchased with the proceeds of the sale of his estate. Suppose the estate had never been sold, must the complainant have lost her legacy? Suppose it to have been sold and the money loaned out upon interest instead of being vested in stock, would she not be entitled to a dividend of that interest, or what would amount to the same thing, interest upon the legacy? I entertain no doubt of it. And that, indeed, is the very case under consideration. The

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estate has been sold, and \*instead of calling it in and vesting it in stock, it is suffered to remain out upon interest. It certainly must have been the intention of the testator, that she should receive her portion of the estate as soon as it became productive. Equity requires that it should be so, and it is not opposed to any rule of law. The time when interest shall be allowed upon a legacy does not depend upon the time when it is received, but when in contemplation of law it may be received. Therefore, in England, it seems to be settled as a general rule, that a legacy shall carry interest after a year from the death of the testator, even though it appears that it could not by any diligence be collected within that time, because in contemplation of law it might have been done. The case of Wood v. Penrye, 13 Ves. 325, is very analogous to the case now under consideration. The testator had given several legacies to be paid out of money due on an Irish mortgage, when the same should be recovered, upon trust, to place out the said sum in government or other good securities, and pay the interest or dividend to the testator's niece for life, for her separate use, &c. At the time of the testator's death, the money due on the mortgage was still outstanding, and therefore could not be placed out upon government securities according to the directions of the will; yet the Court allowed interest upon the legacy from the death of the testator. The abstract question, whether the complainants shall receive a dividend of the interest accruing on the bonds is the only question submitted to us. The time when it shall commence is not involved in the case. And I have no doubt but that it ought to be allowed. If the estate had been sold upon a



long credit without interest, and the bill had been brought for interest on the legacy before the payment became due, it might, as was observed by the counsel, have presented a grave question for the consideration of the

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Court. But as the bonds are a productive fund in the hands of the executors, there can be no reason why the complainants should not have the benefit of it. The circumstance that the legacy was intended as a provision for the wife and children is a reason why the interest should be allowed upon it. If a legacy be given out of land it shall carry interest from the death of the testator, because the land yields a profit. So, if a legacy be payable out of personal estate consisting of mortgages carrying interest, and no time be mentioned for payment. 2 P. Wms. 26, 27. The Chancellor says in his decree, "it is impossible to read the will without seeing that the grand children are the peculiar objects of testator's bounty." But I do not discover, from the will, that his daughter is less so than her children. And unless it were so clearly expressed, we cannot suppose that his affection for his child was less than that for his grand children. But even if it were more manifest that his grand children were the principal objects of his bounty, I should not suppose that he would be less anxious about their present comfort than their future welfare. It is unnatural to suppose that it was his wish to cramp his daughter and her children in their means of support during her life, for the purpose of accumulating a fund for them after her death. I am of opinion, therefore, that the decree of the Chancellor ought to be reversed and the report of the Commissioner be confirmed.

Decree reversed.

#### I McCord, Eq. \*100

\*EDWARD WINSLOW v. Assignees of ANCRUM.

(Charleston. Nov., 1825.)

[Assignments for Benefit of Creditors ⚡196.]

Where a debtor executed a deed of assignment to pay his debts, merely placing certain debts at the head of the schedule gives them no preference.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 615-624; Dec. Dig. ⚡196.]

[Appeal and Error ⚡934; Interest ⚡22.]

Without the act of 1815 interest might be recovered on a judgment by suit on the judgment. The act only authorizes its collection in particular cases without suit, and where judgment has been recovered on a bond for the penalty for that much actually due, interest may be recovered on the judgment, though beyond the penalty; and in the absence of evidence the judgment will be presumed to have been obtained for the correct sum due.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. ⚡934; Interest, Cent. Dig. § 52; Dec. Dig. ⚡22; Judgment, Cent. Dig. § 948.]

[Judgment ⚡754.]

The lien of a judgment is as well for interest which may become due on it as for the principal debt.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1313; Dec. Dig. ⚡754.]

[Assignments for Benefit of Creditors ⚡317.]

[Where, under a deed of assignment, certain debts are preferred, the interest thereon is also preferred.]

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 927; Dec. Dig. ⚡317.]

This case came before the Chancellor on the report of Commissioner Elliott, to whom the case had been referred to ascertain the liens upon the estate of Ancrum prior to his copartnership with Chiffelle. He reported that there were two liens upon Ancrum's estate anterior to the copartnership. One a bond to the heirs of Mrs. Mary Frayer for the purchase money of the plantation on Savannah river called Laurel Hill, which bond was secured by a mortgage of the place. The balance of principal due, on the 7th of May 1824, was \$5,240; to which add a year's interest, which would be due on the 7th of May 1825, \$367; and \$5,607 would be the balance due on the 7th of May 1825. The date of the bond was the 8th of February 1813.

The other lien upon the estate was a bond to William Wightman, dated the 28th of July 1815, in the penalty of \$13,000 to protect him against endorsements on other liabilities on account of the obligor. Upon this bond a judgment was obtained on the 23d of February 1816. The copartnership commenced in 1816. Wightman claimed interest upon his bond, and further insisted that by the judgment he should have an equitable preference, not only to the \$13,000, but for the entire amount of his advances, which would reach \$32,000. As the judgment was for the penalty, the Commissioner sustained the objections of the assignees, and did not allow interest. The report proceeds, "nor does there appear any reason sufficient to make the judgment include the whole of his demand and give him a preference to other creditors whose debts rest upon considerations equally legal and valid. Wightman seemed to have been

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under an impression that the assignees had countenanced the construction that he should be satisfied before the creditors of the copartnership. Evidence has been adduced to this point, by which it is fully explained. Mr. Henwood drew the schedule, and placed at the head of the list of debts the whole of Wightman's demand, which induced this gentleman to believe that the assignees had thereby recognized his claim to priority. But Mr. Henwood said, upon examination, that his object was merely to furnish the account of debts to be paid by the assignees, not to state the order in which they were to have

been discharged, and included the judgment and simple contract in the amount of Wightman's debts. The Attorney General is one of the assignees, and has also testified upon this particular. His evidence is that the schedule is a mere estimate of the debts, and not a statement of the actual and acknowledged amount; nor did they ever intend or intimate that they would pay any creditor but according to his legal right. From these circumstances I cannot sustain Mr. Wightman's claim to interest, nor extend his payment beyond \$13,000, the amount of the penalty of his bond. I further report that Mr. Edward Winslow is admitted to be one of the creditors of Ancrum and Chiffelle, under the benefit of their decree. The only funds remaining with the assignees are Laurel Hill, which is subjected to the balance of the judgment of Mrs. Fraser and Mr. Wightman, and about \$4,000, the balance of Mrs. Bennett's bond, which was given for the purchase of the steam mill. All which is respectfully submitted."

Prioleau, for Wightman, excepted to so much of this report as rejected his claim to the whole amount of his debt, as stated in the schedule of debts annexed to the assignment, and confined him to the penalty of his bond without interest. He argued that

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Wightman was \*entitled to full payment under the assignment, with interest. He also contended that Wightman was a preferred creditor under the assignment.

Thompson, Chancellor. I am of opinion that the Commissioner was correct in not allowing interest beyond the penalty of the bond. There have been cases decided where this Court has made this allowance, but they are of a peculiar nature, and not at all analogous to the present. For instance where the obligor postpones the recovery of the debt by his own act, as by injunctions or other delays, the Court as an act of justice will allow the interest to be calculated beyond the penalty.

In regard to Wightman's being a preferred creditor, the Court differs in opinion from his counsel. The assignment was intended for the benefit of all the assignees, and his name being at the head of the list gives him no legal priority. With regard to the other exception, that he is entitled to come in with the other assignees and put his simple contract debts upon a footing with their judgments and specialty debts, will not admit of an argument.

It is ordered and decreed that the exceptions be overruled, and the report of the Commissioner be confirmed.

Wightman now appealed.

The following points were made by Prioleau for the appellant.

1. That the deed and schedule gave the whole of his demand of \$30,000 a preference

over other demands against the assigned estate of Ancrum.

2. That in the event of his being confined to his judgment, he was clearly entitled to interest upon the whole amount from the date of the assignment, by virtue of the provision contained in the deed.

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\*Dawson cited Buller, 164. 1 Const. Rep. 127. Plow. 467. 1 M'Cord's Rep. 503. 3 Bro. C. C. 502. 1 M'Cord's Rep. 28. 1 Bac. Abr. 417, tit. Bankrupt, letter E. 2 Bro. Par. Rep. 333, 340. 2 Anstr. 543.

Petigru, contra, cited Gainsford v. Griffith, 1 Saund. Rep. 51.

*Curia, per* JOHNSON, J. The claim of W. Wightman to be preferred to the other creditors of Ancrum to the amount of his whole demand (\$32,000) was founded solely on the construction of the deed of assignment, and was not the subject of reference to the Commissioner, and could not regularly come before the Court on exceptions to his report. The reference to him was to ascertain what were the liens on Ancrum's estate prior to his copartnership with Mr. Chiffelle, and could not embrace the deed which was subsequent.

There is nothing in the deed itself, however, which authorizes the conclusion that Ancrum intended this claim to be preferred, and it rests solely on the circumstance that the debts due Wightman stand at the head of the schedule of debts annexed to the deed, and hence it is concluded that they are first to be paid—but this deduction is clearly without foundation. Judging from the terms of the deed itself there is nothing which warrants it. On the contrary it is evident that it was the intention to provide for the payment of all the debts contained in the schedule as far as the fund would go without regard to the order in which they were placed. In any view therefore this ground of the motion cannot be sustained.

The second ground presents the question, whether Wightman has or has not a lien on the estate of Ancrum for the interest which accrued on his judgment subsequent to its date?

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\*As a general proposition there can be no question that in an action at law founded on a judgment the plaintiff would be entitled to recover interest on the amount of the judgment, without the aid of the act of 1815, which makes no change in the law except to authorize the sheriff to collect the accruing interest, without driving the plaintiffs to an action so to recover it. This point was long ago settled in the case of Lamkin v. Nance,<sup>1</sup> and has ever since been acted on. That was a judgment on a simple contract debt;

<sup>1</sup> This case the Reporter has never seen. It is not reported.



but the rule holds good also on judgments on penal bonds, if in fact the amount of the penalty be actually due and owing for principal and interest at the time of the judgment rendered, *Bonsall's Exec. v. Taylor*, 1 McCord's Rep. 503; and in an action on such judgment the plaintiff may recover the interest on the penalty.

It is objected, however, that the condition of the bond, on which the judgment of Wightman against Ancrum is founded, is not for the payment of money, but to save and indemnify him from certain liabilities which he had incurred on account of Ancrum, and that the Court cannot see that they did at the time equal the penalty of the bond, and that therefore interest should not be allowed. Neither the report of the Commissioner, nor the decree of the Circuit Court, furnish any information as to the fact, whether liabilities to the amount of the penalty of the bond had been incurred by Wightman at the time judgment was rendered, and this Court has sought information of the counsel concerned in the case, but has obtained nothing satisfactory: we are therefore left in the dark as to the matter of fact on which this objection is founded. In the absence of any further light on the subject, if we refer to the judgment itself it must be presumed that the

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whole amount of the penalty was then \*due. The judgment is for that sum without any circumstances connected with it, tending to shew that it ought to be for less. Wightman was not bound to submit the condition of the bond to the jury, and to prove the damages by the breach under the act of the legislature. It was the privilege of the defendant, Ancrum, to compel him to do so by rule of Court, and if he neglected to avail himself of this privilege Wightman was at liberty, forthwith, to have taken out execution for the whole amount, (*Mitchell v. Dawkins*, decided in Columbia, December Session, 1824.) and his neglect to do so furnishes a conclusive presumption that the whole amount was due.

It may be objected that equity would relieve against such a judgment. Be it so. But it would be required of the party complaining to shew, that the damages sustained were less than the penalty of the bond; and it is answered that in this case there is no evidence. Having established the position that, as between Wightman and Ancrum, he would have been entitled to recover interest in an action on the judgment, it remains to be seen, whether he has a lien on the estate of Ancrum for the interest as well as the principal sum.

The union of principal and interest is so closely blended, that it is impossible to separate them without doing violence to justice and common sense. They are, I think, justly compared to substance and shadow. It is impossible that one can exist without

the other. Remove the principal, and the interest no longer exists. Remove the interest, and the principal is divested of one of its legitimate appendages. The maxim *partus sequitur ventrem* appears to me not inapplicable to their condition. The case of *Sims et al. Creditors of Rochelle v. Campbell et al.*<sup>2</sup> decided in the Court of Appeals,

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at the \*last sitting in Columbia, is decisive on this question. Rochelle was insolvent, and, on a bill filed in the Court of Equity to determine the rights of the creditors, the Court ordered that the judgment creditors should be first paid in the order in which they stood with respect to time. The judgment of Campbell and Chambers was before the act of 1815, and the first in order to be paid. The Commissioner, however, declined giving them a preference as to interest which had accrued subsequently to the judgment; but on a rule against him the Circuit Court ordered that the interest should also be paid, and this order was affirmed on an appeal to this Court.

I recollect also another case, the title of which has escaped me, and, not being able to find it among the reported cases, I presume it has been overlooked. It arose under the act of 1815. The question on a rule against the sheriff was, whether the interest accruing on the oldest of several executions against the same defendant should be paid in exclusion of younger executions, where the sum levied was insufficient to pay the whole; and the Court ruled that it was entitled to be preferred.

The decree of the Circuit Court is therefore reversed so far as it disallows the interest on the judgment, and it is ordered and decreed, that in the application of the trust fund in the hands of the defendants, Wightman be allowed, in addition to the principal sum of his judgment at law against Ancrum, the interest which has accrued subsequently to the signing of the judgment.

Decree reversed.

<sup>2</sup>Vide ante, page 53.

#### I McCord, Eq. \*107

\*WADE HAMPTON v. LYON LEVY, Treasurer of the State of South Carolina.

(Charleston. Nov., 1825.)

[*Principal and Surety* ¶115.]

B, borrowed of the Loan Office, and mortgaged lands and gave H, as his security. The Loan Office did not record their mortgage, and B, conveyed the same lands to others without notice, and upon B's being sued twelve years after the loan on the bond, and proving insolvent, a suit was brought against his surety H. *Held*, that the Loan officers neglecting to record their mortgage, whereby their liens were lost on the lands, did not exempt H, from his liability, though sued seventeen years after the bond was given. The security could not object

that the lands were but vaguely described in the mortgage.

[Ed. Note.—Cited in *Lang v. Brevard*, 3 Strob. Eq. 63; *Jackson v. Patrick*, 10 S. C. 201.

For other cases, see *Principal and Surety*, Cent. Dig. § 263; Dec. Dig. ☞115.]

[*Principal and Surety* ☞104.]

A creditor has no right to vary the situation in which a surety to a bond has placed himself.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ☞104.]

[*Principal and Surety* ☞104.]

A new agreement with the principal to enlarge the time of payment will discharge the surety; but mere laches is not sufficient.

[Ed. Note.—Cited in *Pickett v. Land*, 2 Bailey, 610; *Beckham v. Pride*, 6 Rich. Eq. 81; *Gardner v. Gardner*, 23 S. C. 593

For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ☞104.]

[*Mortgages* ☞173.]

The statute as to double mortgages does not prescribe it as essential to the validity of the mortgage, that it should be recorded, it only postpones a mortgage not recorded in six months to one that is recorded within that time.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 412, 419–424; Dec. Dig. ☞173.]

[*Mortgages* ☞173.]

Judgments do not take priority of prior unrecorded mortgages.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 412, 419–424; Dec. Dig. ☞173.]

[*Principal and Surety* ☞115]

If the mortgagee does any act to invalidate or destroy the mortgage he releases thereby the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 244–268; Dec. Dig. ☞115.]

[*Subrogation* ☞31.]

The surety is entitled to every remedy which the creditor has against the principal; and all securities given to him must be transferred to the surety.

[Ed. Note.—Cited in *Lowndes & l'On v. Chisolm*, 2 McCord Eq. 464, 16 Am. Dec. 667.

For other cases, see *Subrogation*, Cent. Dig. §§ 70–91; Dec. Dig. ☞31.]

[*Principal and Surety* ☞104.]

A positive agreement to extend the credit discharges the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ☞104.]

[*Principal and Surety* ☞104.]

Neglect coupled with other circumstances of omission will not discharge the surety.

[Ed. Note.—Cited in *Pickett v. Land*, 2 Bailey, 610; *Caston v. Dunlap*, Rich. Eq. Cas. 82, 23 Am. Dec. 194.

For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ☞104.]

[*Principal and Surety* ☞104.]

If in any case mere omission and neglect could discharge the surety, it must be shewn to have operated as an injury to him.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ☞104.]

[This case is also cited in *Thayer v. Davidson*, Bailey, Eq. 414, on the doctrine of limitations of actions.]

Complainant stated that prior to the 20th of Jan. 1802 a loan was obtained by General Isaac Huger at the Land Office, for which he mortgaged the lands hereafter mentioned. That on his neglecting to pay, said lands were sold, by order of the treasurer of the state, by the sheriff of Richland district, according to the act of assembly; that John Bostick purchased them, and the act requiring that personal security should be taken from the purchasers as well as a bond and mortgage, complainant by said Bostick's inducement became his security in the bond, and was so designated therein; and complainant had it also inserted in the condition that the mortgage had been given. The complainant averred that he became bound only on the faith of said collateral security being given. The bill also stated that the bonds were dated the 20th of January 1802, and mortgages were taken as required, and were in defendant's possession, and complainant hoped they might be produced, and it would thereby appear that the lands were described as situated in the fork of the Wateree and Congaree rivers, but without any other description to identify them, or to furnish notice to subsequent purchasers, mortgages and creditors. That the mortgages were never recorded by the state, and that Bostick had sold all or greater part of the lands to persons who had recorded their titles, and thus defeated the lien of the state and the confidence of complainant. That the lands would constitute the first fund to which the state would look for indemnity, and that in any event, complainant might by aid of this

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Court have the said \*mortgages set up to indemnify him if he should pay Bostick's bonds. That the bonds were never sued by the state till July 1812, when Bostick's situation was becoming daily worse. That on the 10th of May 1815, they issued an execution against Bostick, and then dropt all further proceedings. That Bostick lived till 1815 but the state or its officer did not pursue him to insolvency, but were satisfied with one execution, when, as complainant believed, the Register's Office furnished evidence that he was owner of several tracts of land at that time, of value probably more than enough to satisfy the demand of the state against him. That defendant had never foreclosed said mortgages, or made that security available to the state; though it was evidently the intention of the act that it should be first applied to the payment of the debt. That complainant being a mere surety, and in no way benefited by the purchase, had a right to insist that the principal should be pursued to insolvency before he was assailed. But in October 1819 a suit was brought against him in the name of Lyon Levy, treasurer of the state, successor of Daniel Doyley, to recover the amount said to be due on



said bonds, and it was tried at Columbia in March 1821, and a verdict found for the complainant, who relied for defence on lapse of time, laches in the state, and presumption of payment. That the state appealed and a new trial had been ordered, principally on the ground that relief could only be given complainant in equity. That, on the new trial thus ordered, complainant's counsel offered to prove all the facts stated in the bill, and to shew that he was only considered as security in said bond; but the evidence was overruled by the Court, which refused to permit such testimony to go to the jury. That therefore the said Lyon Levy obtained a verdict for the amount of the bond, and was now urging against complainant the execu-

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tion which had been issued on the \*judgment thus obtained. The bill prayed that a perpetual injunction might be granted against the suit at law, and defendant restrained from proceeding while this suit was advancing in this Court. That defendant might resort to the mortgaged premises, and to the representatives of Bostick, and those who held his property, before complainant is compelled to pay, and prayed other relief, &c.

The defendant, Lyon Levy, in his answer stated, that he did not of his own knowledge know the transactions mentioned in the bill: his information being derived from papers in the state treasury; that it did appear from them that Isaac Huger mortgaged to the Commissioner of the Paper Medium, on the 10th of May 1786, two hundred and fifty acres of land described as swamps, in Camden district, bounded west by Congaree river, north east by land of E. Lightwood, and north by land of G. Kelly. That the said lands were mortgaged for the payment of a bond of J. Huger and T. Lewis, and by a pencil memorandum of Major Thews it appeared the said lands were sold on the 29th of March 1797, by virtue of said mortgage, and bought for the use of the state. That by another memorandum it appeared, in 1800 or 1801 sheriff Rees, of Sumpter, was directed to sell said lands, which order was afterwards transferred to the sheriff of Richland, who returned to Daniel Doyley state treasurer an account of the sale, and two bonds of John Bostick and Wade Hampton, each conditioned for the payment of \$649.97; viz. one for the payment of said sum on the 7th of September 1802, and one for the like payment on the 7th of September 1803, with a mortgage of the lands aforesaid to secure the payment. That from entries in a book containing an account of debtors to the Paper Medium and Loan Office, it appeared that J. Walton, then treasurer, delivered the bonds to the comptroller general to be sent

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to solicitor Starke on the 27th \*of January 1815, and that the mortgage was also delivered to Mr. Cogdell, in consequence of an ap-

plication from solicitor Starke. Defendant further stated that he did not believe the mortgage of Bostick was recorded, and that all original mortgages to the Paper Medium were taken in two books kept for that purpose; the body of the mortgages being printed and the blanks written out by the Commissioners, and whenever any mortgage was paid off an entry was made in the books. That Isaac Huger's mortgage was in one of the said Books uncanceled, and defendant did not believe that the mortgages to the Paper Medium were recorded in any of the offices for registry of mesne conveyances. That whenever a sale was made of premises mortgaged to the Paper Medium, and it happened that they were bought for the state, the treasurer used to expose the same for sale in the districts where they lay pursuant to acts of the legislature, and bonds for the purchase money taken, and a mortgage of the premises. But defendant did not believe that the mortgages so taken were recorded at all. That by the mortgages in the office, and by the public books of the debtors to the office, the state of the transaction might at any time be known. Defendant further said, that he was a stranger to the legal proceedings mentioned in the bill. That it belonged to the complainant to order suits to be brought against debtors to the state, and to direct the proceedings therein. Defendant knew nothing of the circumstances of Bostick. He could not admit or deny any allegations of complainant respecting his former ability to pay or subsequent insolvency. That he was a stranger to the reasons of complainant's engagement in the bonds mentioned in the bill, no part whereof defendant admitted or denied, and prayed the same might be proved. Defendant was unwilling to give any opinion on the extent of com-

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plainant's liability to pay the \*bond, or his right to be relieved, all which he submitted to the judgment of the Court.

The proofs in the case were, that John Bostick and Wade Hampton executed two bonds, dated on the 20th January 1802, each conditioned to pay \$649.97 with interest from the 7th of September 1801, being for the purchase money for lands sold at sheriff's sale and lying in Richland district; which lands were originally mortgaged to secure the loan of Paper Medium. General Wade Hampton signed the bonds as security. The sheriff, Williamson, executed a deed of conveyance for the lands to John Bostick. A mortgage was at the same time executed by John Bostick of the lands in question to the state, to secure the payment of the bonds; but it never was recorded. It was proved that John Bostick was solvent till the year 1814, and paid many judgments and debts. He was not sued on his bond to the state till the year 1814, and judgment was entered up and executions issued, to which "nulla bona" had

been returned. Bostick died insolvent. No suit was brought against Wade Hampton till about seventeen years from the date of the bonds. Bostick sold or conveyed some of the lands in question to several purchasers, Kelly and Hemington, &c. The lands in the deed of conveyance and in the mortgage were very vaguely described, and it would be difficult to discover and locate them. By the statute of December, 1801, the lands held by the state under the Paper Medium loan were directed to be sold, and bonds and mortgages to be taken. It was further shewn that in the suit against Wade Hampton on the bonds in which he was surety for Bostick, as appeared on their face, the jury found a verdict for the defendant. But the Constitutional Court ordered a new trial, and a verdict was found for the plaintiff, the Court being of opinion that the grounds did not furnish a sufficient defence at law, and that if

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defendant was entitled to re\*lief it must be in equity. See the case, 1 M'Cord's Reports, 145.

On the argument the following grounds were taken by complainant's counsel.

That Hampton being merely security for Bostick was entitled to relief, because of the long indulgence given by the public officers to Bostick, the principal debtor; to wit, from January 1802 to the year 1814, during which time Bostick was solvent, after which he became insolvent and no suit was brought against the surety till 1819. That the mortgage from John Bostick to the state was never recorded, which was the duty of the public officers to have done, and by which Bostick was enabled to sell the lands to "bona fide purchasers," by which the lands, the primary security, were lost, to the prejudice of the surety. That the lands described in the mortgage were so vaguely described that it was impossible to find them, which neglect was such a disadvantage to the surety in the bond, that if any remain unsold he could not have recourse to them for his indemnity.

De Saussure, Chancellor. The principal question in this case is, whether the creditor has given such indulgence to Bostick, the principal, or has done any act that will discharge the complainant from his liability under his bond. The doctrine on this subject has some difficulties. It has been decided that a creditor has no right to vary the situation in which a surety to a bond has placed himself. He cannot do any act which shall increase the risk or responsibility of the surety incurred by his executing the bond.

He cannot, for instance, enter into a new agreement with the principal debtor to enlarge the time of payment originally contract-

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ed for, as he would thereby preclude \*himself and the surety from urging the debtor, when perhaps others were obtaining judgments against him. But, on the other hand,

it has been expressly decided that mere "laches," or inaction, by the creditor, without his doing any positive act to injure the surety, is not a ground for releasing the surety. (See the cases collected by Maddock, Vol. I. p. 233—4.)

In the case we are considering, it does not appear that the public officers made any agreement to extend the time of payment to Bostick, but they were negligent in not suing earlier. It was great laches; but negligence alone, we have seen, is not a legal or equitable ground for relief to the surety. As to the time which elapsed from the date of the bond to the time of the suit, that does not amount to a duration sufficient to raise the presumption of payment. It has been decided that twenty years, without any demand, would raise a presumption of payment, and under extraordinary circumstances eighteen years have been held sufficient. But only twelve years have elapsed as to Bostick and seventeen as to the surety.

The next ground taken by counsel for the complainant is, that the mortgage from Bostick never was recorded, which it was the duty of the public officers to have done, and by the omission the said Bostick was enabled to sell and convey the lands included in the mortgage to third persons to the prejudice of the surety, who cannot have the benefit of them as he is entitled, which it is contended forms a ground for relief. The fact is acknowledged that the mortgage never was recorded. The counsel for the state insists that it was not necessary to record it. The law of 1801, directing such sales to be made and such mortgages to be taken, did not direct them to be recorded. The statute, as to double mortgages and sales, does not prescribe it as essential to the validity of mortgages that they should be recorded: but merely gives a preference to the first record-

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ed mortgages or sales, though \*the youngest. And it has been decided that judgments do not take priority of unrecorded mortgages.<sup>1</sup> This question is one of nicety and difficulty; for though it be true that the laws do not prescribe the recording the mortgage, especially in the case of the state, yet it seems to be but too certain that the non-recording this mortgage, coupled with the long neglect to enforce the recovery of the debt, did serious mischief to the complainant; as Bostick proceeded to sell the best of the lands, and the purchasers now hold them protected, it is believed, by the statute of limitations, and as purchasers for a valuable consideration without notice. The evidence of Mr. Guinard is very strong, that some of the lands were vaguely described in the conveyance to Bostick and in the mortgage. And he and Mr. Woodward prove, that Bostick has sold the

<sup>1</sup> See *Golson v. Knight*, Columbia, January 1827, at law, not yet reported.



best tracts which were discoverable under the descriptions given, and the remainder are unknown and undiscoverable. So that the surety, Gen. Hampton, can have no indemnity from them. Thus he has suffered by these neglects. On the motion for a new trial at law, that Court said, "If it be a fact that the defendant was only a security, and that the mortgage not being recorded enabled the principal Bostick to dispose of the land, and if it be a fact that the defendant has sustained an injury thereby, it may furnish a ground of relief in another Court." The facts in this case seem to go far towards making out the case thus stated. And the question is, is the surety entitled to relief? The line has been pretty plainly drawn between positive acts of indulgence to the principal debtor, and mere negligence in pursuing the demand. In the former case the Court always gives relief, but not in the latter; unless the neglect be coupled with other circumstances materially disadvantageous to

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the surety. In the case we are \*considering, the neglect has been so gross as to have produced the same disadvantage to the surety as if there had been a positive stipulation to extend the credit: and there are cases in which the Court has decided, that omitting to do what ought to have been done by the creditor, and which if done would have protected the surety, shall be considered a discharge of the surety. See *Law v. East India Company*, 4 Ves. 824, where the omission of the officers of the company to retain money of the principal in their hands was regarded as a discharge of the surety. In *Hayes v. Ward*, 4 Johns. Cha. Rep. 123, Chancellor Kent decided, that the mortgagee ought not to do any act to poison or destroy the mortgage in which the surety has an interest. Now the omission to record the mortgage in this case poisoned or destroyed the efficacy of the mortgage in which the surety had an interest. For by not recording the mortgage, followed by long neglect to sue, Bostick was enabled to sell the lands to innocent third persons for valuable considerations, without notice of the mortgage, by which the surety is damaged. Upon the whole I have come to the conclusion, with hesitation, that this is a case in which the complainant is entitled to relief. It is therefore ordered and decreed that the injunction be made perpetual.

From this decree the Attorney General appealed. He contended that the surety, by his undertaking as a joint obligor, was absolutely bound to pay, and that the rights of the creditor could not be divested, unless he did some positive act to impair the rights which the surety had, as between him and his principal. That in this case nothing had been done, on the part of the state, to prevent General Hampton from having the full benefit of his rights between him and Bostick.

That if General Hampton had been prejudiced at all, it was by the act of Bostick, who sold the mortgaged lands without giving

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\*the purchaser notice (as it was said); but as General Hampton, of his free will, bound himself for Bostick, he was responsible, and not the state, for the acts of Bostick. He cited 4 Ves. 820. 4 John. Rep. 130. 2 John. Cha. Rep. 554. 17 John. Rep. 384. 6 Ves. 260. 734. 6 John. Cha. Rep. 302. It was the duty of the surety to take care of himself; he could not expect the obligee to protect him. 4 Ves. 827.

Dawson, contra, cited 1 Pothier on Obligations, 427. 245. 1 Atk. 135. 1 Equity Ca. Abr. 4 John. 130. 4 Ves. 184. The surety was entitled to all the securities which the creditor had, as a bond, a mortgage, &c. The king may be barred in cases where an individual would be, but not in matters of prerogative. 1 Str. 517. 1 Wooddeson, 31. He also cited 4 Ves. 833. 1 Munf. 316. 1 John. 129. 134. A discharge of the estate is a discharge of the surety. 1 Mad. Ch. 191. 6 Ves. 806. 17 John. Rep. 394. 1 Faust. P. L. 220, act of 1792. The act required that the treasurer should proceed to sell the lands in the same manner as was provided in respect of public vendues. *People v. Jansen*, 7 John. Rep. 332. The surety had a right to confide in the diligence of the officers in performing what was regarded by law, and their neglect to do so discharged him.

Petigru, in reply, cited 1 John. Cha. Rep. 414. *U. States v. Kirkpatrick*, 9 Wheaton's Rep. 720.

*Curia, per COLCOCK, J.* In reviewing this case it is not necessary to go at large into the doctrine which relates to creditors and sureties, because it is clearly and correctly stated by the Chancellor in the first part of his decree. He therein recognizes the clear distinction between positive acts which are injurious to the surety, and mere indulgences, or even negligence. The law is

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well establish\*ed, that "the surety is entitled to every remedy which the creditor has against a principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of the contract, but even by means of securities entered into without the knowledge of the surety; having a right to have these securities transferred to him though there was no stipulation for it; and to avail himself of all these securities against the debtor." 1 Madd. Ch. 234—5. Nor can the creditor, by positive agreement, extend the credit without its operating as a discharge to the surety—but mere indulgence or neglect to sue does not produce that effect. 1 Madd. Ch. 235. But in the concluding part of the decree, it is thought that the Chancel-

lor has extended the doctrine beyond its prescribed limits, in saying that neglect coupled with other circumstances of omission (as he is understood) will operate as a discharge of the surety; for the doctrine he relies on the case of *Law v. The East India Company*. But on an attentive examination of that case it will be found that the creditors were not merely inactive, but that they did acts which were radically wrong, some of them arbitrary in the extreme, and all of them calculated to injure and oppress the sureties, and yet the Master of the Rolls, who made the decree, did not release the sureties. He gave no decision on that point: when speaking of Mr. Law in his character of surety, he says, "I give no opinion whether the sureties are discharged, as will probably be contended hereafter if the company think fit to institute any suit. *Nesbit v. Smith*, and *Rees v. Berrington*, are very strong authorities in favour of the sureties." He then goes on to observe—"where any act has been done by the obligee that may injure the surety, the Court is very glad to lay hold of it in favour of the surety," and then adds—"in this case there are more reasons to do so; for there is

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no doubt of the solvency of the principal." In a few sentences after he again says—"I do not mean to determine that the sureties are discharged." The principal object in the decree was to place Mr. Law in the situation he was in, when about to depart from India, and to rescue him from an act of oppression exercised on him in consequence of his connection with the East India Company. Another case is also relied on, in which Chancellor Kent says, the obligee ought not to poison the mortgage,—the obligee having destroyed the mortgage by tainting it with usury, which certainly can no more be called a mere omission than the not recording of the mortgage in this case can be called an act of the defendant. I think the Court of Equity have gone far enough in protecting the surety from the acts of the creditors; for from his negligence the surety can protect himself; and as to the conduct of the principal it is certainly the duty of the surety to look to that. Who places confidence in the principal? Not the creditor, or he would not require security. The surety certainly reposes confidence in him when he agrees to become bound for him. The rule of Lord Hardwicke, in 3 Atk. Rep. 93, well applies here,—"that he who trusts most shall lose most." If, however, it could be admitted that in any case mere omission or neglect should discharge a surety, certainly it ought to be required to be shewn that such omission has operated as an injury to the surety; for that is required where the creditor acts; and in this case I think it is clear that the injury to the surety, if any has been sustained, has

resulted from the conduct of the principal, and not from the negligence of the state. It is said, if the mortgage had been recorded, Bostick could not have sold. This is mere conjecture—for we every day see men buying land under incumbrances when they know of their existence; and although recording is notice to all the world for some purposes, yet we also know that it does not in reality give

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notice in any one case in a thousand to any other person than the officer who records the paper. This is not all. Suppose the mortgage had been recorded, still the purchasers from Bostick would hold the land after five years' peaceable, uninterrupted and adverse possession. But on the other hand we can affirm with certainty that if Bostick had not sold, the others could not have bought. Again it is said, that the mortgage is uncertain in its description of the land. Whose fault is that? Who makes the mortgage but the mortgagor? The surety could have seen the mortgage, and if he were dissatisfied with it, he might have required the principal to be more explicit. Upon the whole the case cannot be brought within any of those acknowledged principles on which a surety is relieved in a Court of Equity. The decree of the Chancellor is reversed, and the bill dismissed with costs.

Decree reversed.

### I McCord, Eq. 119

Administrator of HUGH RUTLEDGE v. Executors of SARAH SMITH and Others.

(Charleston. Nov., 1825.)

[*Executors and Administrators* ⇨ 388.]

A written acknowledgment by an executor of a trust created by parol, *held*, a lien upon the estate of the testator, conveyed by the executor or trustee to a voluntary purchaser, with notice.

[Ed. Note.—Cited in *Smith v. Smith's Ex'rs*, 1 McCord, Eq. 147; *Johnson v. Slawson's Ex'rs*, Bailey, Eq. 466; *Reid v. Reid*, 12 Rich. Eq. 215.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573–1582; Dec. Dig. ⇨ 388.]

[*Trusts* ⇨ 17, 18.]

All declarations of trust must be in writing except such as arise by construction of law. The trust need not be created by writing if it can be proved by writing.

[Ed. Note.—Cited in *Price v. Brown*, 4 S. C. 152.

For other cases, see *Trusts*, Cent. Dig. § 15; Dec. Dig. ⇨ 17, 18.]

[*Trusts* ⇨ 17, 18.]

But a voluntary acknowledgment will dispense with written proof.

[Ed. Note.—Cited in *Price v. Brown*, 4 S. C. 152.

For other cases, see *Trusts*, Cent. Dig. §§ 15–24; Dec. Dig. ⇨ 17, 18.]



[Trusts  $\hookrightarrow$  17, 18.]

Equity has compelled the acknowledgment of a parol trust; though the statute of frauds was relied on.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 17, 18; Dec. Dig.  $\hookrightarrow$  17, 18.]

[Trusts  $\hookrightarrow$  197.]

A trustee can not dispose of a trust estate to the prejudice of the cestui que trust, unless to a bona fide purchaser, without notice; and if otherwise disposed of it may be followed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 254; Dec. Dig.  $\hookrightarrow$  197.]

[Executors and Administrators  $\hookrightarrow$  57.]

Where a person was indebted having made a voluntary deed, the property shall still be considered a part of his estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig.  $\hookrightarrow$  57.]

The bill alleged that in 1783 Thomas Smith, the grand father, complainant's intestate, being possessed of a very large unincumbered estate, executed his will, in which he made a very extensive and minute distribution of his property among his numerous family. That among other legacies, he bequeathed £300 to each of his grand children. That some of his children becoming

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involved, \*and being apprehensive that his objects might be defeated, either from this circumstance or the complicated character of his will, he, on the 31st of December 1787, made another will, in which he devised and bequeathed the whole of his estate, real and personal, to his wife Sarah Smith absolutely, and died soon afterwards. That although the will was absolute on its face, yet it was made in trust, that the executrix, Mrs. Smith, should pursue implicitly the directions of the first will; the last will being only a power to enable her more satisfactorily to fulfil the desire of the testator as set forth in the former instrument: that the property was received by Mrs. Smith on this express engagement. The trust was proved by evidence of the uniform and repeated declarations of Mrs. Smith in her life time—by her conduct in the distribution of the property received, which conformed strictly with the professions of the first will. That the legacies were all paid, as far as complainant could learn, except that to his intestate: that he being a youth, and generally absent from the state, did not receive payment. But on the 23d of June 1809 Mrs. Smith, aware of the justice of his claim and as a declaration of the trust under which she took the estate of the testator, executed "an acknowledgment in writing," by which she declared that "there is due to her grand son Hugh Rutledge the sum of £1367 18s. on account of the legacies left him by his grand father Thomas Smith, Esq., and promises that the same, together with the interest to grow due thereon from this day, shall be paid to him by her executors, out of what-

soever estate she shall die possessed of or be entitled unto, in preference to any other claim thereon, within one year after the day of her death, unless it should be previously paid by her." That this acknowledgment was witnessed by Peter Smith. That subsequent to the death of Thomas Smith, and anterior to the above acknowledgment, to

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wit, in \*October 1799, Mrs. Smith executed a voluntary conveyance of a large portion of the property which had belonged to Thomas Smith to her son Peter Smith, in trust for his children: that the legacy due to complainant's intestate remained unpaid at the death of Mrs. Smith in 1810. Mrs. Smith made her will in 1799, and Judge Grimke, Peter Smith, James Smith and Benjamin Smith, Esqs. were appointed executors: that Judge Grimke died in possession of a house in Church street which had belonged to Mrs. Smith. In October 1819 the complainant obtained a judgment, on the above acknowledgment, against the executors of Sarah Smith, for \$10,094.98 on which an execution was issued and returned nulla bona.

The bill prayed that this legacy might be paid out of the estate of Thomas Smith, part of which was in the possession of the representatives of Judge Grimke, and part in possession of Peter Smith, as trustee for his children: that it might also be regarded as a debt due by Mrs. Smith from one year after the death of Thomas Smith: and in that view, the conveyances to the children of Peter Smith being voluntary, and when Mrs. Smith was much indebted, that it might also be regarded as an equitable mortgage on her estate from the time of its date. An account and discovery were also sought.

The answer of Peter Smith admitted the execution of the original will, but contended that it was revoked by the last will; and he neither admitted nor denied the trust. He admitted the sufficiency of his father's estate to pay all his debts and legacies, but contended that the whole was given to his mother. That the deed to himself, in trust for his children, was voluntary; but submitted that his mother had a right to dispose of it.

The answer of Mrs. Grimke, a daughter of Thomas Smith, admitted the existence of the original will, which, she said, was the uni-

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form guide by which her mother \*was governed in the distribution of her father's estate: that it was always so declared by Mrs. Smith; and it was well understood in the family from the repeated declarations, as well as the conduct, of Mrs. Smith, that the object of the second will was only to secure the complete execution of the provisions of the former will. That the property of Mr. Smith was distributed among the persons entitled under the first will. The rest of Mrs. Grimke's answer related to the right under

which she claimed the house in Church street.

The answer of James Smith stated, that he was the son of Thomas Smith; that, until he left Charleston in 1798, he always transacted the business of his mother as executrix of his father's will. She always recognized the first will referred to in complainant's bill, as containing the desire of her deceased husband, and as the rule by which she was governed in the management of the estates. The first will was altered in consequence of some embarrassment in the affairs of testator's sons, by which he apprehended that the property devised to them would go to their creditors, and not to their families; that reposing implicit confidence in his executrix, he gave her the whole property, under an engagement that she would fulfil his desire as expressed in his first will, with which she was well acquainted. That this was often declared by Mrs. Smith, and perfectly so understood by every member of the family. The property was divided and the affairs of the estate settled in 1792. Mrs. Smith received, under the first will, about \$50,000. The estate of Thomas Smith was very large, consisting of real property of great value, and personal effects to the amount of \$———. After defendant left Charleston in 1798 Mrs. Smith's affairs were chiefly managed by her son Peter Smith. After filing the bill, Peter Smith died, and the suit was revived against his executors, R. R. Gibbes, and the cestui que trust, Mrs.

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Ann Gibbes \*and Middleton Smith. In the answer of Mrs. Gibbes she stated, that she believed her father, Peter Smith, conveyed some of the property, mentioned in the trust deed, to his mother, Mrs. Smith, for the purpose and on the condition, that she would reconvey this with other property in trust for his children, which was accordingly done.

Waties, Chancellor. I should have felt a difficulty in deciding on the present claim, if it had been necessary to ascertain previously the interests of all the parties who are entitled to portions of the estate of Thomas Smith; but I think that this claim has been established on independent ground, and may be provided for without interfering with any other interest which has been manifested to the Court. All the parties admit, that though the last will of Thomas Smith gave the whole of his estate unconditionally to his wife, yet that it was intended only as a trust, and that the estate was to be distributed by her according to the directions of a preceding will. The last will has been produced, but not the preceding one. This however has been proved to have existed, and to have served as a guide for Mrs. Smith in the distribution which she made of the greatest part of the estate. And it is admitted by all parties that in such preceding will a legacy of £300 sterling was left by Thomas Smith to each

of his grand children (one of whom was Hugh Rutledge, the complainant's intestate), with interest from their respective births. It further appears that Mrs. Smith, by her written obligation, recognized this claim as so derived, giving it a preference to all others, and making it a specific charge "on whatever estate she should die possessed of." The only question then made in this case is, whether a house and lot in Church street, of which Mrs. Smith died possessed, is liable to this claim? It has been contended on the

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\*part of Mrs. Grimke, one of the defendants, and who now holds possession of the house, that it ought not to be made liable until the personal estate of Thomas Smith is exhausted, and that a large portion of this, having been illegally conveyed by Mrs. Smith to Peter Smith, ought first to be resorted to. I can see no legal ground for such a distinction. If the claim of the complainant's testator was to be regarded only as a common legacy, the personal estate of Thomas Smith alone would be liable to it. But Mrs. Smith, by her special obligation, has converted it into a debt, and made it a charge on her whole estate, and there was a good consideration for this. The legacy had been long due, and the payment of it was still to be postponed until Mrs. Smith's death. The complainant then has a lien on the house and lot, as a part of the estate of which Mrs. Smith died possessed. He might indeed pursue the personal estate of Thomas Smith, conveyed by her to Peter Smith: for her written obligation recognizes the preexistence of the intestate's claim; and the conveyance to Peter Smith being voluntary and otherwise invalid against creditors, could not affect this or any other legal demand. But the property thus conveyed is said to be so involved or so disputed, that the complainant might not be able to make it available, and it would be unjust to refer him to a doubtful fund, when there is a certain one to which he has a right to resort. The claim of Mrs. Grimke to the house has not been supported by any legal evidence. She holds possession of it under a conveyance to her, since the death of Mrs. Smith, from Peter Smith, as executor of Thomas Smith, and the consideration is alleged to be her claim to a residuary share of the estate of her father, Thomas Smith. But this claim has not been manifested by the production of the will of the said Thomas Smith, on which it is founded, or by any other legal proof. And as Mrs. Smith was in pos-

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session of this house at her death. \*it must be presumed that she held it previously as a part of the estate of Thomas Smith, subject to her disposition, which would give her a right to charge it with the claim of the complainant's intestate, and no subsequent disposition of it by the executor could divest the charge. It is therefore ordered and de-



creed, that the Commissioner do ascertain the amount of the complainant's claim; that the executors of the late John F. Grimke do account for the rents of the house in Church street, received by him in his life time, and by them since his death, and that the same be applied to the payment of the said claim. It is further ordered, that if the said rents be insufficient to discharge fully the said claim, the Commissioner do forthwith sell the said house, to discharge the same. It is also ordered, that if the said rents and proceeds of the sale of the said house be also insufficient for the purpose, the said complainant may enforce his execution against any part of the personal property, conveyed as aforesaid by Sarah Smith to Peter Smith, which belonged to the estate of Thomas Smith. And lastly, that the costs be paid out of the proceeds of any of the said funds.

On an appeal from this decree, so much of it as regarded the house in Church street was affirmed. On the other point the opinion was suspended.

From the report of the Commissioner it appeared, that he had tried in vain to sell the house in Church street. But the maximum value was \$4,000. The nett amount of rents was less than \$2,000, and the demand of the complainant was now about \$12,000. Under these circumstances the complainant prayed, that he might be permitted to enforce his execution against the other property designated by the decree of the Circuit Court.

[For subsequent opinion, see *Smith v. Smith's Ex'rs*, 1 McCord, Eq. 146.]

Dunkin, for the motion. The answers of

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James \*Smith and Mrs. Grimke and, above all, the written declaration of Mrs. Smith go to prove, beyond doubt, that the estate was devised to Mrs. Smith, in the trust and confidence that she would dispose of it as provided for in the first will. When a gift is absolute, though coupled with a secret trust, a letter from the donor to the donee is a sufficient declaration of the trust: and where one procured a former will to be revoked and the estate devised to him, on a promise that he would only hold to the use of the legatee under the first will, he was declared a trustee. 2 Bridgm. 607. 2 Vern. 50. 106. 288. 1 Vern. 296.

It will be contended, that under the 7th section of the statute of frauds, the trust must be in writing; but the better construction is, that the evidence of the trust, and not the trust itself, must be in writing, which writing may be subsequent to the commencement of it. The declaration of the trust is the only thing required to be in writing. 3 Ves. 696. 5 Ves. 315. 12 Ves. 74.

A wish, desire or recommendation, made by a testator, is as obligatory as a positive request. *Harding v. Glyn*, 1 Atk. 469. 3 Bridg. 46. *Brown v. Higgs*, 8 Ves. 574.

The former decree of the Court subjects

1 McCord, Eq.—4

the property in Church street to the payment of this demand; and it is manifest that the other judgment creditors of Mrs. Smith have a lien on the property conveyed to Peter Smith in trust; as that conveyance was voluntary and void as to creditors. To that fund they ought to be transferred, and this fund left to the application of this demand. When a trustee has accepted the trust he cannot afterwards divest himself of it; and the Court will follow the trust estate in the hands of a purchaser to effectuate the trust, if he was informed of the trust. Peter Smith is a witness to Mrs. Smith's acknowledgment of the trust, &c. *Shepherd v. M'Ev-*

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*ers et al.* 4 Johns. Cha. \*Rep. 136. If Mrs. Smith was a trustee to pay the legacies of the first will in one year after the death of the testator, she became debtor to complainant in the amount of the legacy; and a voluntary deed is void as to him. *Townshend v. Windham*, 2 Ves. Sen. 10. There is no case in which a man has made a voluntary deed to his child, and died indebted, in which the creditor had a right to a lien on the estate for the payment of his debt. 1 Madd. 218. 3 Johns. Cha. Rep. 498. All the authorities are reviewed (and result in the same conclusion) in *Sexton v. Wheaton*, 8 Wheat. 242. *Tunno v. Trezevant*, 2 Desaus. Rep. 264, was a case founded in consideration of marriage, which is an exception to the rule.

King, contra. The creditors of Mrs. Smith are not parties to this proceeding, and the question as to postponing them as respects the property in Church street, and the argument on this point, are gratuitous. The decree of the Court of Appeals cannot be otherwise regarded than as overruling the decree of the Circuit Court, and concludes the question. But if the question were not disposed of, an attempt would be made to shew that the question was with the defendant. It is admitted that if the parties to be charged acknowledge the trust, the statute is satisfied. Now the writing here is not a general admission that defendant accepted the trust in reference to the first will taken in its greatest extent, but is confined to the specific case of complainant, and cannot therefore affect the estate generally.

Petigru, Attorney General, in reply. The question is, whether complainant has the right to impeach the voluntary deed to Peter Smith, and to resort to the trust fund?

The opinion of the Judges, on which de-

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fendant relies, \*concedes the fact that complainant's was a legal demand, and founded on a good consideration; and the decree of the Court places it on that footing. Admitting then it is a mere debt, the deed being voluntary would be void; or if it be put on the footing of a trust, it is equally void, and complainant may pursue the fund. The ad-

mission is, that a debt was due to complainant, arising out of a legacy bequeathed him by his grand father, and all the circumstances shew the truth of the fact.

The cases prove that the acknowledgment of a secret trust has all the effects of a direct trust, and all the rights attach under it. 9 Ves. 519. 10 Ves. 471. Under the 4th section of the statute of frauds, the contract cannot take effect until it is reduced to writing. 2 Bro. C. C. 569. But under the 7th section, by a subsequent written admission, the statute is fully satisfied. 2 Atk. 165. Upon the answer of the defendant admitting the trust, although it was not pretended that it was in writing, the Court decreed that the trust should be carried into effect. 6 Ves. 52. 1 Cruise, 463. These are cases where the defendant was called on and compelled to answer. This case is stronger in as much as the acknowledgment was voluntary. *Ambrose v. Ambrose*, 1 P. Wms. 321. A declaration of a trust refers back to the original deed, although made long afterwards. *Ryall v. Ryall*, 1 Atk. 59. And this is an answer to the objection that the declaration in this case could not operate to affect the deed to Peter.

An executor is liable on his express promise to pay a legacy. 5 Term Rep. 590. 3 East, 124. In *Lush v. Wilkinson*, 5 Ves. 384, a bill by a subsequent creditor to avoid a prior deed was dismissed, on the ground that there were no antecedent debts.

But when there are antecedent creditors, the subsequent creditors may set aside a fraudulent deed.

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\*King. The acknowledgment is a testamentary paper, and not a contract. 4 Ves. 555.

To set aside a deed or settlement for fraud, it must appear that it was made with a view to defraud creditors. 4 Desaus. 232. 3 Desaus. 1.

The deed to Peter was made in 1799, and this bill was not filed until 1820; so that a period of more than twenty years had elapsed, and the Court will not now open the transaction. 13 Ves. 397. 2 John. Ca. 432.

*Curia, per NOTT, J.* By the decree of the Chancellor the two following points appear to have been decided in this case.

1st. That Mrs. Smith, the executrix of T. Smith, was a trustee under his will for the purpose of carrying into execution a former unexecuted will which he had made. That although no trust was actually expressed, yet there was a secret confidence reposed which subjected her to the liabilities of a trustee.

2d. That being such trustee, she could not defeat the interest of the cestui que trust, by disposing of the property, except to a bona fide purchaser for a valuable consideration, without notice. And that as Peter

Smith was a mere volunteer the property contained in the deed to him was subject to the claim of the plaintiff. The decree therefore proceeds to subject the real and personal estate of Mrs. Smith to the payment of the plaintiff's demand, and if that should prove insufficient, then the property of Thomas Smith which has been conveyed to Peter Smith is made liable also. The first part of the decree has been affirmed by the unanimous opinion of the former Court of Appeals in Equity. That Court expressed no opinion on the other part, and it now remains to be decided whether that part of the decree shall be affirmed or reversed. In considering this question we must first as-

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certain what has been decided by \*the former Court of Appeals; for so far as the case has been decided by that Court the decision must be obligatory on this, and we must so dispose of the remaining questions connected with the decision, as to render the decree consistent with itself. The late Court of Appeals have not left us the reasons on which they supported the decree of the Chancellor. We ought therefore perhaps *prima facie* to presume, that they have adopted the reasons of the Court below. But as it does not follow that a concurrence of opinion necessarily admits a concurrence in the reasons on which that opinion is founded, it becomes necessary to go into an examination of the question. And if we find that the grounds on which the decree of the Circuit Court is founded do authorize the decree of the Court of Appeals, and can see no other grounds on which it can be supported, then it strengthens the presumption that the Judges of the Court of Appeals adopted the reasons there assumed as the grounds of their decision. On the contrary, if we find that those reasons will not support the decision, but see others on which it can be supported, then we ought to adopt those as the grounds of our decision and shape our decree accordingly.

The first question is whether there is sufficient evidence of a trust to support the decree on that ground? The objection to that part of the case is, that under the statute of frauds all declarations of trust must be in writing except such as arise by construction of law, and there was no such declaration in this case. But it is not considered necessary that the trust should be constituted by writing, it is sufficient to shew its existence by written evidence. *Randal v. Morgan*, 12 Ves. 67. And for that purpose a letter of the trustee acknowledging the trust has been held sufficient. *Crook v. Brooking*, 2 Vern. 50. So an acknowledgment of a trust, though not in writing, will bind the party.

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*Thynn v. Thynn*, 1 \*Vern. 296. 2 Vern. 288. *Foster v. Hale*, 3 Ves. 696. 5 Ves. 315. Indeed there is no principle better settled than



that a voluntary acknowledgment will dispense with written proof. In the case of *Strickland v. Aldridge*, 9 Ves. 516, the Lord Chancellor went so far as to compel the defendant, to whom property had been devised absolutely, to discover whether the devise had not been coupled with a secret parol trust that he would hold the property for a particular purpose not expressed in the will. And in that case he said, "if a father devises to his youngest son, who promises if the estate is devised to him he will pay £10,000 to the eldest son, this Court would compel the former to disclose whether that passed in parol, and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the amount of the £10,000. Now here is an express and voluntary acknowledgment of Mrs. Smith that she is indebted to the complainant's intestate £1,000, as a legacy left him by his grand father. It is not a debt created by her promise; but it is an acknowledgment of a preexisting debt. If she was indebted to complainant's intestate to that amount, it must have been on the ground of a secret confidence reposed in her by her husband, which she had promised to perform. For without such promise no such debt could ever have existed.

It is not to be sure a declaration in so many words that she was a trustee; but it is an acknowledgment of facts which admit of no other conclusion. For if she was indebted to him a legacy left him by his grand father, then she was a trustee for the purpose of carrying that will into effect. All the parties regarded her as such, and the whole course of her administration goes to establish the fact. She paid every legacy contained in that will except the one due the complainant's intestate. Peter Smith must have considered her as such; for he received the legacy to which he and his family were

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\*entitled to. He was a witness to the contract in which his mother acknowledged the existence of this debt; and as her executor suffered a judgment against himself for the amount. It is from this view of the subject that this Court now presumes the Court of Appeals supported the decree of the Circuit Court, and they can see no other upon which it can be supported. And if that is the ground it seems to follow as a necessary consequence that complainants have a right to follow the property of Thomas Smith in the hands of Peter Smith and his heirs, provided the estate of Mrs. Smith should prove inadequate. For no principle of equity is better settled, than that a trustee cannot dispose of a trust estate to the prejudice of the cestui que trust, unless it be to a bona fide

purchaser for a valuable consideration, having no knowledge of the trust. 2 Fonb. 166. *Taylor v. James*, 4 Desaus. Rep. 1. It is admitted that the deed to Peter Smith was voluntary, and there is abundant reason to believe that he had full knowledge of the trust. It is said in the dissenting opinions of two of the chancellors, that "the promise of Mrs. Smith is binding on her, and that the acknowledgment that there was due to the complainants the sum mentioned has the effect merely of shewing the consideration of the promise, but gives no claim against Mr. Smith's estate." But it must be observed, that the consideration for the promise was a legacy left him by his grand father. Now, Mrs. Smith must have been liable to pay that legacy as a trustee, or not at all. If not as a trustee, then there was no consideration for the promise even to bind her own estate. It was a mere nudum pactum, which could not be enforced either in law or equity. Peter Smith could not have viewed it in that light, or he would not have suffered judgment to go against him. The Court of Appeals could not have considered it as such, or they would not have made the property liable for it. It is true that Mrs. Smith

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\*could not, by any contract which she could enter into, make the property of Peter Smith liable to pay her debts. But on the other hand she could not exempt the property of Thomas Smith from paying a legacy which she justly owed the complainants by a voluntary conveyance. The property of Thomas Smith is therefore still liable, though conveyed to Peter Smith. Where a person makes a voluntary deed to another having a knowledge of the trust, it is conveyed subject to that trust. *Shepherd v. M'Evers et al.* 4 Johns. Cha. Rep. 138. So where a person dies indebted, having made a voluntary deed, the property shall still be considered a part of his estate. 2 Ves. 10. 3 Johns. Cha. Rep. 438. *Threewits v. Threewits*, 4 Desaus. Rep. 560. So that although the promise by Mrs. Smith to pay the legacy to complainant was subsequent to the voluntary deed to Smith, yet it was nothing more than the recognition of an antecedent debt. If therefore Mrs. Smith was liable at all (and the Judges of the late Equity Court of Appeals have unanimously declared that she was) it must have been upon the ground of trust. We are bound, therefore, in order to observe consistency to affirm the decree of the Circuit Court.

Decree affirmed.<sup>1</sup>

<sup>1</sup>Vide post, the case of *Edmonds and Wife v. Crenshaw and M'Morris* [1 McCord, Eq. 252].

## I McCord, Eq. \*134

\*SMITH and RAVENEL, Administrators of Cripps, v. The Executors of SARAH SMITH, the Administrator of H. RUTLEDGE, and Others.

(Charleston. Nov., 1825.)

## [Wills ⇐841.]

The testator made a will leaving his estate to his children and grand children, and afterwards revoked it and devised the whole to his wife, under a parol understanding that she would give it to the children and grand children. After the death of the testator the executrix gave a written acknowledgment that she was indebted to each £— and that it should be paid out of any estate she should be possessed of, in preference to all other claims. She died much indebted, having by a voluntary deed given her property to her son. The Court held that she was a trustee for the children, and that they had a lien on the property given to the son, prior to bond creditors, but not to anterior judgment creditors of the executrix. But the Court thought it was going very far.

[Ed. Note.—Cited in *Steele v. Mansell*, 6 Rich. 461.

For other cases, see Wills, Cent. Dig. § 2144; Dec. Dig. ⇐841.]

## [Executors and Administrators ⇐454.]

Lands may be sold under an execution against an executor or administrator, though there may be personal assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1915; Dec. Dig. ⇐454.]

## [Wills ⇐820.]

[Cited in *Johnson v. Slawson's Ex'rs*, Bailey, Eq. 466; *Barnwell v. Porteus*, 2 Hill, Eq. 221; *Carraway v. Carraway*, 27 S. C. 580, 5 S. E. 157, to the point that a devisee of an estate acknowledged in writing that she took the estate subject to a legacy given by a prior will of the testator, which acknowledgment was held to constitute a specific lien. *Held*, also, that it was not lost or postponed for want of registration.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2121; Dec. Dig. ⇐820.]

This case arose out of the circumstances of the last case of *The Administrator of Hugh Rutledge v. The Executors of Sarah Smith*. Josiah Smith, and Daniel Ravenel administrator of John S. Cripps, filed their bill, on the 22d of October 1823, against the defendants, which bill stated that Sarah Smith in her life time, and at the time of her death was indebted to complainant, Josiah Smith, by a bond dated the 12th of March 1806, in the penalty of £1151 16 shillings, conditioned to pay £575 18 shillings with lawful interest from the date, payable on the 12th of March 1807; that the bond was given by the said Sarah Smith and her son James Smith, jointly and severally.

That Sarah Smith being thus indebted, and being seised and possessed of a considerable real and personal estate, died about the 10th of March 1810, having first made her will and appointed the Honourable John F. Grimke, Peter Smith, Benjamin Smith, and James Smith, her executors. That the three first named qualified on the said will, and by vir-

tue thereof possessed themselves of the estate and effects of the said Sarah Smith.

That complainant's, Josiah Smith's bond being unpaid, he instituted a suit in the Court of Common Pleas for Charleston district against the qualified executors of the said Sarah Smith. That the said executors

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appeared by their attorney and filed a plea of the general issue, and no other. That on the 12th of June 1813 complainant obtained a judgment. That various executions under said judgment had been issued; but the sheriff had not been able to find property of the said Sarah Smith to satisfy the debt. That Sarah Smith at the time of her death was seised and possessed of a considerable real and personal estate; and particularly of large tracts of land in different parts of this state and Georgia, and a valuable house and lot in Church street in the city of Charleston, known by the No. 37. That after her death the Honourable John F. Grimke, one of her executors, and against whom complainant, Josiah Smith, had obtained judgment, took possession of said house, and received the rents thereof until his death on the 9th of August 1819. That previous to his death the said John F. Grimke made his will, and appointed Mrs. Mary Grimke sole executrix thereof, who had since qualified. That since the death of the said John F. Grimke, his said executrix took possession of all his estate whereof he died possessed, more than sufficient to pay his debts, and particularly to satisfy so much of the estate of the said Sarah Smith as was possessed by him in his life time; and she also possessed herself of some part of the specific estate of the said Sarah Smith, and likewise retained possession and received the rents of the aforesaid house in Church street. That Peter Smith another of the executors, died about the — day of — having first made his will, and appointed R. R. Gibbes his executor, who had qualified and possessed himself of his estate, &c. That B. B. Smith, administrator of Hugh Rutledge deceased, on the 12th of August 1820 exhibited his bill in the Court of Equity against the executors and heirs of the said Sarah Smith, therein stating among other things that Thomas Smith the husband of the said Sarah, and grand

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father of said \*Hugh Rutledge, in the year 1780 made his will, and among other dispositions of his property he bequeathed to each of his grand children £500. That afterwards, in 1787, he made another will, whereby he devised all his estate both real and personal to his wife, the said Sarah Smith, absolutely. That the said Sarah Smith, subsequently to the death of her husband, gave an acknowledgment to the said Hugh Rutledge in the following words, "I do hereby acknowledge that there is due to my grand son Hugh



Rutledge the sum £1367 16 shillings, on account of the legacies left him by his grand father Thomas Smith, esq. deceased, and promise that the same, together with interest to grow due thereon from this date, shall be paid to him by my executors out of whatever estate I shall die possessed of or entitled to, in preference to all other claims thereon, within one year after my death, unless it shall be previously paid by me: Witness my hand this 23d of June 1809 (signed) Sarah Smith, (witness) Peter Smith." That the said B. B. Smith, as administrator as aforesaid, instituted a suit in the Court of Common Pleas on said acknowledgment, against the executors of said Sarah Smith, and on the 16th of October 1819 obtained a judgment for the sum of \$10,094.98 cents. The said bill prayed for a discovery and that the claim should be paid; and for that purpose that the house in Church street should be decreed to be sold. The complainants further stated that the defendants to the said bill having filed their answer, the cause came on to a hearing, when it was decreed that the rents of the said house should be accounted for and appropriated to the payment of said claim; that the house should be sold by the Commissioner and the proceeds likewise applied to the same; and if these funds were not sufficient, then that complainant should have liberty to take out an execution and levy the same on any of the personal estate

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of the said Thomas Smith. That \*from this decree an appeal was taken up to the late Court of Appeals in Equity, where the following decree was pronounced in March term last: "The claim of the complainant is founded on an acknowledgment in writing of Mrs Smith, the widow and executrix of Mr Thomas Smith, on the 23d of June 1819, that there was due £1307 16 shillings on account of the legacies left him by his grand father Thomas Smith, and her promise that the same, with the interest to grow due thereon, should be paid by her executors, out of whatever estate she should be possessed of or entitled to, in preference to all other claims thereon, within the year after her death, unless it should be paid previously by her. Mr Smith by his last will left his whole estate to Mrs Smith absolutely; but it appears, in a cancelled will, made some time before, he had given various legacies to his children and grand children. Mrs Smith frequently said, after his death, 'she intended, in the distribution of the property of her testator, to be governed by the cancelled will.' She might make a guide for her own conduct or not, as she pleased, but was under no obligation to do so; nor can any right be derived from the will. The promise of Mrs Smith is binding on her; but it is so entirely by her own act. And the acknowledgment that there was due to the complainant the sum mentioned has the effect merely of shewing

the consideration of the promise, but gives no claim against Mr Smith's estate: nor can it be made to extend the promise itself, which is, that the sum mentioned, with interest, should be paid by Mrs Smith's executors, out of whatever estate she should die possessed of. The decree of the Circuit Court declares the house in Church street, and the rent of it, from Mrs Smith's death, liable to complainant's demand; so far I concur in it: but I think it erroneous, in subjecting to its payment (in case of a deficiency of assets of Mrs Smith's estate) the property of Mr Smith,

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her testator. It is \*ordered and adjudged, that the decree of the Circuit Court, so far only as it declares the house in Church street and the rents liable to complainant's demand, be affirmed, and the rest of the decree suspended." That in obedience to the said decree, the Commissioner had advertised the said house for sale, on the 28th of October 1823, for the purpose of discharging the claim of the estate of the said Hugh Rutledge, and would proceed with the sale unless enjoined by the Court. That the said B. B. Smith had lately departed this life, and administration on the estate of the said Hugh Rutledge had been granted to Alfred Huger, Esq.

The bill further stated, that the estate of the said Sarah Smith was about to be sold, to pay a voluntary debt, which ought not to be paid until all her bona fide creditors were first satisfied. That this voluntary debt was created by a simple contract not under seal, and, on that ground also, ought to be postponed to judgment and bond creditors. That none of the creditors of the said Sarah Smith were parties or privies to the proceedings under which the house in Church street was to be sold. That the said house was the only property then known of on which the creditors could levy their debts, her personal estate being long since distributed or disposed of so that it could not be ascertained or come at. That this was manifest from the very fact, that the administrator of Hugh Rutledge (one of the family, and who, it was to be presumed, knew the situation of the estate better than strangers) did not know where else to resort for the payment of his supposed claim, but to the house; and therefore complainants respectfully submit that his decree, and the execution of it, went directly to frustrate the rights and remedies of the creditors of the said Sarah Smith. That the house was actually bound at law by legal liens, by the administrator of Hugh Rutledge, before the said bill was filed; and the credi-

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tors not \*being parties, their rights were passed by; and therefore the said decree ought not to be executed until their rights have been heard and decided on. That the suit under which the sale was now proposed to be made was now abated by the death of

the said B. B. Smith, the complainant therein, and had not been revived by the present administrator.

The bill prayed that the surviving executors of Sarah Smith, and the representatives of the deceased executors, might answer fully, and set forth a particular account of her estate, and the application thereof. It charged that the said administrator of Hugh Rutledge insisted on proceeding with the sale, pretending that he had a priority over complainants for payment of his claim; whereas the complainants contended that he had no such priority, but ought to be postponed until their demands were fully paid. That the acknowledgment under which he claimed could not, and ought not, to be considered any thing more than a simple contract debt of the said Sarah Smith, and therefore should be postponed until judgment and bond creditors were paid; and moreover, being merely voluntary, ought not to receive the protection of the Court, when it will tend to the injury and defeat of such creditors.

The bill also prayed, that the sale of the house in Church street might be enjoined; and that complainants might be paid their respective debts, together with all the interest due thereon; and to that end, that the house or the proceeds thereof, and all the rents and profits received therefrom, subsequent to the death of Sarah Smith, might be decreed as liable to the payment thereof; and that complainants might have such other relief, &c. as might seem meet.

The answer stated, that defendant was ignorant of the facts on which the claim of

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the complainants was found<sup>e</sup>d, and prayed that the same might be substantiated by satisfactory evidence.

The defendants admitted that Mrs Sarah Smith, being justly indebted to defendant's intestate, did, at the time specified, execute in writing the acknowledgment recited in the bill, by which she acknowledged the claim of said intestate a lien on her estate, from the time of her death, in preference to all other demands; as she was bound in justice, and fully authorized by law, to do. That such proceedings were had, in the enforcement of said claim, as were stated in the bill. That the decrees of the Court were not correctly set forth in the bill, as would appear by a reference to the original decrees of record; but as stated in the bill, both decrees expressly recognized the claim of defendant, as a mortgage on the estate of which Mrs Smith died possessed. The answer also admitted, that the house in Church street was directed to be sold by the Commissioner, and the proceeds appropriated in satisfaction of defendant's claim. That the creditors of Mrs Smith were represented by her executors. That to prevent any possible injustice, however, and through abundant caution, an order had since been obtained and regularly published, notifying all the

judgment creditors of Mrs Smith, whose judgments bore date anterior to her death, to submit their demands to the Commissioner previous to September last (1824). That from the report of the Commissioner it appeared, that there were but two judgments unsatisfied against said estate; one of which was held by the administrator of Bennett Taylor, and the other by Daniel Ravenel, one of the complainants. That in respect to these judgments, defendant was willing to submit to any order which this Court might deem consistent with equity and justice.

The defendant could not, in any manner, admit that there was error in the decree of

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this Honourable Court, \*so far as it postponed the demand of Josiah Smith to that of the defendant. That the acknowledgment of Sarah Smith, given to the defendant's intestate, operated as a mortgage on all her estate, real and personal, from the period of her death, according to the well settled principles of this Court, as recognized and enforced in the decree, which was referred to in the bill. That the claim of Josiah Smith had no lien on her estate at the time of her death, when the defendant's rights attached; nor was any judgment obtained at law until several years after her death. Defendant denied all combination, and prayed to be dismissed with his costs, &c. &c.

De Saussure, Chancellor. In a former suit in this Court brought by the administrator of Hugh Rutledge, Jun. deceased against the executors of Sarah Smith and others, it was decreed by the late Court of Appeals, that so much of the decree of the Circuit Court as declared the house in Church street and the rents applicable to the complainant's demand should be affirmed. At that time none of the other creditors of Mrs Sarah Smith were before the Court. Two of them have since filed the bill in the present case, and insist that they, not being parties to that suit, were not bound by the decree in that case, and that they have prior claims which are entitled to a preference over the demand of the deceased Hugh Rutledge. There can be no doubt that the present complainants, creditors of the late Mrs Sarah Smith, not having been parties to the former suit, are not bound by the decree which was made on the case then presented to the Court; and if their claims are entitled to a priority, they must have the benefit of it. It is conceded on the part of the representatives of Hugh Rutledge that the judgment, obtained on a bond by the late Mr John S. Cripps against Mrs Sarah Smith in her life time, to wit, on

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the 14th day of June in the year \*1806, is entitled to a preference over the claims of Mr. Hugh Rutledge, which was acknowledged in writing by Mrs Smith on the 23d day of June in the year 1809. There could be no doubt on this point, and the decree must be framed accordingly. We are next to consid-



er the claim of Mr Josiah Smith to a priority over the demand of the late Mr Hugh Rutledge. The demand of the latter arose as follows:

[Here His Honour recapitulated the case as stated in the bill.]

The question is whether either of these debts, and which, is entitled to a priority? It is objected against the claim on behalf of the estate of Hugh Rutledge, Jun. deceased, that the acknowledgment of Mrs Sarah Smith, of a debt due by the estate of Mr Thomas Smith for certain legacies bequeathed by him by a will which he afterwards revoked and gave the whole estate to his wife Mrs Sarah Smith, could not operate to set up those legacies as a right, or have any legal or equitable claim on the estate of Mr Thomas Smith. That it was a voluntary act on her part, and bound her only as a simple contract, being without seal. The question, as to the nature and character of the acknowledgment made by Mrs Smith to her grand son Hugh Rutledge, appeared to the Court of Appeals in the following light. The moral feeling of obligation, and the character of implied trust, which she believed herself under, shewed a fair consideration for her written promise, and made that a just debt due by her—so that the same might be set up legally, as well as equitably, as her debt. Accordingly a judgment was obtained thereon. And this is strengthened by the consideration that the property, now in controversy among these conflicting claims, was derived from her husband Mr Thomas Smith's estate; so that there is a connection, though not a lien, between the origin

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of the debt and the fund out of which \*it is claimed to be paid. I have no doubt then that this was a good subsisting debt, afterwards established by judgment at law. And we must now consider what station it is entitled to among the debts of Mrs Smith. If it had stood as a mere acknowledgment without seal, it would have been a simple contract debt and postponed to the bond debt of Mr Smith. But it is contended for defendants, that the acknowledgment contains an engagement which amounts to a lien on her estate. That claim is founded on the following words of the acknowledgment: "and I promise that the same, together with interest to grow due thereon, shall be paid him by my executors out of whatever estate I shall die possessed of, or entitled to, in preference to all other claims thereon." Do these words create a lien on her estate? The Circuit Court of Equity thought that these did and decreed accordingly. As between the complainants and other parties I am not aware that in the present suit, which is to decide on the rights of the contending creditors, that we can come to any other conclusion: for having satisfied ourselves that the debt to Mr Hugh Rutledge was a just and legal debt, it is a mere question as to the ef-

fect of the words which charge that debt on her whole estate in preference to any other debt. The words are very general, but the import and meaning is plain enough. In the case of *Menude v. Delaure*, 2 Desaus. Rep. 564, it was decided that an acknowledgment of the debt, with a declaration that the same should be secured by a mortgage of certain property therein mentioned, should operate as a mortgage. The Judges declared that, though the paper had not the legal form of a mortgage, it bore all the features of one, and the Court of Equity regarding substance, and not forms, will give it the efficacy of a mortgage. So in *Read v. Gaillard*, 2 Desaus. Rep. 552 [2 Am. Dec. 696], the same point was decided. It is true that in both these

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cases the informal \*lien was given on specific property. But I am not aware that the pledge of the whole of the debtor's property is less obligatory than a part. If the whole had been specified in detail, nobody could have doubted. The only case cited on this point by the complainant's counsel is that of *Williams v. Lucas*, 2 Cox's Cases, 160, quoted by Maddock in his Treatise (Vol. I. 539, 2d Edit.), where the Master of the Rolls decided, that a promise in writing to give a security, by mortgage of lands when required, was, on his death, no lien on his real estate. In the case before us, however, it is not a promise to give a mortgage when required, but the paper acknowledges the debt and expressly gives an informal lien on the whole estate; and as the Court regards substance, and not form, it is bound to give effect to the instrument as an equitable lien. It was further contended that the instrument, not having been recorded, lost the lien which it otherwise might have had. The acts respecting the recording of mortgages do not, however, require them positively to be recorded. They only give priority to the recorded over the unrecorded mortgages, though the latter may have been first executed. And it has been decided, that unrecorded mortgages prior in date have priority over subsequent judgments. Nor does the act of 1789, commonly called the executors' act, prescribing the order for the payment of the debts of the deceased, appear to touch this question. By that act, judgments, mortgages and executions are to be paid next to debts to the public, but these words are added—"the oldest first." Now the instrument which we have considered a mortgage is prior in date to the judgment of Mr Smith, which indeed was not obtained till after the death of Mrs Smith the debtor. His demand at that period was merely a bond debt. It is only in a subsequent clause, when speaking of payment of debts in equal degree, that it is said that no

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preferences shall \*be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded and execu-

tions lodged in the sheriff's office, the oldest of which shall be first paid, or in those cases where a creditor may have a lien on any particular part of the estate. Now at the death of Mrs Smith there was no judgment in favour of Mr Josiah Smith, so that it was not in equal degree with the lien previously given to Hugh Rutledge. After all, however, this is a delicate and difficult subject, and I have not absolute confidence in the opinion I have formed. I should be well satisfied that the judgment of the Court of Appeals should be consulted.

It having been referred to the Commissioner to inquire and report what judgments were existing unsatisfied against Mrs. Sarah Smith, he reported that they were only two: to wit, the judgment of Mr. J. S. Cripps, and another in favour of the administrator of Bennett Taylor.

It is therefore ordered and decreed that the injunction be dissolved, and that the Commissioner do proceed to sell the house in question situate in Church street and to collect the arrears of rent due, and to apply the proceeds to the payment of the two judgments above mentioned: and the balance towards satisfaction of the claim of the administrator of H. Rutledge, deceased, and if any thing be left, towards paying the debt to Mr. Josiah Smith.

From this decree Josiah Smith appealed, and made the following points: 1st. That the instrument of writing, given by the said Sarah Smith to the said Hugh Rutledge, created only a voluntary debt, and the payment ought to be postponed until after the discharge of the claims of judgment and bond creditors.

2d. That the said instrument of writing created no lien on the estate of the said Sarah Smith, to the prejudice of her judgment and bond creditors.

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\*3d. That the decree was in other respects, contrary to equity and good conscience.

Lance for the motion. To give the paper the effect of a mortgage, it ought to point out some specific fund, as was the case in Reed v. Gaillard, where the schooner and hands were designated in the written promise to give a bill of sale; but in this case there is no fund particularly designated, and no specific lien. Delaire v. Keenan, Caborne v. Godfrey, 3 Desaus. Rep. 74. 514.

The specific property intended to be mortgaged was pointed out in Burn v. Burn, 3 Ves. Jun. 575, 576. 582. The delivery of deeds for the purpose of having a mortgage drawn does not constitute an equitable mortgage. 12 Ves. 192. A promise in writing to give a mortgage of land is not a lien after one's death. 1 Madd. Ch. 537. 539. 2 Cox's Ca. 160. The case of Atkinson v. Scott, 1 Bay's Rep. 307, was before the executors' law was passed. In that case then the question as to recording the mortgage could not have

arisen. An obligation arising out of a breach of trust is a simple contract debt, unless it is under seal. 2 Madd. Ch. 455. 2 Comyn, 463, 464. 2 Atk. 119. 7 Bac. 153.

When a claim is made under a declaration of trust, the property must be specified. 2 Madd. Ch. 6.

Dunkin, contra. As between mortgage and judgment creditors, it is not necessary that the mortgage should be recorded. 2 Bay's Rep. 86.

*Curia, per NOTT, J.* This may be considered as a branch only of the case of the Administrator of Rutledge v. The Executors of Smith et al. [1 McCord Eq. 119] and it involves two questions which are now submitted for the consideration of the Court.

1st. Whether the paper given to Mr. Rut-

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ledge, recognizing a legacy due to him under the will of his grand father Thomas Smith, gave him such a lien on the property, of which he died possessed, as would entitle his representative to a priority to bond creditors, in paying the debts of her estate.

2d. Whether, if he ever had such a lien on the property, he had not lost it by not having it recorded.

The Court are of opinion that the first question has been decided in the case of the Administrator of Rutledge v. The Executors of Smith et al. And although the creditors were not parties to that case, yet, so far as it went to settle an abstract principle of law, all persons must be bound by it. The question was, whether that paper should have the effect of a mortgage; and the decision could not have been varied by any consideration of the parties to be affected by it. In one part of the circuit decree in the case of the Administrator of Rutledge v. The Executors of Smith et al. this contract of Mrs. Smith is said to be a specific charge, on whatever estate she should die possessed of. In another part it is said, the complainant has a lien on the house and lot as a part of the estate of which Mrs. Smith died possessed. Harwood v. Oglander, 8 Ves. 125. And that the lien was the ground on which the Chancellor held the house and lot liable to pay the legacies without regard to the personal estate, which otherwise would have been the proper fund out of which they ought to have been paid. Milnes v. Slater, 8 Ves. 295. That part of the decree has been supported by the unanimous opinion of the former Court of Appeals. It has, to be sure, decided nothing with regard to the rights of the present claimants. But as it is decided that the complainant had a specific lien on the property, the necessary result was, that he had a preference over those who had no such lien. The judgment creditors who had obtained a prior lien were entitled, as a matter of course, to a priority; but the bond creditors had no such lien, and must therefore be postponed.



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\*Whether if the question had been open for investigation this Court would have concurred in that opinion, is a question on which it is not now necessary to express an opinion. I would however observe that it would require great consideration. The English judges have carried the doctrine to a great length. But they now lament that it has been carried to such an extent. I certainly think that it ought not to be further extended. The second question has also been settled by the case of the Legatees of Ash v. Executors of Ash, 1 Bay's Rep. 304. I must confess, I have never been perfectly satisfied with that decision. But it has been received as a law and acted upon for upwards of thirty years, and ought not to be questioned.<sup>1</sup>

The opinion of the Court therefore is that the decree of the Circuit Court in this case ought to be affirmed also.

Decree affirmed.

<sup>1</sup>That case has since been fully confirmed by an opinion delivered by the Appeal Court in June 1827, viz. Latta v. Smith, brought up from York. See Rutledge v. Smith.

#### I McCord, Eq. 148

ALEXANDER GILLON v. R. J. TURNBULL,  
Executor of William Brisbane.

(Charleston. Nov., 1825.)

[Wills ⚡734, §26.]

Where the testator gave a legacy to be paid out of the income of his estate, as soon as convenient after the expiration of one year from his decease, or sooner if his executors had funds, *held* that it bore interest from one year after testator's death; and the legacy was ordered to be paid, though some debts still remained due, the estate being fully competent.

[Ed. Note.—Cited in Gage v. Rogers, 1 Strob. Eq. 375; Lawton v. Hunt, 4 Strob. Eq. 14; Telfair v. Howe, 4 Rich. Eq. 256.]

For other cases, see Wills, Cent. Dig. §§ 1861, 2138; Dec. Dig. ⚡734, §26.]

[Wills ⚡734.]

Pecuniary legacies, on which no interest is given by the will, bear interest from the end of one year after testator's death, unless a different intention is indicated by the will; and this rule applies as well where there are delays about paying debts, as where the money is in hand.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

[Wills ⚡734.]

Difficulty of collecting the funds will not vary the rule, even though payment be impracticable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

[Wills ⚡734.]

A reference by the testator to the time when the personal estate is to be got in, will not vary the rule, unless plainly to be implied from the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. ⚡734.]

This was a bill filed to obtain the payment

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of a legacy \*(together with interest) bequeath-

ed by the late Mr. William Brisbane, in and by a clause in his last will and testament, duly executed, and bearing date the 21st of October 1821. It was in the following words, "I give and bequeath unto Alexander Gillon in trust for my niece Sarah Gillon, and her children, five thousand dollars, to be paid out of the income of my estate, as soon as convenient after the expiration of one year from the time of my decease."

Afterwards, on the 29th of November 1821, the testator executed a codicil to his will, by which he gave a legacy of \$2,000 to the Orphan House of Charleston, to be paid as soon as convenient after his decease, and he added the following directions: "In order that my executrix and executors may be enabled to carry into full effect this codicil to my last will, I do freely order and direct that the payment of all my legacies contained in my said will (with the exception of that to my wife Mary) shall not be payable as therein directed, but shall commence one year after my decease, or as much sooner as my executrix and executors shall be in funds for the purpose." The testator died very soon after executing the codicil, leaving his will and the codicil thereto in full force.

The executor resisted the demand for the immediate payment of the legacy, and interest from one year after the death of the testator, on the ground that the debts were not all paid (though it was admitted that very little remained due) and that the income of the estate had not been adequate to pay the annuities and the legacies; and that as it would have been necessary to have sold part of the principal of the estate to raise the money, which was contrary to the intentions of the testator, therefore no interest ought to be allowed. The following statement exhibits the provisions of the will, and the situation of the estate. It appeared by the will and codi-

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cil \*that the following annuities and legacies were given by the testator:

An annuity to his wife, to be paid out of the income of the estate, one moiety every six months; the first payment on the 15th of January after the death of the testator..... \$2,000

He also authorized his wife to dispose of by will \$10,000, and in case of her not doing so he bequeathed \$5,000 to her niece, Mrs. Edward Blake.

An annuity to his brother, J. S. Brisbane, payable on the 15th of January, after the testator's death, to be paid semi-annually ..... \$500

An annuity to A. F. Brisbane, to commence and be paid as above..... \$500

\$3,000

An annuity to his two adopted sons, to commence at twenty-one years of age, and continue to twenty-five years of age, to enable them to travel, each \$2,000 ..... \$4,000

These annuitants being boys, this provision did not require any immediate funds.

Legacy to Mr. Gillon, in trust for his wife and family, to be paid as soon as convenient after the expiration of one year from the time of the testator's death, out of the income of the estate. . . . \$5,000

Legacy to Abbot Brisbane, to be paid out of the income of the estate, in one year after the legacy to his niece, Mrs. Gillon, has been paid, provided he (Abbot Brisbane) has attained twenty-one years of age, if not, then on his arrival at that age. . . . \$5,000

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\*Legacy to his niece, Maria Brisbane, to be paid out of the income of his estate, one year after the payment of the legacy to his nephew, Abbot Brisbane, . . . \$5,000

Legacy to his niece, Elizabeth Brisbane, daughter of A. F. Brisbane, to be paid as soon as convenient out of the income of his estate, after her arrival at the age of twenty-one years. . . . \$5,000

\$20,000

Legacy to his god daughter Mary B. Mayer, to be paid in a note of her husband's \$500.

The testator directed that his two adopted sons (for whom he made other ample provisions in his will) should each receive a liberal education, besides the annuity of \$2,000 each above mentioned.

By an exhibit filed by the executor it appeared, that the annual income of the estate of the testator amounted (partly from dividends on stock, interest on bonds, &c.) to about \$9,230

And the estimated expenses for taxes, insurance, repairs, and plantation expenses to about. . . \$1,343

Annuity to the widow. . . . . 2,000

Annuities to the two brothers. . . 1,000

Estimated expense of the two boys . . . . . 900

\$5,243

Leaving an annual balance of. . . . . \$3,987 applicable to the payment of legacies.

On examining the accounts filed by the executor it appeared (as he admitted) that but few debts of no great amount remained to be

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paid, and that the executor had \*felt himself at liberty to pay and had paid the legacy of \$2,000 given by the codicil to the Orphan House of Charleston.

DE SAUSSURE, Chancellor. From the data exhibited in this case it would appear that the legacy to Mr. and Mrs. Gillon ought now to be paid. It is the first legacy directed to be paid; the others are to follow that in succession; and other legacies will fall due on the death of Mrs. Brisbane, the widow, particularly a large one of \$12,000 bequeathed to the testator's adopted son, William Brisbane, at the death of his aunt, so that it is important to hasten the payment of the intermediate legacies.

The question as to the interest claimed by the complainant on the legacy gives rise to more discussion and difficulty.

It is alleged, and admitted, that the legatee made a demand for the payment of the legacy at the end of the year after the death of the testator. The rules on the subject of interest on legacies are very numerous, and some of them depend on nice distinctions. But I take the general rule to be clear, that pecuniary legacies, on which no interest is given by the will, shall bear interest from the end of one year after the testator's death. And this must prevail, unless there shall be something in the testator's will indicating a different intention. Maddock, in his Treatise on Equity, lays down the rule distinctly (Vol. II. p. 79, 80, 2d Edit.); and he cites and is supported by many decided cases, see 2 P. Wms. 25, 343. 2 Atk. 109. 1 Scho. & Lefr. 11, 12. 2 Scho. & Lefr. 455. 1 Ves. 211. 310. 8 Ves. 413. He says this rule has been adopted for general convenience, and applies equally to cases where the debts cannot be arranged for ten years, as where there are no debts, and the property is immediately tangible in the

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funds. 1 Scho. & Lefr. 12. And \*though, where legacies are given out of personal estate consisting of outstanding debts, those legacies cannot be paid till the money due the estate is collected, the Court holds the personal estate to be reduced into possession within a year after the death of the testator, and allows interest on the legacies from the time, unless some other period is fixed by the will; and this takes place though actual payment within that time be impracticable in many cases. In one case the fund did not become disposable in forty years, yet interest was allowed under the rule. Nor does a reference by the testator to the time at which his personal estate should be got in affect the legal presumption without the most plain and distinct indication of his intention that it should be so. See 2 Madd. Cha. 31, 2. 10 Ves. 334. 7 Ves. 534. 8 Ves. 413. 13 Ves. 233, 4. 6 Ves. 528 in note, and 6 Ves. 520. It was argued that the testator indicated an intention that the legacy should not be paid until convenient out of the income of the estate, and therefore not to bear interest; but he couples these words with a reference to one year after his death. If these different expressions seem to be contradictory and to leave the intention doubtful, then the rule would apply; and he gives in a codicil this direction, that all his legacies should commence one year after his decease, or as much sooner as his executors should be in funds for that purpose. Much refined ingenuity was exercised by the counsel to shew, that the testator did not intend that this provision in the codicil should apply to the legacies, but merely to the annuities. And the argument would lead to a presumption against the plain words of the codicil, "all my legacies." Upon the whole, I am perfectly satisfied that this legacy is entitled to carry interest from the end of one year after the death of the testator until paid. It is therefore ordered and decreed,



that the executor do pay the legacy of five  
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thousand dollars bequeathed to Alexander Gillon for the use of his wife and children, together with interest on the same from one year after the death of the testator, in the course of the present year, with leave to the executor to apply to the Court in January next to sell a part of the estate if the legacy be not paid before that period. The amount of the principal to be paid into the hands of a trustee, to be named by the parties and approved by the Commissioner, to be held and secured in trust for the use of Alexander Gillon and his wife and children, according to the intention of the testator. The costs to be paid by the executor out of the estate.

From so much of this decree as directed the payment of interest the defendant appealed, and made the following points.

First. That the general rule, that a legacy bears interest only from the time it became payable, unless otherwise directed by the will, applied here.

Second. That this legacy not being payable according to the will till it should be convenient out of the income, and such convenience not having yet accrued, (as was decided by the Court's allowing the executor one year more to pay the legacy in) it could not bear interest until after the expiration of the year.

Third. And that it was contrary to the testator's intention, as collected from the whole will, that this legacy should carry interest.

Dawson, for the motion. The payment of interest must depend on circumstances. One case can hardly be cited as authority in another. 3 Atk. 102. The case of Wood v. Penorye, 13 Ves. 325, was one of a specific legacy. Chaworth v. Beech, 4 Ves. Jun. 555. All the cases where interest has been allowed proceed on the ground, that the executor was either actually or constructively in possession of funds.

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\*Pearson v. Pearson, 1 Scho. & Lefr. 12. Where the legacy is payable out of income it will not carry interest until the receipt of the income. Cas. Tem. Talb. 2.

Eckhard, contra, cited Sitwell v. Bernard, 6 Ves. 520. 3 Hen. & Munf. 10. Bradwell v. Weeks, 1 Johns. Cha. Rep. 206. Cogdell v. Cogdell, 3 Desaus. 347.

Pepoon, on the same side, cited 2 Mad. Cha. 9. Sibley v. Perry, 7 Ves. 522.

Dawson, in reply. Was there any difference between the will and codicil? If interest was given in this case it must be allowed in every case. If the executor be not in funds, either in law or in fact, interest is not payable. Income is not an outstanding fund. He cited 3 P. Wms, 252. Long v. Short, 1 P. Wms, 403.

The Court of Appeals delivered no formal opinion in this case, but stated, that they

were satisfied with the decree of the Chancellor. The following certificate was delivered. "The Court in this case concur in opinion with the Chancellor. The motion is therefore refused."

Decree affirmed.

I McCord, Eq. \*156

\*JOHN PRATT and CHARLES EDMONDSTON, Sureties of Daniel Botifeur v. CATHARINE WEYMAN and JOSEPH T. WEYMAN, Executors of S. Gale.

(Charleston. Nov., 1825.)

[Account ⇨25.]

Where there has been fraud the Court of Equity will open and examine accounts after any length of time, even though the person committing the fraud be dead.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 146; Dec. Dig. ⇨25.]

[Account ⇨25.]

The Court is not disposed to unravel old accounts, though settled on erroneous principles, but never hesitate to do so if the error is apparent.

[Ed. Note.—Cited in Murrel v. Murrel, 2 Strob. Eq. 154; McDow v. Brown, 2 S. C. 109, 111.

For other cases, see Account, Cent. Dig. § 144; Dec. Dig. ⇨25.]

[Account ⇨25.]

The Court will not open a settled account where it has been signed, or a security taken on the footing of it, unless for fraud or errors distinctly specified and proved.

[Ed. Note.—Cited in Murrel v. Murrel, 2 Strob. Eq. 154; Fraser v. Hext, Id., 254; McDow v. Brown, 2 S. C. 105, 107, 113; Lost Bonds Case, 15 S. C. 231.

For other cases, see Account, Cent. Dig. § 144; Dec. Dig. ⇨25.]

[Account ⇨25.]

The Court always looks to the character of the person who states an account.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 143-153; Dec. Dig. ⇨25.]

[Account Stated ⇨6.]

In some cases when a person keeps an account by him for a long time, without objecting to it, it is considered as an admission of its correctness.

[Ed. Note.—Cited in Gwathmey v. Burgiss, 104 S. C. 282, 88 S. E. 817.

For other cases, see Account Stated, Cent. Dig. § 39; Dec. Dig. ⇨6.]

[Judgment ⇨479.]

The decision of a Court of competent jurisdiction is binding on all Courts having concurrent powers.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 913; Dec. Dig. ⇨479.]

[Account ⇨25.]

The error in account must be specified.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 143-153; Dec. Dig. ⇨25.]

This was a bill filed for the purpose of correcting several mistakes alleged to have been made in an adjustment of accounts which had taken place in February 1818, between the defendants, as the executors of

Samuel Gale, and Danfel Botifeur the original debtor, of whom the present complainants were the sureties. The following case was stated by the appellants' brief.

Gale, in his life time, had several commercial transactions with Botifeur; and among others, had acted as supercargo from Havanna to the coast of Africa and back to Havanna in the summer of 1817. In the autumn of that year Gale returned to Charleston, and died about the 20th of January 1818. The Neuva Maria, a brig belonging to Botifeur, was then in Charleston, and on the 27th of January the defendants, as executors of Gale, filed their bill in equity against Botifeur for an account, and obtained an injunction to prevent the sailing of the vessel. Soon after this bill was filed, Botifeur arrived in Charleston, and propositions were made for an adjustment of the accounts between him and the estate. The books and papers were in Havanna. His vessel under arrest in Charleston. Under the pressure of these circumstances, he exhibited the account of which a copy was filed with the present bill. He gave his bond, with the complainants as his sureties, for \$11,600; the whole cash balance due by him according to the account so exhibited being \$12,734, from which

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was deducted \$759 which had been charged against him as commissions, and also the sum of \$375.

Several items charged against Gale in that account were disputed by his executors, and among others, a charge made of \$2,640 for eight slaves said to have been taken by Gale from the cargo, for his own use, on the coast of Africa. The disbursements for the schooner May Flower, fees paid to lawyers in Havanna by Botifeur for Gale, and sundry other items on the credit side of Botifeur's account with Gale, it was agreed between the parties to refer to Benjamin Booth, of Havanna, to ascertain, and give his certificate of their correctness; and, until this was done, Botifeur was required to give his bonds in double the sum credited to him, that he would procure such certificate. On the debit side of the account, he was compelled to admit the item of \$759, for commissions on certain slaves, which belonged to one Ormond and to Mr. S. E. Lightbourn, claimed by Gale's executors, and which he, Botifeur, denied. And for this also he gave his bond to be paid, if allowed to Gale by the said persons, Ormond and Lightbourn, from whom he was said to be entitled. On the same side of the account also was the sum \$9,057, the interest of Gale in the sales of a certain voyage, and which formed a large item in augmenting the balance then stated as due. Botifeur's cash bonds, to the amount of \$2,000, were paid by the complainants. The bonds respecting the eight slaves and the commissions, and a money bond for \$2,500, only remained uncanceled. Botifeur produced the fullest certificate that the commissions were not al-

lowed; and he also produced certificates that the disbursements of the May Flower, instead of \$700 as allowed him in the account, were, in fact, \$982, 4½ cents; and the fees paid by him to lawyers \$408, instead of \$304. On examining his papers in Havanna, the documents in Gale's own hand writing, which he had thought were in his pos-

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session, could not be found; but he produced the certificate of Mr. Booth, the agent of defendant, that instead of the charge of \$2,640 for the eight slaves, the charge ought to have been only \$2,080, so that he claimed the cancellation of his bond for them on paying the difference between these two sums which was \$560, and that he should have credit for the difference between \$700 and \$982, 4½ cents which was \$282, 4½ cents, and also for \$104 the difference between \$304 and \$408. At the time of the statement of the account Botifeur believed that he had in his possession in Havanna a certificate or document in Gale's own hand writing, that would shew that he had the eight slaves, or their value estimated at \$2,640, from the cargo of the Neuva Maria. His bond given on this item was conditional to produce such a document. It was further alleged by Botifeur that many of the outstanding debts of the adventure, for which, as if all had been perfectly good, Gale's estate had been, as stated, credited with \$9,057, had turned out bad, and he thought himself equitably and justly entitled to a discount from his cash bond for Gale's proportion of these debts. He produced also a certificate, that the commissions charged for Gale had not been allowed, and therefore claimed to have his bond given on that account cancelled. The defendants refused to comply with these requisitions, and commenced actions at law, both on the cash bond and that respecting the eight slaves. The cash bond could not be opened in a Court of Law. On the negro bond the defendants at law, now complainants, insisted that the certificate of Booth was equivalent to the document which Botifeur had undertaken to produce, and that therefore the plaintiffs were entitled to recover only the difference between \$2,640 and \$2,080 namely \$560. The presiding Judge charged, that as the document produced was not that required by the condition of the bond, the plaintiffs were entitled to the

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whole amount. The jury found, however, only for \$2,080, whereas, defendants believed they really intended to allow that the certificate of Booth was equivalent to the document mentioned in the condition of the bond. The defendants at law, from the charge of His Honour, the presiding Judge (James), and from the nature of their case, believed that the only proper relief was obtainable in a Court of Equity, and gave notice of a motion for a new trial that they might have time to prepare their bill in equity. The bill



was filed stating in substance the facts here detailed, and praying relief from the negro bond; that the cash bond should be opened, and the complainants in equity allowed a deduction to the amount of Gale's proportion of the bad debts, and that the bond for the commissions should be delivered up and cancelled. The Chancellor granted an injunction restraining the defendants in equity, the plaintiffs at law, from further proceedings at law. The defendants, in their answer, insisted that the statement of the accounts, in February 1818, was a final settlement; and in consideration of their giving up as they alleged to Botifeur the sum of \$1,134, he agreed to incur the responsibility of collecting the debts in Havanna, and therefore that the cash bond should not be opened. And they further insisted that as the certificate produced did not agree with the one required by the negro bond, that they were in fact entitled to the whole \$2,640, while the jury had only given them \$2,080, 37 cents.

The case came on for trial before the late Chancellor James in November 1824.

The Chancellor decreed for the defendants, and dismissed the bill. The reporter has not been able to procure a copy of his decree.

The complainants appealed, and made the following points.

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\*1. That the decree of the Chancellor was erroneous in considering the account between Gale and Botifeur finally closed, when the parties themselves mutually stipulated for a further examination and adjustment of the items of that account.

2. That if any of the items of that account were open to examination at all, complainants were entitled to a reference for a full examination.

3. That if the account was ever closed, complainants were entitled to have it opened for the correction of the mistakes proved to have been committed in it originally.

4. That in any event, the complainants proved a substantial performance of the condition of their special bond for \$2,600, for the goods converted by Gale to his own use on the coast of Africa.

5. That the complainants were entitled to the interference of this Court for the delivery and cancelling of the special bond given for Gale's commissions and Ormond's slaves, and therefore he should have costs.

King, for motion. When it is doubtful whether a defence will be let in at law, and for that reason it is not offered, equity will retain the case if it has jurisdiction over the matter. 17 Johns. Rep. 384. 389.

Covenants must be strictly performed at law. But in equity it is enough if they are substantially performed. 1 Madd. Cha. 33, 34. Butcher v. Butcher, 9 Ves. 393.

An account settled by arbitrators is not conclusive if an error can be shewn. 1 Madd.

Cha. 102. 1 Scho. & Lefr. 192. 1 Bridg. Dig. p. 16, placita, 114. 116, 117. 119. 125.

Gilchrist, contra. Equity will not open an old settled account; and where there have been releases given the Court will not open it without the clearest proof of error. 3 Ves. 103. 5 Ves. 837. 1 Scho. & Lefr. 192.

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\*Petigru, in reply, cited Beames' Pleas in Equity, 226. Where a settlement has been made by mutual concessions on both sides, the Court never interferes to open it. 1 ves. Sen. 296. Equity will not interfere with settlements of family disputes, although founded on mistake. 1 Fonbl. 117. In an application to open an account, with leave to surcharge and falsify, the complainant must point out and prove specific errors. In relation to the bad debts there is no specification of error, only the general allegation that debts were lost, and Gale was partly interested.

*Curia, per COLCOCK, J.* The authority of a Court of Equity to re-examine acts which have been settled by the parties interested in them is well established. When there has been fraud committed by either party, the Court will do so after any length of time, and even when the person committing the fraud is dead. Madd. Cha. 102. Beames' Pleas in Equity, 232. Where there is an error apparent on the face of the account, the Court will not hesitate to relieve. The Court, however, is not generally speaking inclined to unravel an old account, notwithstanding it may have been settled upon an erroneous principle. Nor will the Court open a settled account, where it has been signed, or a security taken on the footing of it, unless for fraud or errors distinctly specified in the bill and proved as specified. We collect, indeed, as sanctioned by the highest authority, that no settled account ought to be opened upon the mere suggestion of a bill in equity, especially where the truth of such suggestions is fully and substantially, denied by the answer. In a case before Lord Hardwick it was stated, that pending the suit the parties came to a composition. To this it was objected that, as there was no particular account by items, it ought not to stand. But he considered the objection as unavailable,

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observing, that if \*that prevailed, no stale and various transaction could be put an end to without a minute account, which would create endless suits: so that in a case of composition, even without an account, where no fraud was charged, he would not sustain the bill. Beames' Pleas in Equity, 234. The Court also invariably looks to the character of the person who states an account, and if he be in all respects fully competent to a full discharge of the duty, the more reliance is placed in the account. And in some cases where an account is sent by one merchant

to another, with a balance stated against him, and he keeps it by him for two or three years, it is considered as a settled account between them. Having thus shewn the general powers of the Court of Equity in the revision of accounts, I now proceed to shew that in this case there is no ground for the exercise of this power. In the first place it is to be recollected, that this settlement took place in consequence of a bill filed in Equity against defendants, claiming from Botifeur a large sum of money as due by him to Gale. That Botifeur, instead of contesting the claim in the Court, agreed for reasons, not at all affecting the defendants, to enter into this settlement, and that the defendants were entirely ignorant of the transactions of Gale, except so far as appeared from his books, and were wholly at his mercy. In this state of things it was agreed that Botifeur himself should make out the account, which he did; and struck a balance against himself of \$12,734. But as some of the items of this account rested entirely on Botifeur's own statement, it was agreed that Botifeur should be bound to produce proof of them at a future period, or pay the sum fixed on in the said bond—thus manifesting a decided determination to close the account for ever, leaving open the particulars to be settled on the terms stated in those bonds. By this mode of proceeding, an easy remedy was afforded to either of the

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parties, \*if any injustice was done in the settlement of the accounts. In addition to these facts it is proved that a sum of \$——— was given up on the item now disputed of \$9,057, on account of bad debts supposed to have been made on that adventure. It is then clear, beyond a doubt, that the parties themselves did not intend any further or future investigation, and to evidence this still further Botifeur, at the foot of the account, gave a receipt in full. Botifeur failing to produce the proof to substantiate the charge of \$2,640, for eight negroes said to have been appropriated by Gale to his own use, was sued in a Court of Common Law on the bond given. As to that bond in which he obliges himself to produce an acknowledgment, under the hand of Samuel Gale, that he had appropriated to his own use eight slaves on the coast of Africa belonging to a cargo of the said Daniel Botifeur, and also a certificate under the hand of Benjamin Booth of what was the proper amount at which the said eight slaves ought to be charged, the complainants, on the trial at law, produced no evidence but the certificate of Booth as to the price of the negroes, and expressing an opinion that Gale had appropriated the said eight negroes, which not being a compliance with the condition of the bond, a verdict was given against them for \$2,080. No appeal was made, but the plaintiffs filed this bill. As to this item in the account, then, there is an insuperable bar to

any further investigation. It has been submitted to a tribunal of competent jurisdiction, which has pronounced upon it. It has been said, that that Court could not have afforded the relief to which the parties were entitled. But they were clothed with all the power necessary to relieve, had the parties shewn that they were entitled to it. And if as it was intimated, the presiding Judge did charge the jury incorrectly as to the law, the

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\*party had a means of redress by appeal. From the view which has been given to us of this case, no other decision could have been made in the Court below; nor could the plaintiff have succeeded had he carried an appeal to the Constitutional Court. To suffer him to institute an investigation of the matter in a Court of Equity would be to give to that Court appellate jurisdiction in matters of law. In the case of *Starke v. Woodward*, 1 Nott & McCord's Rep. 329 [note] it was determined that the decision of a Court of competent authority is binding upon all Courts having concurrent powers, and this is now a rule of universal law pervading every regular system of jurisprudence. It is founded in the wisest policy—that of putting an end to litigation. If a man, during the whole course of his life, and his representatives after his death, were liable to be dragged from Court to Court upon every item of an account which he had taken the utmost pains to settle, it would introduce a more intolerable state of things than exists in the most arbitrary governments, and would be subversive of every thing like the administration of justice.

The next item of the account, which the Court are required to open, is that which relates to Botifeur's interest in the sales of a cargo charged at \$9,057, on which it is said an allowance ought to be made for certain bad debts. Two objections present themselves to the re-examination of this item; the first is, that a deduction was made on this item between the parties themselves of \$1,134, as was proved by the testimony of Mr Cogdell; and secondly, that it is not stated what the amount of bad debts is, and consequently that it could not be ascertained what the charge ought to be. Only \$375 were deducted on this item, as contended by complainants, they alleging that the sum of \$759 charged as half commissions constituted a part of the aforesaid \$1,134. But although this does appear probable, it is by no means

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to be relied on as \*proof sufficiently strong to overturn the testimony of an intelligent and respectable witness. It is clear at all events, that in the adjustment of the account a deduction was made in the very form now taken. But another objection is, that admitting it to be a proper subject of review, the complainants do not specify the error committed,



they do not pretend to be able to shew satisfactorily to this Court, even now, what is the amount of the loss sustained on the adventure, but state that it is supposed by the agent of Botifeur to amount to ten thousand dollars, no stated account being made of the adventure shewing the profit and loss.

The next item objected to is \$304 for lawyers' fees, which it is alleged should have been \$408; and lastly, the item of \$700, disbursements on the May Flower, which it is contended should have been \$982, making a difference in favor of complainants of \$386. Now admitting for a moment that these two sums could be substantiated, the result would be that the complainants claim \$386; and admit that the defendants gave up in the settlement at least \$375, which would leave a balance in their favour of \$11. For such a sum it cannot be supposed the Court will be required to entertain the bill.

The point which has admitted of any doubt is, whether the bill should be dismissed with costs. On the part of the complainants it is contended, that they are entitled to costs, because it is admitted that the bond, conditioned for the repayment of commissions charged if not allowed by Ormond, and which, since the filing of the bill, has been given up to complainants, should have been given up before the bill was filed. But as we have no evidence that the bond was ever previously demanded, and as it is manifest it did not form any serious obstacle to a

settlement, the Court cannot think that the defendants should be compelled to pay the costs of this protracted litigation on so small a demand. Can it be supposed, if the de-

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fendants had been told that a bill would be filed for the purpose only of compelling a delivery of this bond, that they would have withheld it? Or can it be supposed that the complainants would have filed the bill if this had been their only object. It has not escaped the observation of the Court that the bill is filed by the sureties of Botifeur and that Botifeur lived several years after the settlement of the account. In this bill it is also stated (and the statement was much relied on in the argument) that it might have been inconvenient for Botifeur to find the security which the Court had required, when it is apparent that he found actual security for the payment of the balance stated by himself, and for the payment of the disputed items. Now what greater risk would the complainants have run had they been bound for the whole demand. Botifeur is no more. He has escaped the ordeal of an oath, perhaps, under all circumstances, the defendants' best security for a just settlement of their demands. Upon the whole the Court are satisfied that both on the law and the facts of the case the bill should be dismissed with costs. The decree of the Chancellor is therefore affirmed.

Decree affirmed.

CHANCERY CASES  
ARGUED AND DETERMINED IN THE  
COURT OF APPEALS OF SOUTH CAROLINA  
IN JANUARY TERM, 1826.

JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

I McCord, Eq. \*167

\*R. HUNTINGDON, JAMES M. LOWRY, W.  
H. CAPERS and Others v. JAMES G.  
SPANN.

(Columbia. Jan. Term, 1826.)

[*Assignments for Benefit of Creditors* ⚭104.]

Bona fide creditors, who obtain the assignment of a particular fund, will not have their rights deferred as to such fund, in favour of prior judgment creditors.

Judgments have no lien upon money.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 354, 355; Dec. Dig. ⚭104.]

[*Equity* ⚭61.]

All bona fide creditors stand on the same footing of equity; but in distributing a fund between them, equity can not divest one of them of any legal right he may have acquired.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 182; Dec. Dig. ⚭61.]

[*Equity* ⚭61.]

Where equity is equal law must prevail.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 182; Dec. Dig. ⚭61.]

[*Assignments* ⚭86.]

[Demands against A. were left with B., an attorney, for collection, upon which judgments were recovered, and executions issued. A. paid to B. large sums upon such demands, but before the money was actually applied to the executions A. assigned the money in the hands of B. to a bona fide creditor. Held, that the assignee was entitled to the fund in preference to the execution creditors.]

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 154; Dec. Dig. ⚭86.]

J. G. Spann, Esq., when at the bar, had many demands against J. W. Rees placed in his hands for collection; on some of which he had obtained judgments and issued executions. James G. Spann received from Rees large sums of money, but did not apply them to the payment of the debts in his

hands, except one debt of \$550. Meanwhile the sheriff raised large sums of money upon these executions, some of which he paid over to the execution creditors; and in one in-

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stance paid over to an \*execution creditor, Moody, whom Spann also afterwards paid. Rees then assigned, November, 1820, to Capers, Lowry, Huntingdon and others, the moneys in Spann's hands undisposed of, they being his creditors. James Haynesworth, Josiah Haynesworth, William Taylor, William Desher, who were embraced in this assignment, and other execution creditors who were not, insisted that the assignment by Rees conferred no right upon his assignees to their prejudice; because Spann ought to have applied the moneys in his hands to the executions which he had issued; in which case, large sums of money which were subsequently raised by sales by the sheriff of Rees's property, and which were applied in extinguishment of these executions, would have been a fund in the sheriff's hands, to pay them the said Haynesworths, and other junior creditors. The Commissioner reported against the claim of the assignees, and the exceptions of the assignees, Capers, Lowry and Huntingdon, were overruled by the decree of the Chancellor; from which they appealed, upon the ground, that the creditors who obtained an assignment from Rees were to be preferred to the execution creditors, for whom Colonel Spann did not appear.

W. F. De Saussure, for appellants.  
S. D. Miller, contra.

*Curia, per COLCOCK, J.* I take it to be clear that the money in the hands of Spann undisposed of was the property of Rees, and consequently subject to his disposal. Nor



can it be pretended that the executions which were lodged in the sheriff's hands could bind it. Rees then assigns this money to certain bona fide creditors, and they thereby ac-

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quire a legal right to it. All bona fide creditors stand on the same footing of equity when equities are the same. But in distributing a fund between them, the Court of Equity cannot divest one of them of any legal right which he may have acquired. Where equity is equal the law must prevail. This doctrine is so well established that it would appear to be a work of supererogation to refer to authorities in support of it. Indeed in some cases it has been carried to an extent which, I think, may be questionable. The authorities are collected in page 61 of Francis's Maxims of Equity.

The decree of the Chancellor must therefore be reversed, and the Commissioner is ordered to ascertain the amount in the hands of Mr. Spann, which is ordered to be paid to the assignees of Rees.

Decree reversed.

#### I McCord, Eq. 169

Executors of FISHER v. Representatives of TUCKER.

(Columbia. Jan. Term, 1826.)

[Partnership ⇨278.]

The general rule is, that the power of one partner to find the firm ceases with the existence of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 625, 630, 631; Dec. Dig. ⇨278.]

[Partnership ⇨278.]

After dissolution a power to receive and pay all debts will not authorize one partner to endorse a bill of exchange.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 625, 630, 631; Dec. Dig. ⇨278.]

[Partnership ⇨138.]

One partner cannot bind another by deed.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. ⇨138.]

[Partnership ⇨296.]

The death of one partner dissolves the firm, and the executor of the deceased becomes a tenant in common with the survivor. But they can not be sued jointly at law.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. ⇨296.]

[Partnership ⇨296.]

If the survivor be insolvent then the representatives of the deceased may be resorted to, who, however, may avail themselves of the statute of limitations.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. ⇨296.]

[Partnership ⇨278.]

After dissolution the admission of one partner will bind his copartners so as to prevent their pleading the statute.

[Ed. Note.—Cited in Costello v. Cave, 2 Hill, 530, 27 Am. Dec. 404.

For other cases, see Partnership, Cent. Dig. §§ 625, 630, 631; Dec. Dig. ⇨278.]

[Partnership ⇨278.]

Quære as to admissions made after the operation of the statutory period?

No new contract or burthen can be assumed, nor note given.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 625, 630, 631; Dec. Dig. ⇨278.]

[Equity ⇨87.]

Equity does not dispense with the operations of the statute of limitations, unless some extrinsic equity authorize it.

[Ed. Note.—Cited in Wilson v. Wilson, McMul. Eq. 331; Joyce v. Gunnels, 2 Rich. Eq. 268; Brewster & Dickson v. Gillison, 10 Rich. Eq. 439.

For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. ⇨87.]

[Equity ⇨87.]

The statute is obligatory upon all legal titles and demands.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. ⇨87.]

[Limitation of Actions ⇨143.]

Waties, Ch. The demand being legally barred before the death of one partner, the survivor cannot revive it by a subsequent acknowledgment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 580; Dec. Dig. ⇨143.]

Appeal Court held it admissible but not conclusive.

[Limitation of Actions ⇨143.]

Bond given by survivor for such debt is void as such, but may be evidence of an acknowledgment, but not conclusive.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578-583, 587; Dec. Dig. ⇨143.]

[Executors and Administrators ⇨96.]

An executor cannot bind the estate by giving a bond. He cannot vary in any way the actual state of the testator's debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 410, 412, 413, 417, 418; Dec. Dig. ⇨96.]

[Equity ⇨62.]

Chancery must follow law unless some peculiar equity in a case should make an exception.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. ⇨62.]

[Trusts ⇨365.]

Constructive trust not allowed to be made out at any distance of time.

[Ed. Note.—Cited in Thayer v. Davidson, Bailey, Eq. 414; Buchan v. James, Speers, Eq. 375, 382; Joyce v. Gunnels, 2 Rich. Eq. 267.

For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. ⇨365.]

[Limitation of Actions ⇨102]

Trusts are only an exception from the statute of limitations as between trustee and cestui que trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. ⇨102.]

[Partnership ⇨296.]

After dissolution the debt must be proved, besides the acknowledgment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. ⇨296.]

[Trusts ⇨365.]

Laches in this case sufficient to bar complainant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. ⇨365.]

[Evidence ⇨249.]

Quære, how far the acknowledgment of one partner after dissolution will bind the other. It will save a case from the operations of the statute of limitations, and is admissible as to the existence of debt, but it is not conclusive, and the Court will give it such credit as it may be entitled to under the circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 971; Dec. Dig. ⇨249.]

[Evidence ⇨265.]

Where the acknowledgment was made several years after the dissolution, and the death of the copartner, by a bond given by the survivor, who soon after became insolvent, and the suit not brought for twenty years after the death of the partner, it was held insufficient, per se.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1031; Dec. Dig. ⇨265.]

The bill in this case stated, that George Heriot and Daniel Tucker were copartners in trade, under the firm of Heriot and Tucker; that they became indebted to James Fisher in the sum of £1,100 sterling; that Tucker died in the year 1798, and that in 1800 Heriot, the surviving partner, executed a bond to Fisher in behalf of the firm for the said debt; that in 1805 Heriot was applied to for payment, and he replied by letter that he was insolvent and unable to pay any thing, but that Tucker's estate was good, and that Fisher should be paid out of the

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next \*crop of that estate. The bill further stated that on the dissolution of the partnership in the life time of Tucker, he received a considerable dividend from the partnership funds, and that his representatives, the defendants, were then in the possession and enjoyment of the same. The bill therefore prayed that they should account for the said dividend, and that they should pay the amount of the bond.

The defendants rested their defence on the statute of limitations, and they proved that the partnership was dissolved in 1794, and urged that the debt to Fisher must therefore have been contracted before that time to render them liable. The only evidence offered to establish the debt was the bond given by Heriot, and no proof was produced of its prior existence, and no demand of it made against the defendants, until the filing of this bill in 1814. It appeared further, that the estate of Tucker was divided among his heirs soon after his death.

The question raised on these facts was, whether the bond given by Heriot, the surviving partner, would bind the estate of the deceased partner Tucker.

Waties, Chancellor. There appeared to me at first considerable difficulty in this question; for no case was produced, and perhaps none can be found, in which a similar question has been directly decided. But after giving it a more full consideration I am of opinion, that there are clear and well settled principles which apply to the case and

which govern it. After a careful examination of all the cases which have any relation to the subject, the general law appears to me to be this. The power of one partner to bind the firm ceases with the existence of the partnership. The partnership being dissolved, even a power to receive and pay all debts due to and from the partnership will not authorize one of the late partners to en-

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dorse a bill of exchange in the name \*of the copartnership. The moment the partnership ceases the partners become distinct persons with respect to each other. 1 H. Black. 155. 3 Esp. Rep. 108.

But one partner cannot, even during the existence of the partnership, bind another by deed; and this both for technical reasons and on the general policy of the law. Such a power would have the most mischievous tendency; for as the want of consideration in a deed could not be enquired into, it might extend to mortgages, and would enable one partner to give to a favourite creditor a real lien on the estate of his copartner. 7 Term Rep. 207. 2 Caines' Rep. 256. It has also been established, that the contract of partnership is entirely dissolved by the death of one of the partners, and his representatives become tenants in common with the survivor. And therefore at law the executor of the deceased partner is not liable to be proceeded against by the partnership creditors; for the surviving partner must be joined in the action, and different judgments would be rendered. 2 Vern. 292. 1 Raym. 340. 2 Ves. 268. If, however, the surviving partner should be insolvent, the creditors may resort to the estate of the deceased partner in equity. 9 Ves. 125. 17 Ves. 519.

And here occurs the question, whether the representatives of the deceased partner may avail themselves of the statute of limitations.

It is contended for the complainants, that the statute is no bar to their demand, and they rely chiefly on certain decisions in our Courts, and also on the ground that the defendants are to be regarded as trustees. I have formed a different opinion, and will proceed to examine both of these grounds. 1st. It is contended that the acknowledgments of the debt by the surviving partner will prevent the statute of limitations from running against it; and the case of Higginson and

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others v. Air and others, \*1 Desaus. Rep. 427, has been cited in support of this position. The Court said in that case, "That the assumptions of the surviving partner, as to the affairs of the copartnership, bound the other partner's estate, and that the law had fixed no limitations of time as to the surviving partner's reviving partnership debts by his acknowledgments." The case also of Simpson and Morrison v. Geddes, 2 Bay, 533, has been relied on, in which the acknowledgment



by one partner of a debt after the dissolution of the partnership was held sufficient to charge his copartner with the payment of it.

The dictum in the first case certainly appears to favour the position taken for the complainants, but it refers to no authorities; and it may be confidently said that none can be found to support it in the extent in which it is laid down. On the contrary it is opposed by subsequent decisions in our Courts, and by general principles on the subject.

The same objections might be fairly made to the other case, which was determined at law; but it is sufficient to say of that case that the question of limitations was not before the Court, and it must be presumed that the admission of the debt was made within the legal period, or the statute no doubt would have been pleaded.

It will not be denied that the admission of one partner will bind his copartners so as to prevent them from pleading the statute. It was so ruled in *Whitcomb v. Whiting*, Doug. 629; and in *Smith v. Ludlow*, 6 Johns. Rep. 269, this effect was given to an admission made by one partner after the dissolution of the partnership. But in both these cases the admissions were before the statute had attached, and were allowed to bind the other partners because they created no new engagements.

Every act however of one partner which may charge the others with any new contract, or impose on them any new burthen,

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must be done while the partnership \*exists. This principle has been fully settled both in our own Courts and in those of England.

In *Foltz v. Pourie and Dawson*, 2 Desaus. 43, it was held by the Court "that one copartner cannot bind another by giving notes in the copartnership name after it is dissolved." The same rule has been laid down by the Constitutional Court in the case of *White v. The Union Insurance Company*, 1 Nott & M'Cord's Rep. 556 [9 Am. Dec. 726] also in the case of *The Bank of South Carolina v. Humphreys and Matthews*, 1 M'Cord's Rep. 388. In *Abel v. Sutton*, 3 Esp. Rep. 108, it was determined, that after the dissolution of a partnership, one of the partners cannot put the partnership name on a negotiable security, so as to charge the others, even though it existed prior to the dissolution, notwithstanding such partner may have had authority to settle the copartnership concerns.

"To contend," says Lord Kenyon, "that the liability of one partner to be bound by the acts of his copartner extends to a time subsequent to the dissolution would be a monstrous proposition. A man in that case could never know when he was to be at peace and retired from all the concerns of the partnership, if one partner was to have the power of binding another long after the dissolution of the partnership." 2d. Great stress has been laid on the opinion of Chancellor Kent on

this subject, who has said that "no period has been fixed within which a creditor, by not making his demand upon a surviving partner, should be held to have waived his equity against the estate of a deceased partner." *Hammersly v. Lambert*, 2 Johns. Cha. Rep. 508. No one can entertain a higher respect than I do for the opinions of this accurate and enlightened Judge. But it appears to me, that he has laid down a rule which is not authorized in its extent by either cases or principles. He professes to deduce the rule from the opinion of the Master of the Rolls in the case of *Devaynes v. Noble*, 1 Meriv.

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Rep. 569; but all that \*the Master of the Rolls has said in that case is, "that it is supposed that there is a rule of convenience which requires that the creditors of a banking house shall make their demand for their balances upon the surviving partners within some very short period of time, or else be held to have waived their recourse against the estate of the deceased partner." He then proceeds to shew that so rigorous a course might be ruinous to the surviving partners by the sudden and concurrent pressure which it would bring on them, and ought not to be imposed on creditors as the condition on which their remedy against the estate of a deceased partner should depend. The laches there complained of was a forbearance of only eight months, and in none of the cases cited in support of that ground was the lapse of time sufficient to amount to a legal bar.

The books furnish no case in which a Court of Equity has ever felt at liberty to dispense with the operation of the statute against a legal demand, unless there has been some extrinsic equity to authorize it. The cases are numerous to the contrary, but I will only refer to the following.

In *Reade v. Reade*, 5 Ves. 744, the Court would not on a bill for mesne profits decree an account for more than six years, because more could not be recovered at law. And it is there said that the circumstance of being obliged to sue in equity does not alter the legal nature of the action for mesne profits. And in *Hovenden v. Annesly*, 2 Scho. & Lefr. 630, Lord Redesdale says, "Courts of Equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands."

It is manifest that the present demand was originally a legal one, and the circumstance of bringing it into this Court will not, as was said by the Court in *Reade v. Reade*, alter its original nature. It is stated to have

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\*been for goods sold to the firm of Heriot and Tucker, the remedy for which was exclusively a legal one, while the partners were alive, or while the survivor of them was solvent. It must it appears have been contracted before 1794. Both partners lived more than

four years afterwards, and the surviving partner Heriot continued solvent many years longer; but no suit was brought during either period. The demand was therefore legally barred before the death of Tucker, and it was not in the power of the surviving partner to revive it afterwards against his representatives. The putting the debt in the form of a bond does not exempt it from the operation of the statute. One partner it is settled cannot bind another by deed, and the bond is void as such with respect to the deceased partner. It can only then be regarded as an acknowledgment of the original debt, but this it has also been shewn cannot avail because it was not made within four years. It is however contended that Heriot was the executor of Tucker, and that he has bound the estate by the bond to Fisher, and by the letter promising payment out of the estate. It would be sufficient to oppose to this argument the fact that the bond was not as executor, but as surviving partner in behalf of the firm of Heriot and Tucker. But if it had been given in the character of executor it would not charge the estate of Tucker, for it has been repeatedly decided that an executor does not possess such a power. He cannot vary in any way the actual state of his testator's debts, and therefore cannot revive a claim on the estate which has been barred by the limitation act, or even prevent the running of the act by his acknowledgment of it within the period of limitation.

I refer to the following cases decided by the constitutional Court, *Knox v. McCall* [1 Brev. 531] in 1805. [*Schmidt v. Crafts*] 2 Brev. MS. 266; *Pearce v. Smith* [2 Brev. 360, 4 Am. Dec. 588] in 1810; and *McBeth v. Smith*, 2 Tread. Const. Rep. 676, Tread. Edition, decided in 1816.

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\*I am not apprized of any decisions of this Court on the subject, but I consider it bound to follow the law, unless some peculiar equity in a case should make it an exception.

The second ground insisted on for the complainants is, that the defendants are trustees for this demand.

This ground appears to me as untenable as the first. It is very clear that there is no express trust, and if one can only be raised by implication, it is no exception to the statute. In *Beckford v. Wade*, 17 Ves. 97, the Master of the Rolls says, "It is true that no time bars a direct trust, as between a cestui que trust and trustee; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be."

In *Andrew v. Wrigley*, 4 Bro. C. C. 425, Lord Alvanley recognized this rule and acted upon it; and in *Townshend v. Townshend*, 1 Bro. C. C. 544, Lord Commissioner Ashurst takes the same distinction between

express trusts and trusts by implication. He says, "the rule, as to trusts being an exception to the statute of limitations, holds only as between cestui que trust and trustee."

In all cases therefore of constructive trust, a Court of Equity has constantly applied the statutory limitation.

In *Lockey v. Lockey*, Prec. Ch. 518, the Lord Chancellor was of opinion, that where one receives the profits of an infant's estate, and six years after his coming of age, he brings a bill for an account, the statute of limitations is as much a bar to the suit as it would be to an account at common law. "It is not such a trust as the statute will apply to."

In *Webster v. Webster*, 10 Ves. 93, a bill was brought against an executor for an ac-

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count and payment of a \*debt due to the plaintiff. He pleaded the statute, and although regarded in equity as a trustee for the payment of debts, yet the Court thought his plea a good one, because it appeared that he had been possessed of the effects of his testator more than six years, and the plaintiff might have brought his action of account within that time. If then by any possible construction the original nature of the demand could be converted into a trust, yet according to these cases it would be barred by the statute.

But there is another objection to the demand, which I think fatal to it. There had been no proof of any original debt. The acknowledgment by Mr. Heriot, although it may have been sufficient to prevent the operation of the statute if a debt had been proved, yet being made after the dissolution of the partnership, it does not dispense with the necessity of further proof. It was so ruled in the case of *Hackley v. Patrick*, 3 Johns. Rep. 528. Also in *Smith v. Ludlow*, before quoted.

It would indeed be a most alarming doctrine to the mercantile world, if one partner had the power, after the partnership was dissolved, to charge his former partners to any amount by his bare admission of a debt. Such a power would expose every man who had retired from trade to the collusions of a dishonest copartner, who might ruin him by the admission of fictitious demands which could not be disproved.

There is one more view of the case which the defendants ought to have the benefit of. They have not only a legal but a good equitable defence.

The estate of their father was divided soon after his death in 1789; they have been in the enjoyment of their shares ever since, looking to them for their own support, and as a resource for future portions to their children. There is reason to presume that a sufficient amount of the partnership funds

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was reserved in the \*hands of the surviving



partner Mr. Heriot, to discharge the debts of the firm. This was the belief of one of the witnesses; and it is the usual practice of merchants on dissolving their partnerships. But no demand was made on the defendants until the filing of this bill.

This laches of the complainants, although it may not amount to a bar in equity, yet gives to the legal bar a strong equitable sanction.

It is therefore ordered and decreed that the bill be dismissed.

This case was argued before the late Court of Appeals in Equity, but before the cause was decided that Court was abolished, and the cause transferred to the docket of the present Court of Appeals. The following argument was delivered before the former Court, but the same arguments were used before the latter.

King, for the appellants, after repeating the facts of the case, contended on the first ground, that there was sufficient proof to establish this as a partnership debt. He referred to 3 Johns. 528. 6 Johns. 269. He acknowledged that the first case decided that one partner could not bind the other by the acknowledgment of a debt. But in that case there was no proof that it was by a surviving partner. Both were living. Here the promise had been made by the only person liable at law. This Court was not to be governed by New York decisions, but by the common law and decisions of this state. The case of Foltz v. Pourie and Dawson, 2 Desaus. Rep. 40, differed from this. The copartner in that case made a note, which was a new contract after the partnership was dissolved. But this was only the recognition of an old one. The case of White v. Insurance Company, 1 Nott & McCord's Rep. 556, differed also from this. The company took an in-

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dorsement from the surviving \*partner. Besides, the party had shares on the books, which he had assigned to partnership creditors. He cited *The Bank v. Humphries et al.*, 1 McCord's Rep. 388. 3 Esp. Rep. 108. All of which he said were new contracts. The case in 3 Johns. 528, he said was not law, and he cited *Simpson and Morrison v. Geddes*, 2 Bay, 533, to shew that one party to a joint contract may recognize the debt to bind the other, after the dissolution of a partnership; a fortiori might a surviving partner do it? There was no other person to recognize it; he charged himself by it. The case in Bay was for goods sold to the partnership, and the acknowledgment made after the dissolution, and all the Judges concurred: it was therefore the express law of our own state. The same point was ruled in England, 1 Taunt. 104. The case in Treadway's Edition of the Constitutional Reports he said was only ruled by three Judges. In *Britz v. Fuller*, 1 McCord's Rep. 541, in 1820,

it was held that acknowledgments by one maker of a joint and several promissory note saved the case from the statute of limitations. Treadway's book he said was not authority.

GAILLARD, Chancellor. Is that book considered authority? There is but one equity case in the book, and it falsely reported.

King cited 1 Desaus. Rep. 429. If he shewed that they have proved the debt once due, the law had fixed no limits to the acknowledgment by a surviving partner. He cited 1 Gallison, 330—5. 1 Taunt. 104.

The admissions of an agent bind, much more must those of an agent who had joint interest. The true principle is, that though the partnership be dissolved as to subsequent transactions, yet it continued as to the partnership affairs till they were settled. This admission was competent and plenary evidence in absence of fraud.

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\*Here the admissions were made not only by a surviving partner, but also an executor. The making him executor was a strong proof of his confidence in his character and honesty. There was no other person to make an acknowledgment. He was making himself also liable: it was not denied by the answer of the infants. The executor pleaded the statute of limitations which admitted assets, and the plea was overruled. As to the effect of a plea in bar, he cited *Coop. Eq. Plead.* 223, 231. It reduced the cause to a single point. The point here is, "whether the debt is barred or not?" The plea admitted the debt due. He was entitled to a decree pro confesso, as a judgment by default. He admitted that he could not have a decree against the infants, but that he might against the executors. *Coop. Eq. Plead.* 231. For the purpose of deciding the plea the bill was admitted to be true, *Coop. Eq. Plead.* 251, thereby giving an acknowledgment of the right independently of the answer. See also 6 Ves. 594—5. Ball. on Limitations, 209. The plea of the statute admitted the cause of action. 1 Johns. Cha. Rep. 10. The defendant was precluded by neglecting to answer. 2 Atk. 23. 1 Harper's Rep. 87.

He recapitulated that the debt was sufficiently proved as a partnership contract; and that it was admitted by the plea and established by the order pro confesso.

As to the second ground, he contended that the acknowledgment was good to save the statute of limitations, whether made within or after the four years. He had found no authority supporting a distinction. It did not exist in law. It was too subtle. The cases were contrary. *Whitcomb v. Whiting*, Doug. Rep. 629, laid down the principle broadly without the distinction. The act of one's paying, &c. was the act of all. The

dicta to the contrary of this position were all general. The next case he cited he said was more in point, viz. *Jackson v. Fair-*

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*banks*, 2 H. Black. 340. Payment by the assignees of bankrupt partners nine years after debt was held to take the case out of the statute. 1 Gall. Rep. 635, 6. In *Higginson v. Air*, 1 Desaus. Rep. 429, thirteen years had elapsed. So in the case in 2 Bay's Rep. 533. In 6 Johns. Rep. 269, the Court decided without saying any thing about the distinction. In 1 McCord's Rep. 541, the same question was made: a note dated 1808, part payments made in 1814 and in 1821, the acknowledgments were held to take it out of the statute.

As to the third ground, he said the partnership existed in 1794. The copartner died in 1797. There was no doubt about the debt in Tucker's life time; and the debt was not barred at Tucker's death. It was valid against his estate, or Heriot's admission rendered it so.

As to the fourth ground, he said, there was no waiver of the equitable right, for having pursued the estate of the solvent partner—it was always reserved. The bond and the letter all speak of a copartnership debt. They always trusted to copartnership assets. As to laches there was none; up to 1807 the debt was constantly recognized. The executor pledged, as far as he could pledge, the crops. The laches could only be from 1807 to 1814, when the bill was filed. Independently of the statute twenty years were always required as to a bond. *Nemo debet completari aliena jactura*.

In 4 Desaus. Rep. 429, thirty years had elapsed from the accruing of the debt to filing of the bill, seventeen years before the war had elapsed.

In *Lane v. Williams*, 2 Vern. 292, it appeared considerable time had elapsed. 2 John. Cha. Rep. 508. 1 Meriv. 529. 4 Day's Con. Rep. 476.

In *Heath v. Percival*, 1 P. Wms. 682, twenty-seven years had elapsed between the making of the bond and the decree. *Percival* died the same year.

In *Hammersly v. Lambert*, 2 John. Ch. Rep. 508, the lapse of time was as great as in this case.

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\*On the fifth ground, he said, the possession of the bond was conclusive proof that the debt was due, and rebutted the presumption of payment under the statute. The bond spoke of the partnership. Binding one partner it binds the other. The act of one was the act of both, &c. Partners were identified. Suppose both alive, or Heriot called upon to pay the whole, he would have a right to contribution—the other might be compelled to pay. The statute of limitations would not begin to run till he paid. His

client stood in the situation of Heriot. *Jacob v. Harwood*, 2 Ves. Sen. 265, he thought was conclusive on the whole case.

This Court, he said, was not bound by the statute of limitations if they saw clearly that the debt was unpaid. He had shewn a debt against the copartnership. The surviving partner represented the copartnership. He was bound and therefore both were bound.

*Abel v. Sutton* was not a case of a surviving copartner, but was a contract after the dissolution. The case of *Jacob v. Harwood* was recognized by Sir William Grant, 1 Meriv. 565. He cited *Wodrop v. Ward*, 3 Desaus. Rep. 203, to shew that if one was bound both were bound. If a surviving copartner give a bond or mortgage or judgment, though it extinguishes the simple contract debt, yet it would remain a copartnership debt. *Norton v. Turville*, 2 P. Wms. 144. 2 P. Wms. 241. The rule that one partner cannot bind another did not apply to a surviving copartner. The Court would look at the substance. Would not Tucker have joined if he had been alive?

The reason in England why one partner could not bind by bond was because real estate would be bound. It did not apply here where simple contracts bind lands. These reasons were sanctioned in the case of *Harrison v. Jackson*. The Court would say here is substantially a partnership debt.

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\*The English rule was a barbarous feudalism. In equity a bond given by a partner was a partnership debt, even in England. *Ex parte Roberts*, Coop. Rep. 102. *Ord v. Chase*, 1 Meriv. 729. A fortiori by a surviving partner. But here it was not only a surviving partner, it was the executor who signed.

On the sixth ground he said these were the acknowledgments of the executor, and his acknowledgments took it out of the statute. Some cases did say he cannot bind the estate by a new contract. But it was not so in this case, if the debt be bona fide. He understood in the case of *Knox v. McCall*, the debts were barred in the life time of the deceased; but here it was not barred in Heriot's life time. If the decree was founded on those cases, it must be overruled.

On the ground that the defendants were trustees, he said they could not be sued at law till Heriot's death or insolvency. He inferred from the facts of the case that complainants were ignorant of these facts till the letter in 1815. In analogy to cases of fraud, &c. the statute could not run till discovery.

The funds going into Tucker's hands were res inter alios acta. The letter says the funds were divided. 1 P. Wms. 682. 1 McCord's Rep. 541.

Besides, the defendants took as trustees



for the payment of debts under their father's will. This was a subsisting debt at his death. Against such a trust the statute of limitations will not run. It is a declared trust. He cited 2 Ves. & Beames, 274, to shew that words in a will, directing that debts shall be paid, create a trust. 8 Ves. 574.

There were numerous authorities. It has been held at law that a trust for the payment of debts did not revive a debt barred, but it protected one in existence. The statute of limitations does not bar legacies. But there was more equity for debts as to the

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executor. 1 Scho. & Lefr. 107. Where there is a trust for payment of debts, the statute does not run, if not barred before the testator's death. 2 Ves. & Beames, 281.

S. D. Miller, contra. He said after a dissolution of a copartnership, one party may recognize, whilst alive, a responsibility which lies on himself: therefore it was laid down that he shall not create a debt to bind the copartnership. The case from 3 Johns. Rep. 528, he said, was conclusive. The right to make an acknowledgment of an account was no more admitted than the right to make a note. He cited 2 Johns. Rep. 300. It would be putting all one's rights in the power of a partner for an unlimited time. The powers given were mutually given as far as related to business. On dissolution the business must be wound up. Foltz v. Pourie and Dawson, 2 Desaus. Rep. 40. One partner could only bind during the partnership—not after. It was admitted during the partnership only for the benefit of the concern. 2 Const. Rep. Tread. Edit. 685. The original entries should have been proved. It was many years after the dissolution before the bond was given. Heriot's letter induced the conclusion that the firm of Heriot and Tucker was solvent at the dissolution, and that funds were set apart to pay debts. He afterwards went into partnership with another. The Court should be cautious of establishing a rule which would be subversive of mercantile interests. The partnership was dissolved in 1794. Fisher died in January 1798. Let the death of Tucker be considered the time when the debt became due, and it was barred. The copartnership expired in January 1794 by its own limitation. The letter was written in 1805, and the suit brought in 1814. One partner could not bind another by deed. Watson, 164. It was not a nullity as to Heriot. He referred to the cases cited

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by Watson. If one partner does execute a bond, it binds himself. There was nothing to shew the debt unsatisfied up to 1805 but the letter. The Court therefore would conclude that the letter was not sufficient proof of an original debt. By such evidence he lost the right of cross examination. It is an ex parte statement to relieve himself.

If the original debt was proved, would the letter revive it after it was barred by the statute?

The case in Johnson's Chancery Reports was a mercantile transaction, and was decided on the ground of laches. The statute of limitations was not in question. 1 Meriv. 567.

The true principle is, that there is no necessity for the utmost diligence against a surviving partner.

As to the statute of limitations—if the bond be not a recognition, but the letter is, is not the demand barred after the date of the letter 2 Scho. & Lefr. 632. Equities are barred by analogy to the statute of limitations. It operates on all legal questions. If it were barred after the letter, it is not material whether the letter revived it or not. He presumed the trust was discharged in four years: by analogy a promise not to take advantage of the statute is barred in four years.

An executor could not admit a debt already barred. Knox v. McCall, 2 Brev. MS. Rep. decided in 1805. All the reasoning that applied to a partner after dissolution applied to executors. In 2 Const. Rep. Tread. Edit. 767, it is said that an acknowledgment that a debt is just by an executor is not sufficient proof. The doctrine at law is, that the contract of an executor can not charge the estate. M'Beth v. Goddard's Adm. 2 Const. Rep. Tread. Edit. 677. Pearce v. Smith.

The bond was a contraction of a new debt, if there was no proof of antecedent debt, the bond was the creation of a new one. The rule, that where a trustee assumes the debt he discharges the trust estate, applied to

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\*executors. If the debt is not due, and the executor promises, and the party forbears to sue, the statute does not run. Pearce v. Zimmerman, decided at the last Court. If the debt were not barred before the intestate's death, the lapse of twenty years would raise the presumption of payment. From 1794 to 1814 were twenty years—Vigilantibus non dormientibus jura subveniunt. If Tucker left funds in Heriot's hands and complainants have waited till he became insolvent, it was their own fault. Hammond's Dig. 348. Merchants' accounts are within the statute, the accounts having ceased six years.

Tucker's executor was notified till 1814. It was nothing to say that they had his bond and letter. It was good against him; but it gave no claim on Tucker's estate; at all events from 1807. Equity adopts the statute by analogy. 10 Ves. 466. The case from Scho. & Lefr. 110 shews that a devise in trust does not revive a debt before barred. It was not to be taken for granted that the debt was created at the dissolution. It might have been four years before. The Court would conclude that Heriot, having funds,

made it a personal debt, and that the parties looked to him.

There was no express devise for the payment of debts. It was a mere implication: the estate was to be divided. It was divided; and would not the Court presume that payment had been made before that period?

Gadsden, in reply. The case stood on the naked plea of the statute of limitations. We are entitled to a decree *stricti juris*. This claim is equitable, if the conscience of the Court be satisfied.

The bond and letter are no evidence of a partnership debt. It is only a question of evidence. The debt must be proved in one of two ways, by acknowledgment or by the books. The only surviving partner admitting the debt would only bind himself. 1 Gall.

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Rep. \*636. The answer of a bankrupt partner, made before discharge, was held good. It was the best evidence that could be had. 2 Bay's Rep. 533. 1 Gall. Rep. 635. The confession of one partner was sufficient, not only as to the amount, but as to the existence of the debt. 1 Taunt. 104. Did any one doubt Heriot's honesty?

The bill having been taken *pro confesso* furnished evidence. This was different from a bill of discovery. The party admitted what he did not deny. It was similar to a judgment by default at law. He cited 1 Desaus. Rep. 429. Doug. 630.

With regard to the distinction between acknowledgments made as to a debt barred and not barred. Where did they find this doctrine? It would be extraordinary in a Court of Equity that payment was presumed in four years. The pleadings were against such a conclusion. *Whitcomb v. Whiting*, Doug. 651.

In the case in 6 Johns. Rep. 269, it appeared that the promise had been made after the six years; neither of the cases support the decree.

The Judge seems to have thought the acknowledgment analogous to giving a note, a new undertaking, or one imposing an obligation which did not exist before. 1 Desaus. Rep. 429. This distinction does not exist. There are no limits to acknowledgments. It can not be doubted but there were demands in 1800, not long after the death of the party. It is but fair to infer the debt then alive.

The statute does not run against merchants' accounts until the dealings have ceased. From whence it may be inferred that it did not begin to run till the death of the copartner.

As to the fourth ground, he said that long indulgence to a surviving partner would not discharge the equity against the other. They

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could not come into the Court \*of Equity un-

til the surviving partner was insolvent. There was great diligence used against the surviving partner. It was for the benefit of the deceased partner's estate to indulge. Outstanding debts were to be collected which might have been lost by pressing.

As a motive for indulgence the surviving partner gave the bond. If the concern could not pay the debt the estate must. If Heriot could not pay, what was the course? Was it more for the benefit of a retiring partner to pay or to wait contingencies?

No indulgence given to one joint obligor was considered at law indulgence to the other. If the representatives of the deceased feared that the funds would be wasted, they might have had security. 1 Desaus. Rep. 429.

Although funds were left, yet the acting partner ought to be indulged. 1 P. Wms. 682.

So was the case in Johnson's Reports. The demand was made on the deceased thirteen years after the death of the copartner. There was no period fixed by Sir William Grant in his opinion. It was not laches to indulge the survivor. Almost unlimited indulgence might be given.

As to the effect of the bond, Heriot had a right to give it, and it would prevent the statute. Might he not give a security to obtain indulgence? With regard to the settlement of past transactions, the partnership exists. Heriot alone could act for the firm after the death of his copartner. The representatives of a firm must have the means of obtaining indulgence. A creditor would not have rested without some other evidence. The statute could not have been pleaded at law by Heriot against the bond.

If Heriot had paid the bond and filed a bill for contribution, the representatives of Tucker could not have pleaded the statute.

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Could they say it was barred notwithstanding the bond? Equity cannot dispense with the statute to a legal demand, but coming into equity, would it be said that the statute bars? It was only on the ground of insolvency that he had a right to come into this court. It was demonstrative proof that the debt was not paid. He insisted that the survivor had a right to give the bond, that the statute would not avail at law, and that the insolvency was the ground of jurisdiction. Was there any hardship on the representatives of the deceased?

But funds were left to pay the debts. Why were they not applied? No evidence was given that his client knew the cause. Heriot was the agent and trustee of the other, not his client's. As to the executor's acknowledgments, he asked who was the executor in this case? The surviving partner. All things were done by the surviving partner with the knowledge and assent of the executor. It was not like an executor admitting a demand he knew nothing about. He must have



known whether the estate was liable or not, otherwise he deluded the creditor. Could this be called a case of laches? The party resorted to the estate as soon as he could. An executor was not bound to plead the statute. 15 Ves. 498. That the acknowledgment took the case out of the statute, he cited *Briggs v. Starke*, 2 Const. Rep. 111.

As to the trust, the statute only could begin to run from the time of the discovery that the partnership funds had been taken in trust liable to lien of debts. It was an implied trust. 2 Scho. & Lefr. 634. 2 Ball & Beat. 129.

No agreement between partners can affect creditors. Leaving funds to pay can not discharge the retiring partner. 1 P. Wms, 682.

There was no distinction between an express and implied trust under a will. This is express, as in 2 Scho. & Lefr. 634.

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\**Curia, per* NOTT, J. I concur in the general course of reasoning which the Chancellor has adopted in this case, and the conclusion at which he has arrived. How far the acknowledgments of one partner of the existence and amount of a debt may be evidence to bind another, after a dissolution of the co-partnership, is a question respecting which different opinions have been entertained. In the cases of *Hackley v. Patrick*, 3 Johns. Rep. 536, *Smith v. Ludlow*, 6 Johns. Rep. 267, and *Chardon v. Calder, &c.* 2 Const. Rep. Tread. Edit. 685 [6 Am. Dec. 572], the Court seemed to have thought that the confession of one could not bind the other. But in the cases of *Wood v. Braddick*, 1 Taunt. 104, *Simpson & Morrison v. Geddes*, 2 Bay, 533, and *Van Reimsdyk v. Kane* and others, 1 Gallison, 630 [Fed. Cas. No. 16,872], contrary opinions are expressed. Such evidence is unquestionably sufficient to save a case from the operation of the statute of limitations; and I think it admissible as to the existence of the debt, but I cannot think it conclusive. The Court must be allowed to give it such credit only as under the circumstances it appears entitled to. I do not think that it was sufficient in the present case to entitle the complainants to a decree. The defendants' ancestor had been dead about twenty years when this bill was filed. How long the demand had existed before his death does not appear. The acknowledgment relied on was made several years after his death by a partner, who afterwards became insolvent, and had been dead several years before the filing of the bill. These defendants knew nothing of the transaction; they had a right therefore to call upon the plaintiffs to adduce some other evidence of the existence of the debt. And without such evidence the complainants had no right to expect a decree. The motion therefore must be refused.

Decree affirmed.

## I McCord, Eq. \*191

\*JOSEPH DAVIS v. LEVY F. RHAME, Executor of Jeremiah Rhame, and WILLIAM CLARKE.

(Columbia. Jan. Term, 1826.)

[*Descent and Distribution* ⚡75.]

To give a vested interest in possession to property distributable of an intestate's estate, there must be an actual partition.

[Ed. Note.—Cited in *Trimmier v. Thomson*, 10 S. C. 182.

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 243-251, 260-262; Dec. Dig. ⚡75.]

[*Guardian and Ward* ⚡35.]

The possession of a guardian to a female infant is a sufficient possession to vest the right of personal property in her husband, though she die before the husband obtains actual possession.

[Ed. Note.—Cited in *Sansey v. Gardner*, 1 Hill, 192, 193; *Pitts v. Wicker's Adm'rs*, 3 Hill, 198; *Daniel v. Daniel*, 2 Rich. Eq. 118, 44 Am. Dec. 244.

For other cases, see *Guardian and Ward*, Cent. Dig. § 163; Dec. Dig. ⚡35.]

[*Executors and Administrators* ⚡47.]

The executor or administrator alone of a deceased person can maintain an action for any claim or account due the deceased.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 298; Dec. Dig. ⚡47.]

[*Executors and Administrators* ⚡47.]

Persons entitled under the statute of distributions cannot without administration.

[Ed. Note.—Cited in *Villard v. Robert*, 1 Strob. Eq. 416.

For other cases, see *Executors and Administrators*, Cent. Dig. § 298; Dec. Dig. ⚡47.]

[*Husband and Wife* ⚡8.]

The possession of one joint tenant is a sufficient possession in the other tenant to vest the marital rights in her husband.

[Ed. Note.—Cited in *Burgess v. Heape*, 1 Hill, Eq. 404.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 19-29; Dec. Dig. ⚡8.]

[*Husband and Wife* ⚡11.]

[Where personality remaining in the hands of a former guardian of a feme covert came into the possession of her husband, who was her administrator, after her death, the marital right attached.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 53; Dec. Dig. ⚡11.]

The bill stated that the defendant, William Clarke, intermarried with Elizabeth, the sister of the complainant, who was regarded as an idiot; and that she died not long after the marriage. That during her life the said Clarke took possession of part of her personal property, and soon after her death of several slaves which had been in the possession of the defendant Levy F. Rhame, into whose hands they came after the death of Jeremiah Rhame, who had been guardian of the said Elizabeth; the said Clarke not having reduced them into possession during the life of his wife, nor exercised any act of ownership over them; but soon after her

death they were secretly taken out of the possession of Levy F. Rhame by the said Clarke. That the said Elizabeth was entitled to a tract of land, and choses in action in the hands of Levy F. Rhame, as well as a claim upon Jeremiah Rhame for the hire of her negroes. That letters of administration were taken out by the said Clarke on the estate of the said Elizabeth. That Levy F. Rhame had qualified as executor of the said Jeremiah, and possessed himself of his goods and chattels. That the complainant had applied to the said Levy F. Rhame to account for the management of the property of the said Elizabeth, by his father Jeremiah Rhame, and pay over to him his proportion of the choses in action which belonged to the estate of said Elizabeth; and to said Clarke for a division of the personal property of which he possessed himself after her death; and to make a division of the lands and choses in action

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of the said Elizabeth, \*which had come into his possession since her death. The bill prayed that the said Levy F. Rhame might account for the management of the property of said Elizabeth by the said Jeremiah, and for the choses in action which belonged to her, and for a division of the real and personal property, and choses in action, which had come into his possession since the death of the said Elizabeth.

To this bill the defendant Clarke put in for answer, that the said Elizabeth, complainant's sister, was his wife; and was a woman of good understanding. That in her life time he took possession of four negroes, to wit, Nancy, Jim, Lyddy, and Mary, and after her death of two, to wit, Lyddy and Jim. That the above negroes were his wife's property; that the said Jeremiah was the guardian of his wife; and that Levy F. Rhame was the executor of Jeremiah; and prayed that he should be made to account for the management of her property by the said Jeremiah. The answer further stated, that he took out letters of administration on the estate of his wife. That the two negroes, Dicey and Ivey, were in the possession of Levy F. Rhame, being hired at the time of his marriage with the said Elizabeth. That the said Elizabeth his wife at the time of her death was entitled to a tract of land and choses in action in the hands of Levy F. Rhame, and that he, the defendant, was entitled to the whole of the negroes, and to a moiety of the land and choses in action.

The defendant, Levy F. Rhame, demurred because, by the complainant's own shewing, he was an heir at law of Elizabeth Clarke deceased; and William Clarke had administered on her estate; and his administration was in full force and unrevoked; and that the said William Clarke was entitled to demand and receive of this defendant any personal property of the said Elizabeth in the hands of the defendant, who was accountable to him alone.

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\*W. F. De Saussure, on the demurrer of Rhame. In support of the demurrer he said, that the complainant had no right to force the defendant Rhame to account here; when he, the defendant, could not safely settle with Davis out of Court. As to the lands, the executor had nothing to do with them.

W. Mayrant, against the demurrer. The complainant had a good equitable right to come here to oblige Rhame to account. Suppose Clarke should never call on Rhame to account, would Davis always be precluded from requiring the settlement of an estate in which he had an interest?

W. F. De Saussure, in reply. Jeremiah Rhame had accounted. He referred to the accounts rendered to the Ordinary.

Haynesworth, for defendant, produced the partition, made the 17th of February 1809, of the estate of the father of complainant and of Clarke's wife. Elizabeth's negroes under that partition were held by the guardian, Jeremiah Rhame, for her.

As to the land, he admitted the complainant's right as an heir, as well as to the choses in action. But as to the negroes reduced to possession, the husband was entitled exclusively to them. The possession of the guardian was the possession of his ward. As to the cases decided in our Courts, he cited *Byrne v. Steward*, 3 Desaus. Rep. 135. *Elms v. Hughes*, 3 Desaus. Rep. 155. *Bunch v. Hurst*, 3 Desaus. Rep. 273, 289. There was no partition. In many cases, it is impossible to have actual manual possession.

Preston, for defendant, Clarke. The principle of reduction into possession did not re-

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quire manual caption. \*But the guardian's was the possession of the husband. If the guardianship was at an end, then the husband's marital rights attached more decidedly. There must be a chose in action, to prevent the marital rights attaching. But in case of funds, as soon as he can draw on the Bank the marital rights attach.

Mayrant, for complainant. Clarke could not, as husband, have taken the negroes out of the hands of the executor, or of the guardian, without coming into this Court for an account and settlement. The controversy could only be about two of the negroes, Nancy and Jim, who were allotted in partition, on the 17th of February 1809, to Elizabeth. But Dicey and Ivey, the children of Nancy, he contended, were not reduced to possession by Clarke.

De Saussure, Chancellor. This case lies in a narrow compass. As to the slaves actually reduced into possession by the husband, there can be no doubt the marital rights attached on them, and the defendant, Clarke, is entitled to hold them. As to the slaves, Nancy and Jim, they were allotted to Miss Davis (afterwards Mrs Clarke), by par-



tition, on the 17th of February 1809; and Miss Davis being then an infant, these slaves were placed in the hands of Jeremiah Rhame, her guardian; on his death they came into the possession of L. F. Rhame, his executor; and after the death of Mrs Clarke into the possession of her husband, the defendant. The question as to these two slaves is this—was this a sufficient reduction into possession by the husband, to entitle him to them, under the marital rights? I have examined the cases of *Byrne v. Stewart*, 3 Desaus. Rep. 135, and *Elms v. Hughes*, 3 Desaus. Rep. 155, and *Bunch v. Hurst*, 3 Desaus. Rep. 273 [5 Am. Dec. 551]. These cases were fully argued and considered and decided, first in the

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Circuit \*and then by the Court of Appeals. They establish that the marital rights, as at common law, did not attach to the exclusion of other relations; because there had not been any partition by which the property was divided, and the wife's share of it designated and known distinctly. They decide nothing more on this subject, and I adhere to those decisions. But in the case we are considering there has been an actual partition, and the negroes in question allotted to Miss Davis, and put in possession of her guardian, whose possession was for her benefit, and really hers, and consequently her husband's. I am of opinion, therefore, that the marital rights of Clarke did attach on the slaves, Nancy and Jim: and the children of Nancy, to wit Ivey and Dicey, must go with her.

With respect to the demurrer by L. F. Rhame it is contended, that complainant's claiming as one of the distributees of Mrs Clarke ought to make his demand and suit against Mr Clarke, who has administered on his wife's estate; and to whom defendant, Rhame, is primarily accountable, as executor of Jeremiah Rhame, guardian of Mrs Clarke. There is no doubt that, strictly speaking, Mr Clarke, as administrator of his wife, is entitled to call upon her guardian, or his executor, to account for his transactions in relation to her estate: and when he has done so, he is then liable to the distributees of his wife. So that Davis's suit should be brought against Clarke. It is said the suit of Davis, directly against Rhame, will prevent circuitry of action. The Court willingly pursues the course of preventing circuitry of action, where it can be done with propriety. But there are many cases in which it cannot be done. In the present instance, Clarke, as administrator of his wife, has the right to sue Rhame, executor of Rhame, as guardian of Mrs Clarke, for an account of his stewardship. Now if a distributee of Mrs Clarke were permitted to sue the executor of the

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guardian on the same cause of action, \*it would be great inconvenience.<sup>1</sup> There is

nothing in the objection that Clarke, by not calling Rhame to an account, might defeat complainant's rights. In calling Clarke to an account as administrator of his wife, he will be bound to account for all her interests, which do not exclusively devolve upon himself. As to the lands and choses in action, Clarke, as survivor of his wife, is entitled to a moiety, and no more.

It is therefore ordered and decreed that the bill be dismissed, so far as the same seeks a recovery and an account for the slaves Nancy and Jim, Dicey and Ivey; and that the defendant, Clarke, do account before the Commissioner for so much of his wife's choses in action, and that a partition do issue as to the lands.

From this decree there was an appeal. The same arguments were used before this Court as before the Chancellor.

W. Mayrant, for the appellant.

W. F. De Saussure, Haynesworth and Preston, for the appellees.

*Curia, per* NOTT, J. This Court concur in opinion with the Chancellor for the reasons given in the decree; and in addition to the cases cited in the decree, the case of *The Ordinary v. Geiger et ux. et al.*, 2 Nott & McCord's Rep. 151 [note], may be referred to in support of the Chancellor's opinion.

In that case it was held by the Constitutional Court, that where a mother had given

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negroes to four children, \*one of whom (a daughter) afterwards married, the possession of the other joint tenants was the possession of the married daughter, and therefore vested in the husband. And that those negroes were assets in the hands of his executor, and did not belong to the wife, who survived.

Decree affirmed.

# I McCord, Eq. 197

REBECCA RHAME v. BRADLEY RHAME.

(Columbia. Jan. Term, 1826.)

[*Husband and Wife* ⇨289.]

The Courts of Equity of this state have jurisdiction of cases of alimony. Exercised by the Courts of Chancery, in England, during the Revolution (1640).

[Ed. Note.—Cited in *Smith v. Smith*, 50 S. C. 65, 27 S. E. 545; *Smith v. Smith*, 51 S. C. 384, 29 S. E. 227.

For other cases, see *Husband and Wife*, Cent. Dig. § 1078; Dec. Dig. ⇨289.]

[*Husband and Wife* ⇨283.]

Alimony in this country granted upon the same principles and grounds as divorces in England.

[Ed. Note.—Cited in *Hair v. Hair*, 10 Rich. Eq. 172.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 1062–1073; Dec. Dig. ⇨283.]

<sup>1</sup> See to this effect the subsequent cases of *Farly v. Farly*, and *Bradford v. Felder*.

[*Husband and Wife* ⇨283.]

Alimony is granted in case of danger to life, limb, or health.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1062-1073; Dec. Dig. ⇨283.]

[*Husband and Wife* ⇨283.]

What merely wounds the mental feelings is in few cases sufficient, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language or want of civil attentions, or sallies of passion, do not amount to legal cruelty.

[Ed. Note.—Cited in *Hair v. Hair*, 10 Rich. Eq. 173; *Wise v. Wise*, 60 S. C. 432, 38 S. E. 794; *Levin v. Levin*, 68 S. C. 125, 46 S. E. 945.

For other cases, see *Husband and Wife*, Cent. Dig. § 1064; Dec. Dig. ⇨283.]

[*Husband and Wife* ⇨288.]

The wife should not enter into a contest of retaliation, if she wishes the aid of the Court.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1077; Dec. Dig. ⇨288.]

[*Husband and Wife* ⇨283.]

Words of menace importing actual danger will justify the interposition of the Court.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1062-1073; Dec. Dig. ⇨283.]

[*Husband and Wife* ⇨299.]

The English Ecclesiastical Courts will decree restitution, but not in the alternative.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1094-1097; Dec. Dig. ⇨299.]

Quære, if a bill for restitution will be entertained in this state?

[*Husband and Wife* ⇨3.]

Desertion or abandonment a good ground for alimony in this state.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 6; Dec. Dig. ⇨3.]

[*Husband and Wife* ⇨299.]

The question as to restitution will not be determined on a bill for alimony.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1094-1097; Dec. Dig. ⇨299.]

[*Husband and Wife* ⇨3.]

Jurisdiction confined to granting alimony, and to such orders as are necessary to the execution of such a decree.

[Ed. Note.—Cited in *Mattison v. Mattison*, 1 Strob. Eq. 391, 47 Am. Dec. 541.

For other cases, see *Husband and Wife*, Cent. Dig. § 6; Dec. Dig. ⇨3.]

[*Husband and Wife* ⇨299.]

Alimony is usually allowed till the husband will agree to take back his wife and treat her with conjugal affection.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1094-1097; Dec. Dig. ⇨299.]

This bill was filed by the wife against her husband to obtain alimony.

It stated that the complainant intermarried with the defendant, and at the time of her marriage was entitled to an estate in real and personal property worth from \$8,000 to \$10,000. That very soon after marriage the defendant began to treat her unkindly, and by a course of ill usage finally forced her to

leave his house and take refuge among her friends, on whose charity and bounty she was now dependent; and she averred that she never behaved otherwise than as an affectionate wife. The bill further charged that her estate did not owe more than about \$3,000; in order to meet which four negroes were sold, which brought about \$3,000, as well as a tract of land which brought \$3,200, which it seemed the defendant received. The defendant had also in his possession five negroes which were hers at the time of her marriage, and also furniture, &c. and had refused to allow her any thing for her support and maintenance, &c.

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\*The defendant, in his answer, denied the charge of unkind treatment, and alleged that the complainant left him without any cause, and that she was afflicted at the time of her marriage with a nauseous and unchaste disease. He also asserted that her debts and the debts of the estate consumed the whole amount of the property got by her, and denied that he ever refused to maintain complainant if she would come and live with him.

At the hearing the following evidence was introduced.

Stephen Nettles, a witness for complainant, testified, that he knew the parties well, and went with the complainant at her request to the house of defendant in February 1821. Defendant not being at home, they remained there until next morning. Defendant returned and came to the chamber where witness lay, and after some time went out and locked the door. After some time the door was opened, and witness went down and conversed with defendant, and told him he came to see him on the disagreeable life he and his wife lived together, and asked him, if it were not possible they could make it up and live together again. Defendant said, that was his most distant thought. Witness then asked defendant, if he would not allow her some support. Defendant answered, he would not allow her a four-pence. Witness and defendant conversed with complainant. The defendant said, if she came to live with him, he would build her a house in one corner of his field, for she should not live in the house with him. Complainant said, she would not be stuck off in a corner of his field. Defendant purposed to make a bill of divorce between them, which she said she would agree to, if he would return her property to her. He said he would not give her a dollar. She asked then for a bed and table spoons which he got by her, which he refused. One of her objects in going was to get some of the furniture. But she said if defendant behaved

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well to her she would remain. \*Defendant treated her with contempt, and charged her with living in debauchery in bad houses. She charged him with irregular and vicious conduct. She returned with witness. It was



also stated that there was a verdict at law by B. Rhame.

On the part of the defendant the following evidence was introduced. Thomas Burbage testified, that he went with the defendant to see his wife to endeavour to effect a reconciliation, and Mr. Rhame asked her what she had left him for. She answered for no other reason than she did not wish to take medicine from Dr. Boyd, on that side of the river. He asked her, whether he had not rendered her every assistance in his power, and offered to afford her any physician she pleased, and if he had ever used her ill, to state it and let it be known. She answered no, he had not used her ill. He then said, why do you report that I have used you ill, when you know I attended you and treated you kindly while you were ill. She said, his children had used her ill and were abusive in his absence. He wished her to go back and take the keys and her place as she ought to do. She replied, she would not. The witness further testified, that Mrs. Rhame was regarded as a woman of loose morals, living at the 17 mile house on the Charleston road, in that manner, to the best of his knowledge and belief. Mrs. Rhame said she went up by advice to her husband's, to provoke him to put her away, and she said she would soon give him provocation to do so. Witness once asked her, why she married Mr. Rhame in such a situation as she was in. She answered that she thought she was well, but was deceived. Mrs. Rhame declared that Mr. Rhame had not given her the disease. The witness lived 50 miles from defendant, and could not give any account of his treatment to Mrs. Rhame. Witness thought defendant acquired by marriage with the complainant seven slaves, household furniture, a small stock, and two

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tracts \*of land. Her estate was much involved. Four of the negroes were sold in a short time, to pay one of the debts contracted by her first husband. Mr. Rhame appeared to be in earnest (and witness thought so when he went to see her) to bring about a reconciliation.

Levy F. Rhame, a nephew of the defendant, testified that he was present when Mrs. Rhame left her husband's house the first time she went away. His uncle the defendant sent for him. Defendant persuaded her not to go away. She said she would go, if she had to walk. She took a bridle and had a horse got. His uncle sent for him to witness the separation, and to notice the parting. His uncle heard from the negroes she intended to go. He did not treat her unkindly, but seemed moping and distressed. Witness was surprised when he first heard there was to be a separation. The defendant had from fifteen to twenty slaves, and a good piece of land. The plantation was worth about \$3,000. Witness thought Mrs. Rhame had lands which his uncle sold for \$3,000. Some of her negroes were also sold. His uncle was afraid

she would clandestinely take off some of the slaves she had brought to him in marriage, which were about five in number—one old and worthless. Witness informed the people that she was going away. It was reported that she was diseased. She professed to be of the Baptist Church; not turned out as far as he knew, as she ought to have been.

Fidale, witness for defendant, testified that Mrs. Rhame came to his house (near Mr. Rhame's) with Dehay. She said her object in going to her husband's, was to provoke him to use her ill, and get him to drive her off; which she was advised to do by some lawyer. The suit was brought soon after. Her next friend in the suit lived near Goose creek bridge; and she keeps a house in the neighbourhood. Mr. Rhame is a peaceable, good and orderly man.

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\*Mrs Clarke, witness for complainant, testified that she knew Mr Rhame, having lived in his family in his second wife's time. He was not a faithful husband. She had seen him once commit indecency with a female.

Mr Stigars, for defendant, testified that Mrs Clarke was a woman of low character. It was the opinion of the neighbours she would say improper things and make mischief.

Mr Geraud said that Mrs Clarke bore a bad character. She lived about the 23 mile house.

Another witness testified that Mrs Clarke's character was low. He had seen her sitting in the laps of the most vulgar men and servants. She was much in the kitchen. She was not then married. He did not know her character for truth or falsehood.

This witness lived some time at Mr Rhame's; he treated his wife well. His character was good and correct. He was a member of the Baptist Church and had a congregation.

Dr Boyd testified that he had attended Mr Rhame's family as its physician. That he was sent for to see Mrs Rhame the complainant. She had syphilis, which she ascribed to her former husband. Mr Rhame was a good honest man of pure character. She was married to Mr Rhame in July 1818. And it was supposed that the disease had broken out anew in the spring following. His visit was soon after. Mr Rhame was deeply uneasy and distressed. He never saw or knew of his treating her ill, or proposing to put her in an outhouse.

De Saussure, Chancellor. The question for consideration is, whether Mrs Rhame is entitled to alimony, under the circumstances, in proof, before the Court? There are a few leading principles applicable to this subject, and which guide the Courts in forming their

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\*judgment. The first is, that to entitle a wife to relief, she must come into the Court with an irreproachable character for purity

and correct conduct. The next is, that without any grave faults on her side the husband has used her with such brutality, that it is neither safe for her person, nor tolerable to her feelings, to remain with her husband, and that he has really driven her off by such ill usage. Another question is, whether he is willing to take her back and treat her tenderly, as a husband ought to treat a wife. The cases of *Jelineau*, 2 Desaus. Rep. 45, *Prather*, 4 Desaus. Rep. 33, and *Devall*, 4 Desaus. Rep. 79, all illustrate the principles on which the Courts proceed. In the case we are now considering, the circumstances are of a very unpleasant nature. Several witnesses speak disrespectfully of the character of the wife, yet no specific act of impropriety after the marriage and before the separation is established by proofs. There seems, notwithstanding, to have been a stain upon her at the time of the marriage. The witnesses do not speak out fully on a gross subject, but they speak sufficiently intelligibly to shew, that she was suffering under a disgusting and disgraceful disease at the time of her marriage. It was shocking to marry any man under such circumstances, and must necessarily have produced deep disgust and even horror in the mind of the husband. It is true, there is no proof that this odious defilement of the person originated in a guilty commerce with others; and it may be, as was alleged, that it was an anterior stain contracted during her former marriage, without any fault on her part. But I repeat it, there was much blame to marry at all under such circumstances. When questioned why she married at such a period—she said she thought she was cured; upon which point she ought to have been absolutely certain before she married. This converts what may have been merely her misfortune into a fault

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in relation to her husband. There is indeed no direct evidence of criminal conduct during her former marriage or during her widowhood.

We come now to consider the conduct of her husband. There is no proof of personal ill usage by him to his wife, by blows or by actually turning her out of doors by force; and it seems, by the decided cases founded on principles and on the great reluctance of Courts of Justice to interfere between man and wife (except in extreme cases), that the wife is not justified in departing from her husband, nor in demanding alimony, without some proofs of such ill treatment. The Court, however, if satisfied of such continued ill conduct as deeply afflicts the feelings of the wife, will give her protection and relief on moderate proof of bodily injury, if the wife be entirely blameless. In the case before us, it appears that the husband did not treat his wife with delicacy or tenderness. He spoke disrespectfully to her; but he

did not strike her, nor turn her out of doors. And his discontent at her unhappy disease, which was disgraceful if not criminal, must necessarily produce disgust and ill humour, and naturally account for his treatment of her not being as kind and respectful as it was desirable. To diminish the effect of his reasonable disgust and ill humour, it was urged that he himself was criminal with others. One witness only, Mrs Clarke, testified to this; but she was so completely discredited and shewn to be so low and worthless, that I place no reliance on her testimony, especially as the correct conduct and moral character of Mr Rhame are established by reputable witnesses. There is also no evidence that he put her away by violence, blows, or any other outrageous means, or even menaces. She went away voluntarily, and though it was a mere affectation of reluctance on his part, and on the part of his relation, to her going away, still it was a

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voluntary departure. For it is in evidence that her object was to provoke him to personal ill usage, to lay a foundation for a suit for alimony. Upon the whole I do not think a case has been made out to justify the Court to give the relief demanded; at least, not for the present.

There is another view of the case to be taken. She brought Mr Rhame land and slaves, part of which he has sold, and he is in possession of the remainder. She is now living an outcast, without the means of support, and exposed to the temptations and vices which may utterly destroy her. She does not ask a large provision out of his estate; but simply the enjoyment of the remnant of property which she carried to him. The husband has professed a disposition to take her back. This very disposition is a declaration that, though she may have been unfortunate and indiscreet or degraded, he does not believe her to be guilty; for no man of good feelings or purity could make such an offer to a guilty wife. But if he takes her back it must be with good faith, to receive her kindly and treat her as a man should the wife of his bosom, and he must give assurances of that to the Court. If he is not prepared to do this, he is bound by every tie, divine and human, to make a reasonable provision for her, so that she may live in comfort and in peace, unexposed to the temptations arising from distress or misery. It is therefore ordered and decreed, that the defendant do forthwith receive home the complainant, and treat her respectfully and kindly as the head of his family. Or if he is not disposed to do that, that he do make immediate provision for her comfortable subsistence; and that until this be regularly done, he pay her, quarterly, the sum of forty-five dollars.

Both parties appealed from this decree.



The complainant on the ground that the  
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Chancellor ought to have \*allowed alimony; and the defendant on the ground that the bill ought to have been dismissed.

Preston, for complainant.

S. D. Miller, for defendant.

*Curia, per NOTT, J.* That the Courts of Equity in this state have jurisdiction of cases of alimony is now settled by the long practice of the Court. *Prather v. Prather*, 4 Desaus. Rep. 33. From necessity such jurisdiction must exist somewhere; and there is no tribunal in the state where it can be so well exercised as in that Court. It belongs to the Ecclesiastical Court in England; but we have no such Court in this state. And even in England, during the Revolution, when the Ecclesiastical Courts were shut up, the Courts of Equity took cognizance of such cases. 1 Madd. Cha. 386. In the exercise of this power, however, there is no little difficulty in determining the extent of the jurisdiction.

The first question presented in this case is, whether the complainant is entitled to alimony?

In England, it appears that alimony is allowed only where a separation is decreed. And although our Courts of Equity have not the power to grant divorces, yet as the two subjects, "divorce and alimony," are inseparable companions in England, we must look to the causes of divorce, to ascertain the grounds on which alimony will be allowed. Sir William Scott (now Lord Stowell), in the case of *Evans v. Evans*, 1 Hagg. Rep. 39, which was an application for a divorce on the ground of cruelty, says, "In the oldest cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usual-

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ly inserted as \*the ground on which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. What merely wounds the mental feelings is, in few cases, to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm) do not amount to legal cruelty."

The same learned Judge, in the case of *Oliver v. Oliver*, 1 Hagg. Rep. 364, says, "words of menace, importing actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait until the mischief is actually done. But the most innocent and deserving woman will

sue in vain for its interference for words of mere insult, however galling; and still less will that interference be given, if the wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation."

And it appears to me, that our Courts have hitherto acted upon the same principles. The case of *Jelineau v. Jelineau*, 2 Desaus. Rep. 50, appears to be the first reported case which occurred in our Courts. The evidence in that case is not so fully reported as to give us a very distinct view of the facts. It appears however from the decree, that the husband had never used personal violence towards his wife, but he had threatened to do so; and had in other respects treated her in a cruel and brutal manner. And words of menace, importing actual danger of bodily harm, will justify the interposition of the Court. The cases of *Prather v. Prather*, 4 Desaus. Rep. 33, *Devall v. Devall*, 4 Desaus. Rep. 79; *Taylor v. Taylor*, 4 Desaus. Rep. 167, and *Threewits v. Threewits*, 4 Desaus. Rep. 569, all are cases of personal ill usage.

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The \*case now before us, furnishes no such ground for the interposition of the Court. No personal violence has been used, no harsh language indeed, nor unkind treatment, which the complainant has not brought upon herself by her own improper conduct. This Court, therefore, concur with the Chancellor, that the complainant did not make out a case for alimony.

This brings us to the question submitted by the defendant, to wit, whether the Court ought not then to have dismissed the bill.

In England actual desertion or abandonment of the wife by the husband (except in particular cases) will not be a ground for alimony, unless accompanied with cruelty, 1 Consist. Rep. 120. But the Court will grant a restitution of conjugal rights. That Court has the power, and will compel the husband to take the wife back and to treat her with kindness. But in those cases there is no such alternative provision as is made in this case; for that would leave it optional with the husband whether to perform the decree or not. The Court therefore decrees restitution unconditionally, and will compel obedience to its decrees. If the Chancellor intended this as a decree of restitution, there ought to have been no alternative. But it does not profess to be such, and I do not know that a power has ever been exercised by the Court of Equity in this state. I am disposed to think, however, that a bill for that purpose would not be entertained. I therefore presume that desertion or abandonment of the wife by the husband would be a good ground for alimony, contrary to the English rule. There must be some method by which the husband may be compelled to maintain his wife; and when restitution of conjugal rights cannot be decreed, alimony must. And even

<sup>1</sup>In this case it seemed the husband was in danger both of limb and health.

in England where the abandonment is such that the party cannot have relief in the Ecclesiastical Court, the Court of Equity will interfere. And therefore in the case of Col-

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mer v. Colmer \*et al. Moseley, 119, where a husband had left the kingdom and gone to the state of Maryland, having first made a fraudulent assignment of all his real and personal estate in trust to pay his debts, the Court decreed the wife a maintenance out of it.

But that will not avail the complainant in this case; for it was proved and so expressly stated in the decree, that the departure of the wife was voluntary. But if the Court actually possessed the power to decree a restitution of conjugal rights it could not be exercised on this occasion. It must be on a bill brought expressly for that purpose. Lord Stowell, in the case of Evans v. Evans, which was a case for a divorce, adverts to a case for restitution of marital rights, and says, "the monition is not only that he shall take her back, but that he shall treat her with conjugal kindness." Yet in a subsequent sentence, a few lines below in the same case, he says, "it is a mistake to say that in the present suit I can issue a monition to either party to return. This suit can lead to no such sentence." And in the conclusion of his opinion (p. 129), after having made several pertinent observations upon the reciprocal duties of husband and wife, he says, "but in taking this review I rather digress from my province in giving advice. My province is merely to give judgment, to pronounce upon what I take to be the result of the facts laid before me." His Lordship therefore concluded with dismissing the parties. Lord Hardwicke, in the case of Head v. Head, 3 Atk. 547, has in his decree made terms somewhat similar to those made in the decree now under consideration. But that was on a bill brought by the wife for the arrears of an annuity which the husband agreed to pay during their separation. The husband agreed to receive her back again. The Lord Chancellor decreed that the annuity should cease upon his receiving her back, and maintaining

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and treating her as his wife; \*otherwise that it should continue. But that was merely requiring his promise to be performed with good faith, as a condition upon which he should be exempt from paying the annuity. If the defendant was now asking to be relieved from paying alimony upon receiving his wife back, whom he had driven from his house, such a condition might be proper. But the Chancellor has decreed, and this Court concur with him, that the complainant is not entitled to alimony; and that was the only question submitted to the Court. The complainant does not ask her husband

to take her back. She does not appear to wish it. On the contrary, her object was to provoke him to turn her out of his house. But as she could not bring him up to such a pitch of excitement, she concluded to abandon it herself.

I am of opinion, that the jurisdiction of the Court must be limited to the allowing of alimony; and to such orders as are necessarily incident to the effectual execution of such a decree.

Alimony is usually allowed until the husband shall agree to take his wife back, and treat her with conjugal affection. Whenever the husband professes to have complied with those terms, and comes to be relieved from the payment of alimony, the Court will grant the relief only upon his faithfully performing the condition. In those cases, and those only, can the Court impose the terms made in this decree.

All that part of the decree, therefore, (after declaring that a case has not been made out to justify the Court to give the relief demanded) must be reversed. That part of the decree, which refuses the complainant the relief demanded, is affirmed. The bill is therefore dismissed.

Decree modified.

### 1 McCord, Eq. \*210

\*JOHN T. LEWIS and Others v. ROBERT WILSON and Others.

(Columbia. Jan. Term, 1826.)

[Appeal and Error  $\hookrightarrow$  119.]

A party cannot appeal on a mere question of costs.

[Ed. Note.—Cited in Stegall v. Bolt, 11 S. C. 524.]

For other cases, see Appeal and Error, Cent. Dig. § 827; Dec. Dig.  $\hookrightarrow$  119.]

[Courts  $\hookrightarrow$  90.]

The decisions and practice of the late Court of Appeals and Equity binding on this Court, unless it be thought some manifest principle of law or equity has been violated, or where the circumstances would authorize a revision of a decree of this Court itself.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 315; Dec. Dig.  $\hookrightarrow$  90.]

[Costs  $\hookrightarrow$  13.]

[In suits in equity the allowance of costs rests in the discretion of the court.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 21; Dec. Dig.  $\hookrightarrow$  13.]

The defendants in the present case had filed their original bill, to which this was a cross bill. The original bill upon the hearing was dismissed. The cross bill had been demurred to; but as the original bill had been dismissed, there existed no necessity for hearing the cross bill, and Chancellor Thompson ordered it to be dismissed without costs, as he regarded it somewhat analogous to an answer and plea.



Harrison, for the defendants in the cross bill, appealed, on the ground that the Chancellor should have allowed costs to the defendants.

Earle, for the complainants, contended that costs were not subject matter of appeal.

Harrison. An appeal is a legal right and the Court cannot control it. Discretionary power is dangerous, but it is more dangerous to act without discretion.

A cross bill must be filed before publication of the original bill, which was not the case here, 3 Johns. 335.

Earle, contra. The complainant's bill was dismissed on the point now in question; and then the cross bill failed.

The counsel cannot agree as to the facts. How then can the Court determine the question? When the original bill had been dismissed, the cross bill could not be sustained. Whether it was properly dismissed or not could not now be inquired into. That has been disposed of by a competent authority.

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*\*Curia, per* NOTT, J. The object of the motion in this case is, the reversal of the decree with regard to costs. Without going into the merits of the motion, a preliminary question has been raised; whether a party is entitled to an appeal in a matter of costs only.

It appears to have been settled by the former Court of Appeals, that an appeal in such a case should not be allowed. I do not think that such a decision is absolutely binding on the Court: but it is a rule which we have adopted, to follow the practice of that Court as nearly as is practicable, until we find some inconvenience to result from it, and to consider their decisions of binding authority, except where it shall be thought some manifest principle of law or equity has been violated; and where the circumstances are such as would authorize a revision of our own decisions, or the decisions of any other Court. It is the more reasonable that we should follow the rule adopted in cases of this sort, because it appears to have been the result of observation and long experience.

It is now contended that an appeal is a matter of right; and that a Court cannot withhold a right which is secured to the party by a positive act of the legislature. It is true, that it is the duty of Judges to obey and not to resist the law; but it is their duty to expound the law and to give it effect, according to its spirit and the apparent intention of the legislature. And it is to be presumed that the Court did not adopt the rule now under consideration, without a due regard to both.

But I am disposed to think, independent of authority, that it is the only practical construction which can be given to the act.

It is an established maxim in the Court of Equity, that the direction of the payment of costs is altogether in the discretion of the Court. And it is an almost universally received opinion, that a Judge can not be controlled in the exercise of his discretion in

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those \*things which are altogether matters of discretion. To be sure it must be what the law terms a legal discretion. And most of those cases, which we term matters of discretion, furnish something like rules by which the judgment ought to be directed.

The difficulty arises from the want of possession of all the circumstances by which the opinion of the Court was influenced. If we could be possessed of all the facts and circumstances precisely as they appeared in the Court below, we might then perhaps be permitted occasionally to exercise a control even over the discretion of the Judge. But even then the cases would be so few in which it would be proper to interfere, it would be unwise to give up a rule, otherwise good and wholesome, for the purpose of getting at them.

There is another view of the subject, which satisfies me of the correctness of this course. Most of the cases in which the question would arise would be of a complicated nature, consisting of a number of parties, and of a variety of conflicting claims. We might, therefore, have as many successive appeals as there were parties to the suit. In all those appeals we should be driven to the necessity of examining the whole case through all its minutest details, to ascertain whether the Chancellor had exercised a proper discretion, with regard to the payment of costs. And after all this investigation we should not be half so well qualified to determine the question as the Judge from whom the appeal had been brought. No doubt, there may be individual cases of hardship, and there may be some which would form a just exception to the rule. But if the door should be left open, every case will be brought up, and more time will frequently be employed in ascertaining whether the case comes within the rule or the exception, than would be required to divide the question itself. It would be burthensome and distressing to the Court; it would entail upon the country an irremediable grievance,

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by the delay which it \*would occasion; and in most cases would be unprofitable to the parties; and after our best exertions, I am satisfied we should do more harm than good by making such an attempt. My best reflections have brought me to the conclusion, that the practice heretofore adopted is a salutary one, and ought not to be departed from. The motion therefore, in this case, must be refused.

Decree affirmed.

## 1 McCord, Eq. 213

WILLIAM M. SIMPSON et al. v.  
JOHN FELTZ.

(Columbia. Jan. Term, 1826.)

[Evidence ⇨574.]

The opinions of witnesses as to the profits of a copartnership are not to outweigh the positive answer of the defendant, copartner, who kept the store.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. ⇨574.]

[Partnership ⇨20.]

An agreement between merchants to set up a store and for one to superintend the business and to receive one third of the profits realized, (he putting in no stock) constitutes a copartnership, and a loss sustained by fire is mutual.

[Ed. Note.—Cited in Hiram Bartlett & Co. v. Jones, 2 Strob. 473, 49 Am. Dec. 606; Pierson v. Steinmyer, 4 Rich. 318.

For other cases, see Partnership, Cent. Dig. § 7; Dec. Dig. ⇨20.]

[Partnership ⇨12.]

The deriving a certain emolument from a trade does not constitute copartnership; but if this emolument depends on profit and loss, then it is a partnership.

[Ed. Note.—Cited in Hiram Bartlett & Co. v. Jones, 2 Strob. 473, 49 Am. Dec. 606.

For other cases, see Partnership, Cent. Dig. § 27; Dec. Dig. ⇨12.]

[Interest ⇨12.]

Where one man retains money of another, the presumption is that he kept it for the purpose of profit, and that he should therefore pay interest on it.

[Ed. Note.—Cited in Gee v. Humphries, 49 S. C. 258, 27 S. E. 101.

For other cases, see Interest, Cent. Dig. § 23; Dec. Dig. ⇨12.]

[Partnership ⇨75.]

So where a copartner retains funds in his hands he must pay interest.

[Ed. Note.—Cited in Gee v. Humphries, 49 S. C. 258, 27 S. E. 101.

For other cases, see Partnership, Cent. Dig. §§ 120-123; Dec. Dig. ⇨75.]

This was a bill for an account and settlement of a copartnership as merchants. Two points arose. First, as to the quantity of cash received by the defendant; and, secondly, whether the defendant was a partner, or only a clerk. The complainants and defendant agreed to establish a store in Laurens district. The complainants were to furnish the stock of goods and the store house, and the defendant was to attend to the store, keep the books, receive the money and manage the whole concern, for which he was to receive one third of the profits realized. The defendant in his answer swore positively that he did not receive more cash than from thirty to fifty dollars, but surely less than fifty, during nineteen months that he kept the store, besides the sum of \$170 which he had charged himself with. That the store was not a cash store, but one which generally sold on credit. That there were several cash stores in the neighbour-

hood, which rendered their cash still less. Several witnesses on the part of the com-

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plainants swore \*that they kept stores in that part of the country, and that from their knowledge of the place and business of the defendant and complainants, and from a comparison with their own business, the defendant ought to have received fifty dollars per month. No cash book was produced, as it was alleged to have been burnt with the store.

The next question was, whether the defendant was liable with the complainants for the loss of the goods, which had been burnt, by accident, in the store. The defendant contended that he was not a partner, and therefore not liable for any accidental loss.

The Commissioner, (Mr. James) reported against the defendant on both grounds, and deducted the loss of goods by the fire before he allowed the defendant a credit for a third of the profits; and also charged him with cash at fifty dollars per month. As to the question of copartnership, the Commissioner assigned the following reasons for his report: to wit—"My idea is, that by the word 'profits' is meant that which remains after the capital is restored and all the expenses of the concern paid. In this case the complainants furnished all the capital, and the defendant, as a compensation for vending the goods, was to receive one third part of the profits. It appears to me, therefore, that he should be considered a copartner, and not a clerk. 'If one advances funds for carrying on trade, and another furnishes his personal services, for which he is to receive a share of the profits, this will make them partners between themselves, and as regards third persons.' Dobs et al. v. Halsey, 16 Johns. Rep. 34. 1 Comyn's Dig. 277. Mr. Justice Blackstone remarks, 'I think the true criterion, when money is advanced to a trader, is, to consider whether the profits or premium is certain and defined, or whether casual, indefinite and depending on the accidents of trade. In the former case it is a loan; in the latter a partnership.' 1 Comyn's Dig. 365. If then the defendant is to

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be con\*sidered a copartner is it not proper he should bear a part of the accidental losses? In mercantile transactions, loss and gain are inseparably connected, and should be mutual and reciprocal. The advantage held out of receiving equal advantages: on the one hand to an admission of liability; on the other to sustain equal losses. 'Every man who has a share of the profits of a trade ought also to bear his share of the loss.' 1 Comyn's Dig. 258. I am therefore of opinion that the defendant is properly thus chargeable; in other words, that the amount of the burnt goods should be deducted from the profits before a division takes place."



To which report the defendant excepted, on the grounds that the Commissioner ought not to have allowed more, on account of cash, than the amount set forth in the answer, which had not been contradicted by sufficient evidence, and that the defendant was no partner, and therefore not liable for any loss sustained by the burning of the goods.

The complainants also excepted to the report, on the ground that the Commissioner should have allowed interest on the balance due by the defendant from the first of January 1819, before which time all the moneys were received by him.

Thompson, Chancellor. This case came on to be argued upon the exceptions to the report of the Commissioner. The first exception is, that the Commissioner ought not to have allowed more on account of cash sales than the amount set forth in defendant's answer. The evidence in support of this item of the Commissioner's report is very flimsy, weak and altogether conjectural: being founded on the opinion of merchants in the neighbourhood, whose situations were entirely different from that of complainants; they being owners of new cash stores, whereas that of complainants was a credit store.

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\*The defendant swears positively that his cash receipts, during the nineteen months which he was employed by complainants, did not exceed fifty dollars, with the exception of \$170 as stated in the bill. This, connected with the strong reasons assigned in the answer, induces the Court to rely thereon, rather than on the vague conjectures of the witnesses for complainants. This exception is therefore sustained.

The second exception is, that the defendant ought not to be charged with any of the goods burnt. His liability is predicated on the mistaken ground that he was a copartner. The Court views him in no other light than that of a hireling; the only difference is in the mode of payment, and not in the capacity in which he acted. His being paid in meal or malt did not vary his duties. The complainants were better satisfied to allow him a share of the profits than to give him standing wages, and he was content to receive them. This exception to the report must also be sustained.

There is only one exception relied on by complainants, which is that they should be allowed interest on the amount of moneys received by defendant.

It appears there were several attempts to compromise this case, all of which proved ineffectual; nor does it appear to the Court to what amount, if any, the defendant is indebted to complainants. This exception must therefore be overruled.

The Court is of opinion that the proper mode to settle this case is to charge the defendant with the amount of capital and cred-

it him with the amount of profits; and the surplus (if any) to be divided between the parties agreeably to their original agreement. The costs to be paid out of the profits in the first instance.

From this decree the complainants appealed.

Dunlap, for the appellants, made the following points.

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\*First. That the count was wrong in overruling the Commissioner's report allowing \$50 per month for cash sales, as the answer was sufficiently contradicted by evidence.

Second. That the Chancellor erred in decreeing that the defendant was not a copartner, and that he should only be allowed his share of the profits after deducting the loss sustained by the goods that were burnt.

Third. That the Chancellor should have allowed interest on the amount due from the defendant to the complainant.

Fourth. Because the mode of settlement directed by the decree was erroneous, viz. to charge the defendant with the capital, and to deduct therefrom the profits. For the more the partnership settled, the less the complainants would receive. He said if the partnership had continued until by judicious management the profits had amounted to more than the capital, the complainants would have lost their capital as well as their profits, and besides would have been in debt to their clerk.

Fifth. That the Chancellor was wrong in ordering the complainants to pay two thirds of the costs.

P. Fanow, contra, cited 1 Mont. on Partn. 11, 12. Gow, on Partn. 15. Grace v. Smith, 2 W. Black. Rep. 998. Muzzy v. Whitney, 10 Johns. Rep. 226. Cheap v. Cramond, 4 Barn. & Ald. 663. Walden v. Sherburne, 15 Johns. Rep. 409. Did it make a difference where a person undertakes to do a particular act and to receive a part of the profits, and where he enters into a general concern for an unlimited time, or to embrace successive investments?

O'Neill, in reply, referred to Dob v. Halsey, 16 Johns. Rep. 34. 1 Mont. on Part. 6. As to the question of interest he referred to 4 Desaus. Rep. 113.

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\*Curia, per NOTT, J. In this case the Court concur in opinion with the Chancellor on the first exception to the report, for the reasons given in the decree. The defendant has sworn to a maximum which he declares unequivocally the cash receipts could not have exceeded, and in which he is sure he cannot be mistaken. Opposed to this are the opinions of gentlemen founded on data which do not authorize any certain conclusion. And however respectable the witnesses are, their opinions, which are merely conjectural as it regards this case, cannot outweigh the posi-

tive answer of the defendant. This Court therefore are of opinion that that exception was properly sustained by the Chancellor.

With regard to the second exception, the Court concur in the opinion expressed by the Commissioner in his report. And the authorities relied on clearly support him in the views which he has taken. The bill states that the complainants and defendant entered into partnership in trade and merchandize; that the defendant was to superintend the business of the store, and to receive one third of "the profits realized by the said firm." The defendant in his answer admits that he did enter into partnership with the complainants, as in the bill stated, and that he was to receive one third of the profits as therein stated. If therefore the defendant's acknowledgment of the fact is to be used as evidence of the copartnership, every thing required to be proved is admitted. The terms of the contract admit of no other construction. He was to receive one third of the profits realized by the firm. In the case of *Grace v. Smith*, 2 Black. Rep. 998, Chief Justice De Grey says, "every man who has a share of the profits of a trade ought also to bear his share of the loss." Judge Blackstone in the same case says, "I think the true intention is to consider whether profit is certain and defined; or casual, indefinite and

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depending on the accidents of trade. In \*the former case, when money is advanced it is a loan; in the latter a partnership." And I take it that that is the distinction which runs through all the cases: if a person derives a certain emolument from the trade then he is not a partner; if his emoluments depend upon the profit and loss, then he is considered as such. There is a particular class of cases in which, although a person may receive a share of the profits only, he will not be considered a partner, as where he is to receive a share of the profits of a mere isolated transaction; such as the case of *Muzzy v. Whitney*, 10 Johns. Rep. 226, and the cases there cited. But then the question was, merely whether the defendant was a partner in such a sense of the word that an action at law could not be maintained against him.

And in the present case, it is no farther necessary to go into the inquiry than to ascertain the true construction of the contract with regard to the compensation which he was entitled to receive. And there can be but little doubt that he must be considered so far a partner as to share in the profit and loss. The profits "realized" by the firm could have been only such as remained after the losses were deducted. It is admitted,

that he was liable to the losses usually incident to mercantile speculation, such as bad debts and the like. But suppose a hogshhead of brandy or pipe of wine had sprang a leak and had been lost; or that the rain had beat in and destroyed a quantity of sugar or salt; or that by some misfortune a quantity of crockery or glass had been broken or destroyed: all these must have been carried to the account of profit and loss, and must so far have reduced the dividend of the defendant; and if the loss should turn out to be equal to the profit, it would not be difficult to ascertain how much was realized by the firm. Whether the loss should happen by fire or by either of the casualties above mention-

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ed could not, in my opinion, \*alter the result. The parties had all embarked their fortunes in one common concern, and were all equally dependent on the success of their undertaking for the profits which they were to receive. It was inconsistent with the nature of the contract that one should gain and the other lose. I am of opinion therefore, that the decree of the Chancellor on this point should be reversed, and that the exception be overruled.

The exception on the part of the complainants in relation to interest I think ought to be sustained. The rule in England—if the opinion of Lord Ellenborough in the case of *De Haviland v. Bowerbank*, 1 Campb. Rep. 50, is to be considered as authority on that point,—is that a person shall not be required to pay interest, except where there is an express stipulation to that effect, or where it may be inferred from the course of dealing between them that such was the understanding; or where it can be proved that the party has used the money and derived a profit from it.

But our rule has been, where one man has retained the money of another, to presume that he kept it for the purpose of profit, and that therefore he ought to pay interest upon it, *Goddard v. Bulow*, 1 Nott & McCord's Rep. 46 [9 Am. Dec. 663]. The balance due by the defendant is so much of the funds of the firm retained by him to which he was not entitled, and for the use of which he ought therefore to pay interest. On this point also the decree of the Chancellor must be reversed.

With regard to the costs the Court is not disposed to interfere.

It is therefore ordered and decreed, that the case be referred to the Commissioner to amend his report in conformity with the principles herein laid down.

Decree reversed.



## I McCord, Eq. \*221

\*THOMAS RODGERS v. NANCY JONES,  
Administratrix of Charles Jones, Deceased.

(Columbia. Jan. Term, 1826.)

[*Mortgages* ⇨386.]

All mortgages may be foreclosed in equity. The fact of its being given to secure the performance of a covenant does not vary the rule.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1151; Dec. Dig. ⇨386.]

[*Appeal and Error* ⇨886.]

Leave will be granted in the Court of Appeals to amend if it is there found necessary.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ⇨886.]

[*Mortgages* ⇨587.]

A bill to foreclose mortgaged lands will not conclude a purchaser of such lands who was not made a party to the foreclosure.

[Ed. Note.—Cited in *Wilks v. Davis*, Rich. Eq. Cas. 394; *Greenwood Loan & Guarantee Ass'n v. Childs*, 67 S. C. 254, 45 S. E. 167.

For other cases, see *Mortgages*, Cent. Dig. §§ 1685, 1685½, 1687, 1688; Dec. Dig. ⇨587.]

[*Mortgages* ⇨414.]

[A mortgagee may file a bill to foreclose a mortgage given to indemnify him against his liability on a bond without first bringing a suit at law to ascertain the amount of the damages.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1205; Dec. Dig. ⇨414.]

[*Mortgages* ⇨417.]

[Where a mortgage is given to two persons to indemnify them against a joint liability, one of them, who has alone been damnified, may file a bill to foreclose the mortgage, without joining the other mortgagee.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1236; Dec. Dig. ⇨417.]

The bill in this case stated, that on the 18th of June 1813 the complainant, together with Charles Jones deceased and Samuel Rodgers, purchased a tract of land from Letty Rodgers, the mother of the complainant, for which they were to give her \$600, and build a house for her to live in, and furnish her a comfortable maintenance and support for herself during her life, and for her daughters, Letty, Elizabeth, Polly and Sally, (their minor sisters) until they married: for the performance of which the complainant and the said Charles and Samuel entered into a bond, under the penalty of \$12,000. In pursuance of said contract, the purchasers aforesaid built a house and furnished the said Letty and family until the 19th of November 1816; when the complainant and the said Charles and Samuel wishing to get rid of their liability on the bond, made an agreement that the land should be put up for sale between them, and that whichever of them made the highest bid should take the land, and release the other two from the bond entered into by them jointly for the support of the said Letty and children; which agreement was entered into in writing, and lodged with the said Charles. The land was accordingly sold, and Charles became the purchaser, to whom the complainant and

the said Samuel executed titles. But the said Letty, not being willing to rely on the said Charles alone for support, refused to release the complainant and the said Samuel from their bond. Whereupon the said Charles executed a mortgage of a tract of land containing 126 acres, conditioned that

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the \*said Charles should save harmless the said complainant and Samuel from any loss or injury from the bond held against them by the said Letty for support, &c. as appeared from the mortgage exhibited.

The bill further stated that at the time of entering into the last contract, the said Charles was unprepared to furnish the support necessary for the said family, and the complainant thought it incumbent on him to continue the support which was required until the said Charles was able to do so himself, relying on the mortgage for indemnity, together with the repeated declarations of the said Charles, that he would soon be able to take charge of the family, and repay complainant for what he had furnished and would furnish on his account. But the said Charles still neglecting so to do, the complainant was compelled to continue the support or lay himself liable to be sued on the bond, as well as to the just censure of his friends and acquaintances for neglecting to furnish his mother and minor sisters with the sustenance they held his obligation to supply. Under these considerations, he supported the said Letty from the 9th of November 1816 to the 11th of February 1817, when she died; Polly from the same time to the 11th of March 1818, and Sally to the 27th of March 1821, (at which times they respectively married) at the rate of four dollars per month for each.

The bill further stated that on the — day of — the said Charles died intestate; and that the said Nancy, the defendant, administered. The complainant further stated that his family was large; and that he had but slender means to support them; and that this additional family falling on his hands had occasioned him to sustain much more loss than the charge he had made would compensate; but for a variety of reasons he only wished to charge the estate of the said Charles with what would reimburse him his

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actual expenditures. He therefore \*prayed that the mortgaged land be sold, and the amount to which the Court might think him entitled paid from the proceeds thereof.

The answer of the said Nancy, the defendant, admitted the contract as stated in the bill; that her intestate purchased the interest of the complainant and the said Samuel, and thereupon was bound to support the said Letty and family, as stated; that he gave a mortgage as security, as stated, to keep harmless the complainant and the said Sam-

nel from loss or injury from the bond mentioned in the bill. But she denied that the complainant supported the said Letty and family, as stated; that her intestate complied with the conditions stated in the mortgage, by giving support and maintenance to Letty and family, from the time stipulated, until their respective death and intermarriages. The defendant also submitted, whether the complainant could support his bill alone; that the said Samuel should have been made a party, and claimed the same benefit as if he had demurred to the bill. She also contended, that she was protected by the statute of limitations, and relied on the same as if specially pleaded. She also stated, that the mortgaged land had been sold by the sheriff, to satisfy judgment debts against her intestate; and that the purchaser thereof, and not she, should have been the party proceeded against.

Upon the reading of the bill and answer, Chancellor Thompson dismissed the bill for want of jurisdiction, at the costs of complainant; saying, that the proper remedy was at law.

Dunlap, for the complainant, appealed, and contended that the bill presented a case properly within the jurisdiction of the Court of Equity; and the defendant by answering admitted the jurisdiction, after which the Court should have sustained it: and also,

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that the Court \*should have ordered a reference to settle the matters of account.

Irby, contra, argued that the Court of Chancery in this state had not jurisdiction to foreclose mortgages. That by the act of 1791 that Court is expressly prohibited from entertaining jurisdiction of cases where plain and adequate remedy could be obtained at law. By the act of 1791, 1 Faust, 64, the Law Courts are authorized to foreclose mortgages. The complainant had nothing to do but to sue on the bond at law, and after judgment was obtained to state by suggestion, that there was a mortgage, and thereupon the Court at Law would order a sale of the mortgaged premises. That the law proceedings, under the act, gave plain and adequate remedy, and ousted the Court of Chancery of the jurisdiction they formerly had of foreclosing mortgages. The jury alone could properly assess the damages under this covenant, for how could the Commissioner assess damages. Without objecting to the jurisdiction generally, this case could only be properly tried at law, as the damages for breach of covenant could only be assessed by a jury.

O'Neill, in reply, said, that the jurisdictions were concurrent. The remedy in most cases was much plainer and more adequate in equity. An account was necessary to be taken, to ascertain the correct amount due under the mortgage; and all matters of ac-

count could be better settled before the Commissioner than before a jury. Granting concurrent jurisdiction to one Court never takes it away from another by implication. This Court cannot be deprived of jurisdiction, so well settled and so ancient, except by an express act of the legislature. This is not a case differing from most cases of mortgages.

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There is nothing more than an account \*to be taken, which could be best done before the master. It was not a case of damages to be assessed by a jury.

*Curia, per* JOHNSON, J. The jurisdiction in the cases of mortgage is so clearly of equitable cognizance, that none will be disposed to question it. Indeed, its antiquity is of such remote date, that the most learned have not been able to trace it to its origin; and must, from necessity, have existed from the time that redemption, and consequently the right to foreclose the equity of redemption, was first allowed; nor has the power of the Court over the subject generally been questioned in the arguments urged in opposition to this motion. But it has been contended, that the questions, "Whether the defendant's intestate had or had not broken his covenant with the complainant, and whether he had sustained any, and what amount of, damages, are matters only cognizable in a Court of Law; and that these matters ought first to be disposed of in that tribunal, before the complainant is entitled to come into a Court of Equity for relief.

A numerous class of cases, which belong to the Equity jurisdiction, are those where the party, on account of the organization or defects in the process of the Courts of Law, cannot obtain a complete and adequate remedy in that Court; and on this principle alone Equity would retain this cause; because, although a Court of Law might be competent to try the questions of fact, involved as they are, it is, except in a particular instance, provided for by statute, incompetent to foreclose the equity of redemption, so that the remedy would be incomplete.

If we divest the Courts of Equity of jurisdiction in all cases where it becomes necessary to decide on facts, there would be none left for them to determine; for it is a rare case in which they are not involved in some shape or other. It is clear, therefore,

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that when the Court \*has jurisdiction over the subject it, must of necessity decide facts that are incident to it, or direct an issue at law when they are so doubtful and complicated as to render that mode necessary. And the case of *Jacomb v. Harwood*, 2 Ves. Sen. 268, is referred to as directly applicable to this case. There are, however, cases in which the jurisdiction of the Court arises out of an incident: as for example, where a discovery is the foundation of the bill as



an incident to some other matter; and then it would be necessary, as preliminary to the question of jurisdiction, to pronounce first on the incident. And the misapplication of this principle has probably laid the foundation of the arguments opposed to this motion. I have looked into this case with some attention, with a view to discover some circumstance, if any existed, which would distinguish it from an ordinary mortgage to secure the payment of money, but I have not been able to detect the slightest. In the case of the money mortgage, over which all agree the Court has jurisdiction, the allegation of the complainant is, that the defendant has broken his covenant by the nonpayment of the money. And hence may arise all the questions of fact incident to the execution of the bond, the legality of the consideration, the extent of credits, and all the multifarious matters growing out of such a contract. In the case under consideration, the allegation, as in the former, is, that the defendant's intestate has broken his covenant, which the answer controverts. And there can be no reason why the Court is not competent to try that question, or to direct an issue at law, as in the case supposed. The motion is therefore granted, and the case is ordered back to the Circuit Court for trial.

The objection urged in the answer, that Samuel Rodgers was not made a party, is without foundation. The complainant exhibits no cause of complaint against him,

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\*and, so far as appears to the Court, he has suffered no wrong. There can then be no ground for involving him in a litigation when there exists no legal necessity, and from which no fruits could be derived. If, however, the land has been sold, as stated by the answer, and the purchaser is in possession, it would perhaps be advisable to make him a party, as he will not otherwise be concluded by the decree of the Court: and the complainant has leave to amend his bill, so as to make him a party, if a state of facts does in truth exist which renders it necessary.

Decree reversed.

I McCord, Eq. 227

THOMPSON SWAN v. THOMAS LIGAN  
and THOMAS RUDD.

(Columbia. Jan. Term, 1826.)

[Equity ¶91.]

None but those legally or beneficially interested in the subject matter and result of the suit need be made parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 251; Dec. Dig. ¶91.]

[Life Estates ¶5.]

A trustee need not be made a party, after he has fully executed his trust and the proper-

ty delivered to the person authorized to receive it.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 12; Dec. Dig. ¶5.]

[Life Estates ¶6.]

When one buys a life estate in personal property with a knowledge of the fact that the remainder is vested in a particular individual, he becomes a trustee for such individual; and may, under circumstances, be compelled to give security for the forthcoming of the property, or to prevent its being squandered.

[Ed. Note.—Cited in Ioor v. Hodges, Speers, Eq. 601.]

For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ¶6.]

[Life Estates ¶5.]

The first taker is a trustee for the benefit of those having subsequent interests.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 11, 12, 21; Dec. Dig. ¶5.]

[Vendor and Purchaser ¶235.]

A voluntary purchaser, stands as one with notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 567-569, 571-576; Dec. Dig. ¶235.]

[Husband and Wife ¶14.]

[Property was delivered to a trustee in trust for a husband and wife for their joint lives, and, if the wife should survive the husband, to deliver and transfer the property to her. Held, that on the death of the husband, leaving the wife, the trust would be presumed to have been executed by a delivery of the property to her: and hence those entitled in remainder might bring a suit in relation to the property in their own names.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 72; Dec. Dig. ¶14.]

The bill stated that a marriage being about to take place between Thomas Swan and Judith Swan of the state of Virginia, the said Thomas and Judith, and a certain William Ligan, as trustee, on the 24th of October 1801 executed a marriage contract, which stipulated in the following words:—

"This indenture between Thomas Swan of the first part, and Judith Swan, widow of Thomas Thompson Swan, deceased, of the second part, and William Ligan of Amelia county, of the third part. Whereas a marriage is intended shortly to be had and solemnized, by the permission of God, by and between Thomas Swan and Judith Swan; and whereas the said Thomas is possessed of a considerable personal estate, consisting

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of \*slaves, stock, household furniture and debts, with a legacy bequeathed him by Elizabeth Spencer, his sister; and whereas it has been agreed that the said Thomas Swan, after the said intended marriage, shall receive and enjoy, during the joint lives of them, the said Thomas and Judith, the interest and occupation of the said personal estate; but in case the said Judith should survive the said Thomas, it is agreed on that she should exclusively enjoy the sole benefit, profits and emoluments of two negroes, to wit, Sawney, a negro man, and Jane, a negro girl about

thirteen years of age, during her natural life; and after her death, to the issue of this intended marriage (if any);—in default of such issue, to be equally divided among the surviving children of said Thomas, by his first marriage. It is also agreed to, that the said Judith should receive out of the estate of the said Thomas a horse of her choice, on the same terms and considerations as the negroes aforesaid. And whereas a provision is made, by the last will and testament of Elizabeth Spencer, deceased, for the support of the children of Judith Swan by her late husband Thomas Thompson Swan, deceased; and as such support hath been furnished entirely at the expense and industry of the said Judith, it is now agreed on that whatever sum she may be allowed, on a reasonable calculation, shall be considered as the exclusive property of said Judith, and at her own disposal. Now the indenture witnesseth, that in pursuance of the before recited agreement, and in consideration of six shillings lawful money of this commonwealth to the said Judith in hand paid, by the said William Ligan, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Judith Swan, by and with the privity, consent and agreement of the said Thomas Swan, testified by his being made a party to and his sealing of these presents, hath

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granted, bargained, sold, \*assigned, transferred and set over unto the said William Ligan, his executors, administrators and assigns, the two negroes aforesaid, horse, and that part of the estate bequeathed by Elizabeth Spencer, deceased, for the support of her children, to have and to hold the said property hereby conveyed to his heirs, executors, administrators or assigns, upon such trust nevertheless, and for such intents and purposes, and under such provisions and agreements, as are hereinafter mentioned; that is to say, in trust for the said Judith and her assigns, until the solemnization of the said marriage, then upon trust, that he, the said William Ligan, his heirs, executors, &c. shall and do permit the said Judith and Thomas, during their joint lives, to have, receive, take and enjoy all the interests and profits of said property hereby assigned to and for their own use and benefit: but in case the said Judith should survive the said Thomas, he, the said William, shall and do assign over, and transfer to her, the said Judith Swan, the aforesaid two negroes, horse and other estate, to be appropriated as aforesaid. And it is further covenanted and agreed to between the parties aforesaid, that all the estate which she, the said Judith Swan, now possesses shall be considered as her exclusive property, and at her disposal."

The bill also stated, that after the marriage contract the said Thomas and Judith intermarried: and some years after the said

Thomas died, leaving the complainant, the only issue of the marriage, and his widow, the said Judith, him surviving; and that William Ligan, the trustee, was dead; and that Judith Swan, at the time of the death of her husband, and for several years afterwards, resided in the state of Virginia, and being in possession of the negro girl Jane, under the marriage contract, sold her to Thomas Ligan, who was fully apprized of the marriage contract, and of all the right, title and interest she had to the negro, and

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that Thomas Ligan took the negro into possession, and afterwards sold her to Thomas Rudd in fee. The bill prayed that Thomas Ligan and Thomas Rudd might be decreed to deliver up to complainant the negroes in question, or account for their value; and that if it should be determined that defendants were entitled to hold possession of the negroes during Judith Swan's life; that they should be decreed to deliver them up on that event, or account for their value.

The defendants filed a demurrer on the following grounds.

First. Because Judith Swan should have been made a party, as she was alive, and within the jurisdiction of the Court.

Second. That the legal representatives of William Ligan, the trustee, alone could sue, and should have been made a party.

Third. That the complainant had adequate remedy at Law, and the Court of Equity had no jurisdiction.

Chancellor Thompson overruled the demurrer: from which order the defendants appealed, and moved the Court to reverse the Chancellor's decision, on the grounds taken in the Court below.

Irby, for the motion, cited Cooper's Pleadings, 33.

O'Neill, contra, cited Desaus. Rep. 29. 2 Fearne, 46, 7, 8. 2 Fearne, 474. 2 Caines' Cases in Error, 175. 1 John. Ca. 417.

Irby, in reply. The trust was executed in her as soon as her husband died.

Curia, per COLCOCK, J. On the first ground of demurrer in this case it is only

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necessary to remark, that \*by the deed of trust, Judith Swan takes only a life estate, and it is alleged she has sold; she therefore can have no possible interest in the case. The rule, as laid down in Cooper's Equity Pleading, 33, is, that all, who are either legally or beneficially interested in the subject matter and result of the suit, must be made parties. Now she can have no legal right having sold; and having been only so far interested as her life estate extended, she can have no beneficial interest.

The second ground is equally untenable. William Ligan was appointed trustee by the deed, to hold first for Judith and assigns un-



til the marriage, and then for the joint benefit of husband and wife during their joint lives; and if she survived her said husband Thomas, then that he would assign over and transfer to her, the said Judith Swan, the property to be appropriated as aforesaid, after the death of the husband. It is therefore to be presumed, that the property was delivered to her, and the trust executed by William Ligan.

In support of the third ground little could be said which did not go to defeat the right of the defendants; for the complainant could not have a remedy at law unless the life estate has been forfeited, a point which we cannot now determine. But the bill has a double aspect. If the complainant should not succeed in establishing a claim to the immediate possession of the property, he might have a claim to the assistance of this Court to secure the enjoyment of his ulterior rights. For it is clear, that one who purchases a life estate, with a full knowledge of the existence of a deed by which the remainder is vested in a particular individual, becomes thereby a trustee for such remainder man, and might, under circumstances, be required to give security for the forthcoming of the property. In the case of *Lattimer et al. v. Elgin et al.* 4 Desaus. Rep. 26, the Chancellor says, "the interposition of the Court to protect the rights of persons enti-

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fled to personal estate, on the \*death of an intermediate person who has the enjoyment for life, from being squandered away, is a clear established branch of its jurisdiction. And the system of equity would be very imperfect without it. For there is no remedy at law in such cases. It is analogous to the doctrine of waste in relation to real estate; but it also rests on the general foundation of equity." And he refers to 2 *Fearne*, 34; and 2 *Freeman's Rep.* 206, is also cited. It is there clearly laid down, that upon a devise of goods to A. for life, with remainder to B. that it was a good devise to B.; and he might exhibit his bill against A. to compel him to give security that the goods should be forthcoming at his decease; and that it was the same whether the goods, or the use of the goods, were devised for life. In the case of *Hyde v. Parrot*, 1 P. Wms. 1, Lord Somers decided the same point; and in the case of *Foley v. Burnell*, *Fearne*, 410, (7th Lond. Edit.) 1 Bro. C. C. 274, the Court admitted, that the ultimate devisee of a chattel might come to the Court to protect the property from destruction by a tenant for life. And Mr. *Fearne*, who was a great lawyer, lays it down expressly, that the Court is well warranted to give protection in such cases. *Fearne on Executory Devisees*, p. 413, (7th Lond. Edit.)

The Court considers the first taker as a trustee for the benefit of those having subse-

quent interests. *Fearne*, 414 et seq. (7th Lond. Edit.) So also in the case of *Wamburzee v. Kennedy et al.* 4 Desaus. Rep. 474, it was held by the Chancellor, "that in the case of a purchaser for valuable consideration with notice of the trusts, or a voluntary conveyance without notice, the purchaser or voluntary grantee would hold the property liable to the trust;" and he refers to the case of *Mansell v. Mansell*, 2 P. Wms. 678. And it is also stated in the complainant's bill, that the property has been withdrawn from that jurisdiction under which it was placed by the parties to the trust deed: that

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it has been removed from Virginia—\*Now if in the trial of the merits of the case it should appear, that the complainant has done nothing to affect his rights, he may be entitled to the aid which is afforded in such cases. The demurrer is therefore overruled, and the defendants ordered to answer to the bill of complainant. Motion refused.

Decree affirmed.

# I McCord, Eq. 233

THOMAS WILSON, WILLIAM HAYS and  
Wife v. HEZEKIAH CHESHIRE.

(Columbia. Jan. Term, 1826.)

[*Fraudulent Conveyances* ⇨111.]

The statute, 3 Hen. VII, c. 4, avoiding all deeds of gift of goods made in trust to the use of the person himself is only in favour of creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 361; Dec. Dig. ⇨111.]

[*Fraudulent Conveyances* ⇨111.]

A person holding the note of a feme who had executed such a deed, given during a subsequent coverture with her husband, is not such a creditor, especially as he had notice of the deed before he contracted.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 361–363; Dec. Dig. ⇨111.]

[*Trusts* ⇨134.]

The statute of uses does not execute a use upon a use, nor a chattel interest, nor where the trustee not only holds the estate, but has some act to do; as to receive and pay over the rents and profits or to convey, &c.

[Ed. Note.—Cited in *Creighton v. Pringle*, 3 S. C. 99; *Steele v. Smith*, 84 S. C. 471, 66 S. E. 200.

For other cases, see *Trusts*, Cent. Dig. § 177; Dec. Dig. ⇨134.]

[*Equity* ⇨43.]

The Court of Equity will never interfere where a party under no disability neglected to make his defence at law.

[Ed. Note.—Cited in *Miller v. Furse*, *Bailey*, Eq. 191; *Waller v. Cresswell*, 4 S. C. 356.

For other cases, see *Equity*, Cent. Dig. § 122; Dec. Dig. ⇨43.]

[*Husband and Wife* ⇨167.]

A married woman can do no act which tends to the destruction of her trust estate; and where she gave a note with her husband upon which a judgment was obtained, and her trust

estate sold, the Court of Equity will enjoin the proceedings at law, and relieve the trust estate.

[Ed. Note.—Cited in *Dunn v. Dunn*, 1 S. C. 354.]

For other cases, see *Husband and Wife*, Cent. Dig. § 656; Dec. Dig. ¶167.]

[*Courts* ¶37; *Equity* ¶42.]

In a case in which the Court obviously had no jurisdiction, the objection to the jurisdiction can never be made too late; but where it is doubtful, and the defendant instead of demurring has answered in chief, it is too late on the final hearing to object to the jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 148; Dec. Dig. ¶37; *Equity*, Cent. Dig. §§ 119, 120; Dec. Dig. ¶42.]

[*Appeal and Error* ¶184.]

[Except in cases where the bill, from the subject-matter of it, cannot be brought within the jurisdiction of equity, an objection to the jurisdiction cannot be raised upon appeal for the first time.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1179; Dec. Dig. ¶184.]

[*Husband and Wife* ¶85.]

[The negotiable note of a married woman is absolutely void.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 336; Dec. Dig. ¶85.]

The bill in this case stated that the complainant, Mary, on the 20th of November 1821, while a feme sole, made and executed to complainant, Thomas Wilson, a deed of trust in the following words, to wit: "State of South Carolina, Laurens district. Know all men by these presents, that I, Mary Wilson, of the state and district aforesaid, for and in consideration of the natural love and affection which I have to my brother, Thomas Wilson, as well as the confidence I repose in him, have granted, bargained and sold, and by these presents do grant, bargain and sell, for the sum of one dollar to me in hand paid, as well as for the considerations after named, all the property hereinafter named, being the same left me by my father's will, viz. one tract of land containing one hundred acres, being the same on which my father died, lying on the waters of Little river, adjoining Hezekiah Cheshire, William Wright

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and Wash\*ington Williams: also one other tract of eighty-three acres, being called the Mountain tract, part of the estate of Thomas Wadsworth, deceased, adjoining the aforesaid tract, and leased by my father from the trustees of the Wadsworthville Poor School for the term of seventy-five years; one negro girl named Harriet, and her two children named Eliza and Washington; one road wagon, two beds, the steeds and furniture: to have and to hold the said property to the said Thomas Wilson, his heirs, executors, assigns and administrators, during the remainder of my natural life, the profits and rents of said property, still to be by him applied to my individual use and to no other, except by my consent, in case I should at any

time think proper to change my situation in life; by which change of situation I do not intend to withdraw any power given by this deed, but to continue the same as a check against the waste or improper use which might be made by myself or my husband or children; the property always to be at his disposal when any thing like waste or impropriety occurs. It being always understood, and the true meaning and intent of this trust deed is, that the profits and use shall remain in me and my husband as long as and no longer than proper use is made of the same."

The bill also stated that subsequent to the execution of the deed, the complainants, William Hays and Mary, intermarried; that they had ever since retained the possession of the real and personal property thereby conveyed. That previous to the intermarriage, Hezekiah Cheshire had recovered a judgment against the said William, for a trespass in killing one of his oxen: that some time since the intermarriage, the said Hezekiah, although explicitly informed of the execution of the deed of trust and its contents, caused his execution to be levied on the tracts of land conveyed by the deed of trust, and caused all

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the interest of William Hays \*therein to be sold by the sheriff of Laurens, and became the purchaser. That since the sale he had commenced his action of trespass, to try titles, against William Hays for the recovery of the said lands; and that as Hays could not in that case set up an outstanding title as a defence, the said Hezekiah would recover the same, and eject complainants from the possession, unless prevented by this Court.

The bill prayed that the defendant, Hezekiah Cheshire, might be perpetually enjoined from proceeding in his action at law.

The defendant's answer admitted all the facts set forth in the bill, and stated that after the intermarriage he took a note from William Hays and wife for the amount of his judgment against William Hays, on which he sued and recovered judgment; and that under the last judgment the land was sold, and he became the purchaser.

The case was heard upon the bill and answer, and the defendant's admission, made in Court, that he had full and explicit notice of the execution of the deed of trust and its contents, shortly after its execution, and long before the land was sold under his execution.

Thompson, Chancellor. This bill is brought to restrain the defendant, Hezekiah Cheshire, from proceeding at law in an action of trespass, to try titles, against William Hays, as stated in the bill. It is only necessary, in forming an opinion in this case, to refer to the deed of trust, in order to ascertain the interest which William Hays had in the property; and whether it was of such a nature as



to be liable to the operation of a *fieri facias*. By the trust deed, the legal estate is absolutely vested in Thomas Wilson, and nothing reserved to the use of the cestui que trust except the rents and profits. Hays, by his intermarriage, could acquire no other or greater right in the property than his wife was

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\*entitled to before marriage: to wit—the assets and profits, which were invisible and intangible, and consequently not the subject of a levy. Two grounds have been relied on by the counsel for the defendant. The first is that, by the statute of uses, the use being in William Hays, the legal estate also is. If this were the law *déeds* of trust would be nullities, and the object of them altogether defeated; for they would be placed upon precisely the same footing that any other legal conveyance is. It was evidently the intention of Mary Wilson, in executing the deed, to protect the property from her own dilapidations, as well as those of any husband she might afterwards have, which intention is obviously expressed in the deed.

The second exception is equally untenable with the first: to wit, that Mary Hays joined her husband, William Hays, in the execution of the note on which the judgment at law was founded. It is clear law, and it has repeatedly been decided, that a feme cestui que trust can do no act which will affect the trust estate; and some decisions have gone so far as to say, not even with the consent of the trustee himself.

The Court is therefore of opinion, that the whole of the proceedings, so far as they relate to the trust property, are illegal and should be set aside; and it is ordered and decreed that a perpetual injunction do issue to restrain the defendant from further proceeding at law in his action of trespass to try titles as aforesaid. The defendant to pay the costs of suit.

Irby, for the defendant, appealed, and stated for cause,

First. That the deed of trust was void, in as much as Mary Hays, who conveyed the property, reserved to herself the use and profits of the same. By the statute of uses, which is in force in this state, conveyances of lands, reserving the use to the grantor, were void.

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\*Second. That by operation of the statute of uses, the legal estate was in the cestui que use, and not in the trustee. For whenever a party had the power to dispose of the profits, he had the use, which is vested by the statute of uses in possession. Then an execution could attach on the property.

Third. That independent of the statute of uses the legal estate was in Mary Hays, and not in Thomas Wilson the trustee.

In *Ramsay and others v. Marsh*, 2 M'Cord's Rep. 252. The Court decided that personal property was in the trustee. And the stat-

ute of uses did not operate on it. 1 Madd. Cha. 360.

The cestui que trust may devise, and would forfeit, and subject his interest to an extent. But the use here was in the wife, by the deed. Could the cestui que use dispute the title of a purchaser under an execution against him?

Fourth. That the Court of Equity has no jurisdiction of the case.

O'Neill, contra. The deed was to her separate use. The rule of equity is that where there is any control given to the trustee, the use is not executed. 1 Madd. Cha. 357. 7 Ves. 201. 322. 12 Ves. 238. There are cases where the intention was not to execute the trust, and they were held therefore not executed, 1 Eden's Cha. Rep. 195, 207, as was stated in *Ramsay v. Marsh*, where the trustee was empowered to receive and pay over. He cited *Ewing v. Smith*, 3 Desaus. Rep. 417.

The wife could do no act to charge her estate. She was restrained by the words of the deed from injuring the property.

As to the jurisdiction, it was sold as his property; they could not set up an outstanding title.

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\*Nott, J. Could not the trustee have defended at law?

O'Neill. That would not oust the jurisdiction of Equity. He cited 2 Cox's Ca. 208. *Weymouth v. Boyer*, 1 Ves. 417. *Bateman v. Willoe*, 1 Scho. & Lefr. 205. 1 Madd. Cha. 359. The Equity jurisdiction was peculiar and exclusive.

Irby, in reply, referred to the statute against fraudulent deeds of gifts of goods and chattels, reserving use. Pub. Laws, 42. 13 Eliz. ch. 5. It was not an executory, but an executed, trust. 1 Madd. Cha. 445. The property was liable, because the trust was executed. The Court will not say the judgment at law was void. He thought a feme covert could make her separate property liable. She had consented by giving her note and submitting to the judgment.

*Curia, per COLCOCK, J.* In support of the first ground taken in this case, the defendant's counsel rely on the statute 3 Hen. VII, c. 4, declaring "all deeds of gift made to defraud creditors void." Pub. Laws, 42. It is a sufficient answer to this, that this very deed has been declared to be a good deed to convey the personal goods and chattels for the purposes therein intended, in the case in 2 M'Cord's Reports, 252 [13 Am. Dec. 717].<sup>1</sup> But as it was suggested that this statute was not then brought to the view of the Court: and the circumstances of this case are different from those of the case referred

<sup>1</sup>There is no such case at that page, unless the Court alludes to *Ramsay v. Marsh*.

to, I will briefly inquire if there be any thing in this case which can make that act applicable.

The chapter is in the following words,

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"Item, that \*where oftentimes deeds of gift of goods and chattels have been made to the intent to defraud their creditors of their duties, and that the person or persons that maketh the said deed of gift, goeth to sanctuary or other places privileged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid: It is enacted, that all deeds of gift of goods and chattels, made or to be made, of trusts to the use of that person or persons, that made the same deed of gift be void, and of none effect." Now it is clear from the language of the statute that it was intended to protect the rights of creditors; and in the case before us there are no creditors of the person making the deed, either prior or subsequent to its execution. The defendant cannot be considered as a creditor. The note of a feme covert is a mere nullity. It does not bind her. But if it did, the defendant took it with a full knowledge of the existence of the deed of trust and its provisions. How then can it be said that he has sustained, or could by any possibility sustain any injury in consequence of this deed? His taking the note was a mere speculation. He stands on the same footing which he did before the coverture of the cestui que trust. He has the note of the husband for his debt. The statute then has no application. The statute of 13 Eliz. chap. 5, was also relied on; but that is still more foreign to the case, for it relates to subsequent purchasers.

The second ground cannot be maintained. For although in cases of absolute trusts the statute of uses does execute the use in the cestui que trust, and make him the complete owner of the lands or tenements, both in law and equity: yet it was very early decided by the cotemporaneous expositors of the statute, that a use could not be raised upon a use; that the word seised could only apply to a freehold interest, and therefore the use of a chattel interest could not be ex-

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ecuted; and \*lastly, that where the trust was executory, that is where the trustee was required to act and not merely to hold the estate, that there also the use could not be executed. Mr. Maddock, in his first volume, 448 and 449, after stating the first position above mentioned, that a use could not be raised upon a use, which has no application to the case before us, goes on to observe, "the Judges also held that as the statute mentioned only such persons as were seised to the use of others, it did not extend to copyholds or to terms of years or other chattel interest, whereof the tenure is not seised but only possessed, and therefore if a term of one thousand years was limited

to A. to the use of (or in trust for) B., the statute did not execute this use, but left it as at common law. They further held that where lands are limited to trustees to receive and pay over the rents and profits, the use is not executed, but the lands remain in them to answer those purposes. Where therefore there is a conveyance to trustees in trust to convey or to sell, or to pay the profits to a feme covert, and as it seems in all cases where any control or discretion is given to the trustees in the application of the profits of the estate, as to pay annuities, or to make repairs, or to provide for the maintenance of the cestui que trust, the legal estate remains in the trustees, unexecuted by the statute;" which doctrine has never been controverted, and is supported by innumerable cases there referred to: so that the freehold in this case remains in the trustees.

The third ground is, that, independent of the statute of uses, the legal estate, by which is meant the fee, is in Mary Hays, and not in Thomas Wilson.

In the first place there are no facts disclosed in the case which enable the court to determine the point. I think it is presumable from the language of the deed that the fee never was in her. She speaks of the property as having been left to her by her fa-

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ther \*by will; and she only disposes of her life estate. He probably left her but a life estate. But if the whole estate was in her, the defendant could not come at the remainder until the determination of the life estate; and it will be time enough for him then to make the attempt. In which attempt his success would depend alone on his establishing a right to recover against her on the note made during coverture.

I come now to the last ground, the want of jurisdiction in the Court, and which is now for the first time made in the case.

Trusts are the creatures of the Courts of Equity. It is their province to guard the rights of all who are interested in a trust deed. Here a separate estate has been created for the use of the complainant Mary Hays. Her husband has prevailed on her to do an act which is in itself unlawful, and calculated to injure, or at all events to affect, the property which has been secured to her. The defendant availing himself of her signature to the note has obtained a judgment against her, and sold the land secured by the deed of trust. She could know nothing of these proceedings. The trustee, from any thing that appears, was also ignorant of them. And the defendant threatens to make further attempts to proceed. He has thus gotten an unconscientious advantage over the cestui que trust, and she calls on the Court to restrain him from availing himself of it. The Court of Equity will never interfere where a party, who was free to act and to protect his



rights, has neglected to make a defence at law. But such was not the case here. Had this cestui que trust been at liberty to defend herself, she could have done it completely: for in the case of *Ewing v. Smith*, 3 Desaus. Rep. 417 [5 Am. Dec. 557], it was determined that a married woman can do no act which tends to the destruction of her trust estate.

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\*In *Bateman v. Willoe*, 1 Scho. & Lefr. Rep. 261, the Lord Chancellor says, "where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, equity will either put it out of the way, or restrain him from using it." These reasons are probably sufficient to shew that the Court had jurisdiction. But as Chancellor Kent in the case of *Underhill v. Van Cortland*, 2 Johns. Cha. Rep. 369, very properly remarks, "at any rate, by answering in chief instead of demurring, the defendants have submitted to the cognizance of the Court, and they came too late at the hearing on the merits to raise this objection. It would be an abuse of justice if the defendant was permitted to protract litigation to this extent, and with the expense that has attended this suit; and then at the final hearing interpose with this preliminary objection." Such he remarks, "appeared to be the opinion of a majority of the Court of Errors in the case of *Ludlow v. Simond*, 2 Caine's Cases in Error, 40, 56."

In a case in which there was obviously no ground of jurisdiction, the Court might be induced to interpose even at the last moment; but they will not be astute to discover such an objection at the very moment when all the rights of the parties are about to be finally determined on and put at rest for ever.

Decree affirmed.

### I McCord, Eq. \*243

\*JOHN LOWE, Sen., v. HUGH MOORE.

(Columbia. Jan. Term, 1826.)

[Pensions ⇨9.]

All assignments, mortgages or transfers of pensions are void, by act of congress.

[Ed. Note.—For other cases, see Pensions, Cent. Dig. § 11; Dec. Dig. ⇨9.]

[Contracts ⇨138.]

The general principle is correct that equity will not interfere to set aside an executed contract; as in case of an unlawful contract, both parties being in *pari delicto*.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. ⇨138.]

[Pensions ⇨9.]

But where the defendant fraudulently obtained an assignment of a pension certificate, (all transfers, mortgages or assignments of which are declared void by congress) and received the pension, it is not such an executed contract as the Court will refuse to rescind.

[Ed. Note.—For other cases, see Pensions, Cent. Dig. § 11; Dec. Dig. ⇨9.]

This was a bill filed to set aside an alleged transfer or assignment of a pension granted by the congress of the United States to the complainant, John Lowe, Sen., and to recover back the sums received by Moore, under and by virtue of the transfer or assignment, and a power of attorney given for that purpose; because the said assignment was founded on a fraud practised on the complainant; and because the transfer or assignment of such pension was forbidden by the acts of congress, which declared them wholly void.

It appeared that the defendant was the son-in-law of the complainant, who being very aged, infirm, ignorant and poor, employed the defendant Moore, to take the proper steps to obtain a pension due to him for services performed during the revolutionary war. This was performed by Moore at some trouble and expense. On this ground Moore set up a demand for compensation; and he also offered proofs that Lowe had agreed to give him half his pension for life, in consideration of those services, and of some other aids and assistances which he had advanced to Lowe for the maintenance of himself and wife. A great deal of evidence was gone into as to the alleged agreement between Lowe and Moore, and the terms thereof, and as to the steps and trouble taken by Moore in the business, and as to the advances made by him to Lowe.

De Saussure, Chancellor. We are saved from the necessity of discussing and deciding the questions as to the fairness of this trans-

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action, by a recurrence to the act of congress under which this pension was granted. By the statute of the 3d of March, 1819, it is enacted "that no sale, transfer or mortgage of the whole or any part of the pension, payable in pursuance of this act, shall be valid," which was a repetition of a similar provision made in preceding acts, for the protection of those infirm veterans, who were better able to defend their country, than to defend their own rights from the attacks of greedy speculators.

The case before us comes within the prohibition; and the contract or transfer or assignment of the pension in question must be pronounced void, under the act of congress. But as the defendant claims some compensation for his trouble and expense in establishing the complainant's right to the pension, it is proper that he should have the benefit of any real services performed. It is therefore ordered and decreed, that the alleged agreement, transfer or assignment of the pension of the said John Lowe, in whole or in part, be, and the same is hereby declared to be, invalid and void under the acts of congress; and that it be referred to the Commissioner, to examine and report what amount of the pension has been received by Moore, under and by virtue of the said pension, and that the said Hugh Moore do account for the

same. And also that the Commissioner do inquire and report what essential services were performed by Moore in establishing and obtaining the pension, and what expense he incurred therein, and what personal trouble he was put to, and to report to the Court what sum he is entitled to for those services and expenses. The defendant to pay the costs of suit.

The defendant appealed.

Farrow and Henry, for the appellant. The decree was contrary to law and equity, there being no such transfer, mortgage or assign-

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ment of the pension itself, \*as was rendered void by the act of congress of 1819, Ingersoll's Digest, 675. This is only an equitable lien, upon a sufficient and valuable consideration. It is only a right to retain so much of the money when drawn. The contract, so far as it had been executed, is valid and can not be set aside, the executory part only being liable to be rescinded. As to the costs they thought the complainant should pay them, as he came into Court to demand the rescission of his own contract, which, if void, was at least bona fide, and made at the instance of the complainant, who should not now be suffered to demand a redelivery of documents by him voluntarily deposited with the defendant, without paying the costs.

O'Neill, contra.

*Curia, per NOTT, J.* The defendant in this case does not ask the Court to reverse the decree of the Chancellor, but contends that it ought to be so modified, that he should have the benefit of that part of the contract which was actually executed before the filing of the bill.

I have no doubt of the correctness of the general principle, that a Court of Equity will not interfere to set aside an executed contract, even where it may have been founded on an illegal consideration. A person is at liberty to do what he pleases with his own so he does not injure another. If therefore a person embarks his funds in an unlawful trade, although the Court will not enforce the contract, it will not give him back his money where he is in *pari delicto*. But I think it would be difficult to bring this case within that principle.

The complainant was poor and necessitous. That we know, because this provision was made for no other persons. Ignorant of his

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rights, or rather of the means of \*obtaining them, or unable to avail himself of those means, and having confidence in the superior sagacity of the defendant, he made him his agent for that purpose. Without imputing to the defendant any actual fraud, it is apparent, that by taking advantage of this poor old man, he extorted from him, by means

little short of actual duress, a promise to divide this little pittance with him during life. To secure the performance of that contract, he next obtained a transfer of the certificate of his claim, which transfer, he must have known, the law itself, under which the complainant's claim arose, had declared invalid. Clothed with this authority, he has succeeded in getting possession of the money. And this is what he calls an executed contract. Now it is to be observed that the original contract was absolutely void. It is, therefore, as if no contract had taken place. The defendant then can be considered only as agent, or what the Court of Equity would call a trustee, for the complainant. The complainant has never acquiesced in the right of the defendant to retain the money, or any part of it. No settlement has taken place, no discharges have been given, nor any thing from which the Court can even infer a contract executed on the part of the complainant. I cannot therefore see any cause of complaint on the part of the defendant. The decree allows him full compensation for his services, and a reimbursement of all his expenses. If he is entitled to all that he has received for those services and expenses, it is allowed him by the decree.

He does not come to this Court then on the ground of equity. For he admits that he has received the money without any consideration, and on a contract which he knew at the time to be unlawful. But the amount of his language is, that having got an advantage, whether morally right or wrong, if he can intrench himself within a technical rule of

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law, he will keep it. But this Court \*would fall very far short of fulfilling the humane intentions of the government by affording him such a retreat. The object of the act was, to provide for a class of men, who had once rendered essential services to their country, and who are now unable to assist themselves. It has erected a barrier against the greedy harpies who, it was foreseen, would be prepared to snatch the last morsel of food from their mouths. And it is the duty of the Court, to see that it is not evaded by those iniquitous speculations, against which it was its object to guard. There does not appear any just ground to interfere with the decree of the Chancellor, and the motion is therefore refused.

Decree affirmed.

I McCord, Eq. 247

JOHN PACE, Administrator of Silas Pace, v.  
JOHN BURTON, Guardian.

(Columbia. Jan. Term, 1826.)

[*Executors and Administrators* 104.]

An administrator, under particular circumstances, allowed to retain funds in his hands, without interest, to pay expenses of suits in-



stituted, to try titles to lands of his intestate, the retention being bona fide and prudent.

[Ed. Note.—Cited in *Oswald v. Givens*, Rich. Eq. Cas. 350.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 427; Dec. Dig. ☞104.]

[*Executors and Administrators* ☞104.]

Generally executors, administrators and others standing in like situations are liable to pay interest on funds which they have detained in their possession, but an exception is allowed in cases where the exigencies of the estate might require the immediate application of the fund to a different object.

[Ed. Note.—Cited in *Duncan v. Dent*, 5 Rich. Eq. 11.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 427; Dec. Dig. ☞104.]

[*Executors and Administrators* ☞104.]

And if the money has been prudently retained, he will not be charged with interest during such retention, unless it be shewn that he has derived an interest from it, or applied it to his own purposes.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 423-432; Dec. Dig. ☞104.]

[*Costs* ☞13.]

Cost is a matter of discretion in equity, and even where there has been no great violation of right costs may be decreed.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 21; Dec. Dig. ☞13.]

The complainants were the minor children and the widow of Silas Pace, who died intestate on the 11th February 1811. The object of their bill against the defendant, who administered on the estate, was for an account of the personal property, and of the rents and profits of the real estate of the intestate.

The defendant, by his answer, alleged, amongst other things, that, as far as the knowledge of the defendant extended, the intestate claimed but two tracts of land, one called the Deadfall and the other Allenberg and Matthews' tract. These were small pos-

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sessions, on what was \*called the Salvador tract, and generally known by the name of the Jews' land. The defendant rented them out as the property of the intestate; and not long after he acquired the possession of them, actions were brought against the tenants by Robert E. Griffith, and subsequently by Patrick Duncan, to try the title and for damages, and that the defendant was obliged to indemnify them against any damages which might be recovered. The defendant believing that he incurred great responsibility to the real owners, and having taken counsel on the rights of the heirs and widow, was advised that they had no right or title. He then endeavoured to save himself against all costs and damages which might be recovered. He also stated that the said Patrick Duncan did recover the Allenberg and Matthews' tract with damages; and the intestate's right to the Deadfall tract was es-

tablished on the naked possession of the intestate. That there were no grants or title deeds of these lands, the intestate's rights depending on the length of his possession. That during the pendency of the actions, John Burton, the complainant, was appointed guardian of the minor children, and attorney of the widow; and that defendant offered to account with him for the rents of the lands, provided he would indemnify him, which the said John refused to do. That after the termination of the said actions, the defendant never refused to account with the said John Burton for the rents after deducting the expenses incurred.

Upon the reference of this case to the Commissioner, he charged the defendant with the rents, and allowed interest on each year's rent, calculated up to the time of his report.

The defendant, amongst other exceptions, excepted to so much of the report as allowed this interest, on the ground that the exigency of the estate required him to retain this fund

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in his hands, to meet such costs and damages as might be sustained in the actions at law, as these lands were nearly all the time subject to litigation, and the defendant was responsible to his tenants for whatever damages might be so recovered.

The case was argued on the Commissioner's report and exceptions thereto.

The Chancellor overruled the exceptions and confirmed the report, and ordered the defendant to pay the costs. The defendant now moved to reverse this decree on the following grounds:

That the defendant's exceptions to the allowance of interest on the rents should have been sustained, inasmuch as the exigency of the estate required this fund to be retained in his hands; the lands being nearly all the time in litigation, and the defendant liable for the costs and damages which might be recovered. And,

That under all the circumstances of the case, the defendant ought not to pay the costs.

Noble, for the appellant. All the money decreed to be paid arose from the rents of these very lands, except \$264 interest, which he contended was not recoverable, and cited *Griffith v. Frazier*, 8 Cranch, 9. *Perkins v. Baynton*, 1 Bro. C. C. 359, 375. 3 Bro. C. C. 73. 2 Atk. 151. 2 Fonb. 429. *Darrel v. Eden*, 3 Desaus. Rep. 241. 4 Desaus. Rep. 369, 464, 555. 5 Ves. 843.

As to costs, the defendant ought not to pay them. He has done an act of kindness in renting these lands, which, as administrator, he was not bound to do. He has actually trespassed on the lands for the complainants' benefit, and now they should not punish him for it. This is different from the case of an executor who might have some trusts over the land. 13 Ves. 550.

Bowie, contra, cited 1 Desaus. Rep. 193. 2 Desaus. Rep. 233. 3 Desaus. Rep. 241. 4 Desaus. Rep. 65.

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*\*Curia, per JOHNSON, J.* Generally executors and administrators, and others standing in the like situation, are liable to pay interest on funds which they have detained in their possession. But it is clearly deducible from all the cases on the subject, that an exception is allowed in those cases, when the exigency of the estate might require the immediate application of the funds to a different object. 1 Bro. C. C. 359. 375. 3 Bro. C. C. 73. [Winthrop v. Lane's Survivors] 3 Desaus. Rep. 341. [Benson v. Bruce] 4 Desaus. Rep. 464. [Milling v. Barber] Id. 559. And the good sense of it is well illustrated by the common occurrences of life. A prudent man who was in the possession of funds, and against whom an action was depending, the result of which was doubtful, or against whom there were demands which might be pressed upon him unexpectedly, would, on estimating the advantages or disadvantages that might result from the course to be pursued, generally come to the conclusion, that it was more for his interest to retain the fund, than to incur the hazard to which he would be exposed if he parted with it, although he might derive an interest from it.

The defendant, in this case, had assumed the responsibility of leasing the lands of which his intestate died possessed. Actions were commenced against his tenants to try the titles to the land; and he was liable over to them for the damages and costs which might be recovered; the amount of which it was impossible he could foreknow; and when and how they would terminate was equally a matter of conjecture. He stands, therefore, precisely in the situation in which the case supposed places the prudent man; and it is unreasonable that he should pay interest on the fund pending those actions, unless indeed it had been shewn that he had derived an interest from it, or applied it to his own purposes.

It is therefore ordered and decreed that it be referred to the Commissioner, to ascertain

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when the actions \*brought by Patrick Duncan, against the tenants of the defendant, were finally determined; and that the complainants be allowed interest on the balance arising from rents, in the hands of the defendant, only from that time. It has been alleged at the bar, that in the account stated by the Commissioner between the parties, interest has been allowed on the disbursements made by the defendant; and if so, the Commissioner will expunge so much of it as arose prior to the determination of the cases above referred to.

In the Court of Equity costs are said to

be a matter of discretion; and in looking through this case, the Court is unable to discover that it has been improperly exercised. A part of the fund arising from the personal estate, and which is still in his hands, was not paid over when it should have been; and this fact, combined with other circumstances which enter into the case, takes away from the defendant any claim which he may have on the indulgence of the Court. This ground of the motion is therefore refused.

Decree reversed.

## I McCord, Eq. \*252

\*JEFFERSON L. EDMONDS and Wife and Others v. ANDERSON CRENSHAW and JAMES M'MORRIS, Executors of Aaron Cates, Deceased. (Styled in the Judges' decree J. L. EDMONDS and Wife and Others v. PENDLETON PAGE.)

(Columbia. Jan. Term, 1826.)

[Executors and Administrators ⇨365.]

Purchases by an executor at his own sales void; and voidable in the hands of a purchaser from him with notice, express or implied.

[Ed. Note.—Cited in Stallings v. Foreman, 2 Hill, Eq. 406.]

For other cases, see Executors and Administrators, Cent. Dig. § 1500; Dec. Dig. ⇨365.]

[Lis Pendens ⇨3.]

The doctrine of lis pendens being notice to all the world not to be extended beyond the property, the immediate object of the suit.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 3; Dec. Dig. ⇨3.]

[Lis Pendens ⇨24.]

If a purchaser buys the subject of litigation, he takes it subject to the claims of the complainant; but even in those cases the principle is cautiously admitted.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38-40, 42-46; Dec. Dig. ⇨24.]

[Mortgages ⇨151.]

So a mortgage given by the defendant on his own property anterior to an order for sequestration, but subsequently to the filing of the bill will take priority to the sequestration; and although the mortgage was given to secure advances to be made subsequently thereto, "at different periods," to the defendant himself, "to buy provisions for his family," it will be good to the extent of the advances; which the mortgage must shew to have been actually advanced.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 332; Dec. Dig. ⇨151.]

This bill was filed against the defendants, Crenshaw and M'Morris, as executors of Aaron Cates deceased, by Jefferson L. Edmonds, and Dorothy Ann his wife, Dorothy Wadlington, and the minors Polly Brooks Wadlington and Sarah Susannah Frances Wadlington, the legatees of the testator, for an account of the testator's estate, and to displace the executors from their trust, on the ground of Crenshaw's absence from the state, having removed to Alabama, and the intemperance and insolvency of M'Morris,



and that the funds should be paid over to a receiver, to be laid out in the purchase of lands and negroes. The will required the executors to sell the whole estate, real and personal, and to invest the proceeds in bank stock, for the benefit of the legatees, &c.

The bill was filed on the 9th of January 1824, and M'Morris was served with a subpoena, to answer on the 19th of the same month. The bill charged, and it so appeared, that Crenshaw, before leaving the state, turned over the whole of the assets of the estate to his co-executor M'Morris.

At February term, 1824, an order was obtained, requiring M'Morris to deliver over the whole of the assets of the estate to the Commissioner Higgins, who had been appointed receiver; with this order he partially complied, by delivering over assets to an amount not exceeding one third of the assets of the whole estate.

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\*On the 27th of April 1824 his Honour, Chancellor James, made a further order, "that the said defendant M'Morris should surrender to the Commissioner all the moneys, bonds, notes, or other securities for debts, due the estate of Aaron Cates deceased, on or before the third Monday in May next; and that upon his making default so to do, to the satisfaction of the Commissioner, that he give security for the forthcoming of said moneys and other securities, to the amount of the sale bill of the estate and interest thereon; and that upon his failing to comply with this order, that an attachment issue against him."

This order not being complied with, on the 4th of May 1824 his Honour, Chancellor De Saussure, made the following order:

"Upon reading the bill and affidavits presented in this case, it is ordered that a writ of ne exeat be awarded against the defendant James M'Morris, to continue of force until he shall fully answer the plaintiff's bill, and until this Court shall make some further order to the contrary. And the said writ is to be marked in the sum of \$2,500. And it appearing further, that the said James M'Morris, has failed to yield obedience to an order of this Court heretofore made in this cause, by which he was required to pay into the hands of the Commissioner of Newberry district, acting as receiver, all the funds of the estate of the said Aaron Cates, it is therefore ordered that a commission of sequestration do issue, directed to Francis B. Higgins, William Gillam, Frederic Foster, William Dunlap and James Garcy, to sequester the personal estate of the defendant James M'Morris, and the rents and profits of his real estate, until the said M'Morris shall answer the bill fully, pay over to the receiver the funds of the said estate in his hands, and until this Court shall make some other or further order to the contrary."

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\*Under this commission of sequestration

1 McCORD, Eq.—7

the whole of M'Morris's personal estate, and the rents and profits of his real estate, were sequestered, and immediately after he filed a very imperfect answer.

At June term, 1824, the cause came on for trial before Chancellor De Saussure, and then one Page moved to discharge the sequestration of a tract of one hundred acres of land and the negro Will, on the ground that they were bona fide alienated or mortgaged before the sequestration. This was opposed by the complainants, on the grounds that Page was no party to the suit, and that the transaction between him and M'Morris was fraudulent.

There was another party to these proceedings—one Hatton. The executors, in pursuance of the directions of the will, sold the estate of the testator; and M'Morris, at the sale, bought for himself a negro man, named Young, for \$344; and afterwards sold him to one Garcy, who, entertaining doubts of the legality of the transaction, sold him to the defendant Hatton, who is stated by the Chancellor to have had notice of the complainant's claim. The complainants contended that this sale was void, and prayed to have it set aside, as an executor could not purchase at the sale of the testator's estate.

His Honour, however, decreed on that part of the case, as follows: "On behalf of the defendant, James M'Morris, another motion was made to discharge the levy made, under the sequestration, on the slaves Will and Young, and one tract of one hundred acres in Laurens district, which, it is alleged, were alienated or mortgaged, bona fide, before the sequestration. If this be so, there can be no doubt of the propriety of granting the discharge, subject, however, to the lien which Cates's estate may have on one of the slaves, which, it is alleged, M'Morris purchased at the sale of the estate. The Commissioner is

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therefore directed to inquire and \*examine into these points, and report thereon to the Court. I thought at the hearing, that as Mr. Garcy and Page were not parties, no order could be made thereon. On consideration, I am inclined to the opinion, that such an order, being for their benefit, may be made."

The other parts of that decree are omitted, as not elucidating the question appealed from. It may, however, be remarked, that it removed the defendants from their trust, directed the appointment of a receiver, sanctioned the investment of the funds in lands and negroes, and established the complainants' rights to have eventually a decree against the defendants for \$31,473.45, with interest from the 11th of March 1824.

Subsequently to the decree of June 1824, but before the final decree, M'Morris, by his written consent, authorized the Commissioner for Newberry district to sell the whole of his real and personal estate on a very liberal and extensive credit, and to apply the proceeds, so far as they would go, towards the

payment of the anticipated decree. The complainants also consented to this arrangement, and M'Morris's personal and real estate was accordingly sold, including a tract of one hundred acres of land, and a negro named Will, which were mortgaged to one Page. Sometime after the sale, to which Page had not objected, he delivered his mortgage or bill of sale of the negro Will to the sheriff of Newberry district, and authorized him to seize the said negro and sell him in satisfaction thereof.

The complainants thereupon presented their petition to the Chancellor, praying that Page might be restrained from enforcing his mortgage in this summary way, until his mortgage should be established, and the account between him and M'Morris be ascertained, by the decree of this Court. Chancellor De Saussure, on the 29th of April 1825, made the following order:—

"On reading the within petition, it is or-

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dered that \*the said Pendleton Page and the sheriff of Newberry district be restrained from enforcing the mortgage of the said Pendleton Page, by the sale of the negro Will, until the Commissioner shall have reported on the claim of the mortgagee Pendleton Page, according to the decree heretofore made in this cause, and until the further order of the Court."

In June 1825 the Commissioner took the testimony in relation to Page's mortgage, and reported it to the Court as follows: "On the 27th of April 1824 M'Morris was indebted to Page in the sum of \$150.67¼ for the balance of a book account of that year, which was not payable, according to the usual custom of merchants in that part of the country, until the January following. On that day Page, with a full knowledge of M'Morris's insolvency, and of the pendency of the complainants' bill and the orders made thereon, sold to M'Morris's daughters, who had a separate estate amply sufficient for their maintenance, goods to the amount of \$155.56¼, and charged the same to M'Morris, making thereby the balance of his account \$306.24. For this balance, on the 28th of April 1824, Page took M'Morris's promissory note payable on the 1st of January 1825, and a mortgage of 100 acres of land as above mentioned in Laurens district, to secure the payment thereof. On the same day after the execution of the mortgage, M'Morris stated to Page that he was without funds, and wished to sell Page a negro named Will. Page agreed to buy the negro for \$400, which was to be advanced to M'Morris afterwards, at different times, to buy provisions for his family. M'Morris accordingly executed an absolute bill of sale of the negro to Page on that day. On the back of it Page executed a defeasance stipulating that on the repayment of the consideration money, by the 1st of January 1825, the sale was to be void. The negro was never deliv-

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ered to Page, \*and the possession of him remained in M'Morris. At the time of the execution of the bill of sale he gave M'Morris five dollars; and long after the negro had been sequestered as M'Morris's property, he paid to John Bonds fifty-eight dollars for bacon, which M'Morris had got of him, and which he had verbally promised to see paid. This was all he ever paid on account of the bill of sale of the negro Will. In order to shew that there was fraud in this transaction, it was proved that Page had said, that the articles which he had sold to M'Morris's daughters, amounting to \$155.56¼, and a sum of \$206.08 paid to one Matthews, formed a part of the consideration of the bill of sale for the negro Will; and upon examining Page's account for the balance of which the note and the mortgage of land was given, both these items appear to form a part of that account, and were computed, and formed a part of Page's claim against M'Morris, from which he Page deducted a note on Garcey, which M'Morris paid him, and then struck the balance of \$306.29, for which the note and mortgage of the land was given. It thus appeared (as it was contended) that these two items formed no part of the consideration of the bill of sale for the negro Will. The case was heard June term, 1825.

Thompson, Chancellor. These cases are so very loosely and irregularly presented to the view of the Court, that I should not undertake to decide upon them, were it not that they have incidentally, heretofore, come before this Court, and also the Court of Appeals, and have been partially recognized by them. Still I reluctantly take them into consideration, as they are unprecedentedly anomalous; nor would I do so, unless by the consent of the parties, and to save considerable expense.

I shall in the first place consider the case

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of Hatton. \*James M'Morris and Anderson Crenshaw were appointed executors of Aaron Cates, by his last will, wherein he directed that the whole of his real and personal estate should be sold, &c. This, by the by, seems to have been the only clause with which the executors complied. At the sale, James M'Morris purchased the negro man Young, the subject of this controversy, and sold him to Doctor Garcey, who becoming dissatisfied, and entertaining doubts with respect to the validity of the title, sold him to Hatton for the same amount which he gave, to wit, \$344. James M'Morris who purchased a considerable proportion of the property of Cates at the sale, and converted it to his own use, is notoriously unable to satisfy the claims of the complainants, and they have therefore instituted this inquiry for the purpose of recovering back the negro Young, or his value. This claim is founded on two grounds. The first is, that the purchase



made by James M'Morris of the negro, at the sale of Cates, was invalid and void; and secondly, that Hatton was a purchaser with notice of the claim of the complainants. With respect to the first point, the law has been clearly settled in numerous cases, that such purchase is void. In regard to the second point, the evidence of implied notice is incontrovertible; but there was no necessity of resorting to implied notice, as positive actual notice has been proved. The complainants are entitled to the amount for which the negro, Young, was sold by the Commissioner under the writ of sequestration, which is accordingly decreed to them.

Page's case depends upon very different grounds. It is attempted to create a liability as to him, under the doctrine of "lis pendens." This doctrine in many of the reported cases has been extended to a most unwarrantable length, equally inconsistent with the principles of justice and common sense, not unfrequently contradictory, and in this particular case has been laid down en\*tirely too broadly. I have never yet met with a case where it has been applied beyond the property in litigation. In the present instance, the negro Will, mortgaged by M'Morris to Page, was his own absolute property: the mortgage was executed anterior to the sequestration of the goods and effects of M'Morris. It does not appear from any evidence before the Court, that Page had any knowledge of the suit between complainants and M'Morris, further than the implied notice arising from the "lis pendens." He gave a valuable consideration for the negro, and the transaction was bona fide, untinctured with the least species of fraud, and ought not and cannot be disturbed by any Court having regard to justice and the laws of the land. The injunction is therefore ordered to be dissolved, the petition dismissed, and Page left to pursue his remedy at law.

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From this decree the complainants now appealed, and moved to reverse it, and for a decree in their favour, on the following grounds:

First. That the mortgage and bill of sale, as to the complainants, were fraudulent and void.

Second. That the mortgage and bill of sale were both executed after the filing of the bill, and after Page had full knowledge thereof, as well as of M'Morris's insolvency, with a view to give a fraudulent preference to debts not due.

Third. That the mortgage and bill of sale must be regarded as a subsequent lien to that of the complainants, their claim being entitled to rank as a mortgage, from the sale of Aaron Cates's property in 1816.

Fourth. That the consideration of the bill of sale of the negro Will was altogether executory, and not performed by Page, and it was therefore void.

Hatton also appealed on the following grounds:

First. That the purchase of the negro boy

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Young, at \*the sale of the testator's estate by the executor James M'Morris, ought to have been sustained as valid in law and equity, inasmuch as there was no fraud in the purchase, the price being the full value of the property, he being interested in the estate to the extent of the purchase, and had possession under that purchase during several years.

Second. That the claim of Hatton ought to have been supported, inasmuch as he purchased of Dr. Garcy, who had purchased the negro boy of the executor James M'Morris for a valuable consideration, without notice that the executor had purchased him at the sale of the testator's estate.

J. Johnston, as to Hatton's rights. M'Morris, the executor of Cates, purchased the negro Young at his own sale of his testator's estate; and both Garcy who purchased from M'Morris, and Hatton who purchased from Garcy, knew this.

The executor's purchase at his own sale was void, and the slave still belonged to Cates's estate. 2 Johns. Cha. Rep. 252. If not, still as M'Morris had never paid for him, the Court would follow him and subject him to a lien for his price. Inasmuch as the will of Cates required purchasers to give bond and mortgage, equity would consider that done by M'Morris which he ought to have done, and consider him as holding the slave he purchased, subject to a mortgage lien. He, as executor, could not take property on any other terms than those laid down in the will, if upon those terms; nor could he change the nature of the security required by the testator. The intention of Cates was, plainly, to have the benefit of a mortgage lien, and the executor could not deprive him of it. The principle was analogous to that laid down in the case of *Executors of Gadsden v. Executors of Lord*, 1 Desaus. Rep. 208.

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where an execu\*tor's estate was charged as of a bond debt, with moneys collected by him on bonds due to his testator. Purchasers from the executor, with notice of the lien, hold subject to it as well as the executor. Here they had notice. Besides, the record of the will requiring the executors to take mortgages, &c. was constructive notice, in addition to that arising from the pendency of the present suit.

As to Page's rights, M'Morris, as executor having been required by the will of Cates to take mortgages on the sale of the estate of Cates, was to be presumed to have done so. Being charged by the Commissioner, on his accounting, with the whole amount of that estate, was evidence that he had collected it: or in other words, that he had received \$20,000, or \$30,000, to which that estate amount-

ed on mortgages. But if he received it on mortgages, according to the decision in *Gadsden v. Lord*, his own estate instantly became bound by an equitable lien of the same grade. If Page had notice of the facts, he took subject to the same. That he had notice was clear. The will was notice, being on record. He knew of the pendency of this suit, which charged M'Morris with the estate as a defaulter. He knew of the appointment of the receiver, on the ground of M'Morris's inability to meet the complainants' demand; and by relation back of every transaction in the progress of a cause to the time of its commencement, he was, by law, charged with notice of the sequestration, although it took place a few days after Page took his mortgage. *Sorrel v. Carpenter*, 2 P. Wms. 482.

A person commencing a suit must necessarily be understood to be about to do all he can do towards asserting his rights. It is on this principle that after process relates back to the commencement of the suit, and affects all the world with notice for that time. The plaintiff must be considered by the world as already, at the very outset, exert-

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ing all the power he possessed; which although but in posse, yet as to others must be considered as in esse.

Besides, Page knew that M'Morris was an executor, and knowing him in that character, he could not, after suit, contract with him, but in reference to all his liabilities under that suit as such. 2 Johns. Cha. Rep. 158. Alienation pendente lite was void, even for a valuable consideration.

As to the land mortgaged. The only consideration proved was \$5. The store account set up was for purchases by M'Morris's daughters who had separate property, and some of whom were of age. Under the circumstances M'Morris ought not to be allowed to pay it. It was tantamount to charging it on Cates's estate when the daughter's own property should be liable. The account was not for necessities.

As to the negro, Will. The evidence shewed conclusively the store account of \$306.24, which formed the consideration of the land mortgage, entered also into this. The rest of the consideration of the mortgage of Will consisted altogether of a contract for future advances by Page to M'Morris. The incumbrance of this suit was known to Page; and all subsequent payments and advances were void. 2 P. Wms. 307. 1 Atk. 382. Notice of incumbrances before a party takes titles is sufficient. 7 Johns. Cha. Rep. 65.

As to both land and negro, the complainants' equity was equal at least to Page's; particularly as to the negro: and being equal, Page's claim should not have been allowed. 3 Johns. Cha. Rep. 371. 7 Johns. Cha. Rep. 65. 2 P. Wms. 482.

J. J. Caldwell, (and John Caldwell was with him) for Hatton. The complainants'

claim ranks only as a simple contract debt.

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2 Madd. Cha. 114. Taking a security for a debt is equal to a consideration. 2 Madd. Cha. 257. A purchaser for less than the real value will, if bona fide, be supported. If M'Morris could mortgage for any consideration he might for the support of his family. The mortgage preceded the sequestration.

As to Hatton's bill of sale, M'Morris although an executor could purchase at his own sale; at least to the extent of his interest. And M'Morris had an interest to the extent of his commissions at 10 per cent. *M'Guire v. M'Gowen*, 4 Desaus. Rep. 486.

The Chancellor mistook the facts. Garcy had no notice, although Hatton had. Hatton was to be protected by Garcy's ignorance. A purchase with notice from a purchaser without notice should be supported. 2 Madd. Cha. 257. So of a trustee without notice. 2 Madd. Cha. 114. 214.

O'Neal, in reply. The Court was to protect the interests of the complainants, their wards. 2 Madd. Cha. 114. 2 Atk. 119. Page's debt was not due till January, 1825, M'Morris could not prefer one creditor over another after suit commenced.

*Curia, per NOTT, J.* It is unnecessary to trace the history of the bill in order to ascertain in what manner Pendleton Page became a party in the case. It is sufficient to state that it has become a question, whether he is entitled to the two sums above mentioned out of the estate of the said James M'Morris; or whether the debts are fraudulent; or, if due at all, whether they, or either of them, were contracted under such circumstances that they ought to be postponed to the demand of the complainants.

The grounds on which the complainants rest their claims are,

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\*1. That the filing of the bill was notice to all the world of complainants' demand; and that therefore every person purchasing the property, or taking any incumbrance upon it, must take it subject to that claim.

2. That if the bill itself did not operate as notice the order of sequestration ought to have relation back, and to operate as a lien on all M'Morris's property from the time of filing the bill, which was anterior to the mortgage.

3. That on various other grounds, the sale of both the land and negro to Page ought to be considered as fraudulent and void against these complainants.

On the first ground, I concur with the Chancellor, that the doctrine of "lis pendens" being notice to all the world ought not to be carried too far. It ought not to be extended beyond the property which is the immediate object of the suit. Nor do the authorities authorize a greater extension of



it. The object is to prevent that interminable round of litigation which must ensue if property might be shuffled from hand to hand to elude the process of the law. It is then a wholesome and sound principle of law, that when a person purchases property while the subject of litigation, he must be held to take it, subject to the claim which the complainant has upon it. Were it not so, a person might be perpetually in pursuit of his rights without ever being able to overtake them. Therefore where a person purchases an estate during the pendency of an action to try the title, or where a bill is filed to obtain an estate which is charged with the payment of debts, the estate will be subject to those prior claims. *Walker v. Smallwood*, Amb. 676. *Sorrell v. Carpenter*, 2 P. Wms. 482. But even in those cases the Courts admit the principle cautiously. Therefore in the case last mentioned, Lord King would not let the complainant amend his bill to

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enable him to set aside a sale made pending a suit, because it appeared that the defendant was a bona fide purchaser, without any notice except what was implied from the pendency of the bill. It does not appear to me therefore that the title of the defendant can be impeached on that ground.

The second ground appears to be equally unfeable. The order for the sequestration was anterior to the mortgage; and can only take effect from the time it was awarded. *Burdett v. Rockley*, 1 Vern. 58. It cannot be made to trace relation back to the time of filing the bill so as to overreach a bona fide contract previously entered into.

The third ground I think is entitled to more consideration. With regard to that part of the defendant's claim which was secured by the mortgage of the tract of land, I do not see any ground on which the Court can interfere. It appears to be a regular merchant's account liquidated by note, and as far as I can discover, for a bona fide consideration. A considerable part of it was for articles purchased by his daughters, and perhaps to an amount which did not exactly comport with the economy which the situation of his affairs at that time seemed to require. But it was not so extravagant as to furnish such evidence of fraud as to authorize the interposition of this Court.

The mortgage of the negro Will, however, stands upon different grounds. The two mortgages bear contemporaneous date. And it is very apparent from the testimony that it was the object of the parties to make a final settlement of all accounts between them at that time. That not only appears from the

face of the papers, but from the declaration of the defendant himself. He was desirous of effecting a settlement, and getting security for his debt on account of the sinking situa-

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tion in which he considered M'Morris to be. It is further apparent from the circumstance, that although a mortgage of the negro was given, it was not accompanied with any evidence of a subsisting debt. Nor has the defendant himself when examined on oath been able to give any satisfactory account of the consideration for which it was given. But it is explained by the other testimony; by which it appears, that it was intended as a security for future advances to be made for the support of M'Morris's family. It was incumbent on him, therefore, to shew how much he had actually advanced. It does appear that he has made advances in pursuance of that contract, and on faith of the property mortgaged to the amount of about sixty dollars. That sum therefore he is entitled to retain out of the proceeds of the sale of the negro, and no more.

It is therefore ordered and decreed, that so much of the Chancellor's decree, as relates to the defendant's debt which was secured by the mortgage of the land, be affirmed; and that the decree be so modified, that he be also allowed to retain out of the proceeds of the sale of the negro the money which he has advanced on that account, with the interest thereon; and that it be referred to the Commissioner to ascertain the amount, and that the balance be paid into the hands of the receiver for the benefit of the complainants.<sup>1</sup>

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\*The Court concur in opinion with the Chancellor so far as the decree relates to the case of Hatton, and the motion therefore in that case is refused.

Decree modified.

<sup>1</sup>In *Partridge v. Gopp*, 1 Eden's Cha. Rep. 163, Amb. 596, the doctrine of "pendente lite" was carried farther than in this decree. The mortgage here, so far as it embraced future advances to be made for the support of M'Morris's family, was certainly not less voluntary than the gift of £500 apiece by Shewell to his two daughters for their maintenance, pending a suit against him to account as executor under circumstances very similar to those of the present case. In both cases it is as Lord Keeper Henley said, "affection getting the better of justice;" and as M'Morris might afterwards demand the supplies himself for his family, it

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is something like "a reservation for his own benefit." But *Partridge v. Gopp* has been said to have gone farther than any other case. See Eden's and Ambler's notes to that case. See ante, *Adm. of Rutledge v. Exec. of Smith*, page 119.

## I McCord, Eq. 267

WILLIAM MONTGOMERY v. ANN  
EVELEIGH and Others.

(Columbia. Jan. Term, 1826.)

[Principal and Agent  $\S$  38.]

A trust estate is liable for necessities furnished to the estate, though purchased by a general agent of the estate.

[Ed. Note.—Cited in *Boggs v. Reid*, 3 Rich. 451, 458, 464; *Frazier's Trustees v. Center*, 1 McCord, Eq. 276; *Douglas v. Fraser*, 2 McCord, Eq. 112; *Magwood & Patterson v. Johnston*, 1 Hill, Eq. 233; *Welsh v. Davis*, 3 S. C. 117, 16 Am. Rep. 690.

For other cases, see *Principal and Agent*, Cent. Dig. § 62; Dec. Dig.  $\S$  38.]

This was a bill filed to make the trust estate of Mrs Ann Eveleigh liable for a quantity of corn, alleged to have been supplied for the subsistence of the slaves of the trust estate. The complainant, who was the endorser of the note of hand given for the corn, had been obliged to pay it; and this proceeding against the trust estate was for reimbursement.

The answers stated, that at the time the corn was purchased Mrs Eveleigh, the cestui que trust for life, had hired out the slaves and plantation by the year to her son Thomas Eveleigh, and that he was bound to support the slaves, and was alone responsible for the corn purchased by his agent, William Eveleigh, for that purpose. That Mrs Eveleigh did not give any authority to Thomas or William Eveleigh to purchase the corn in question.

The case was referred to the Commissioner

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to report the facts. He made the following statement: to wit—"That Mrs Ann Eveleigh established a plantation on Black Pine river in the neighbourhood of the complainant—that the plantation was in want of provisions—that at a sale of the estate of Thomas Holloway deceased, in December 1817, William Eveleigh, the son of Mrs Ann Eveleigh, and who had the plantation in his charge, purchased corn and potatoes at the sale to the amount of \$435.27½, for which he gave his note with the complainant as his security. That all the corn and potatoes went to the plantation, except \$119.88 worth of the corn, which the complainant got of the said William Eveleigh—that complainant had been sued on the note and had to pay the same.

To this report the defendant filed exceptions.

First. That the matter reported on by the Commissioner was not embraced in the order of reference.

Second. That the Report could not be sustained by the evidence.

Third. That the Commissioner received incompetent evidence.

Miller, for complainant.

Mayrant, contra.

De Saussure, Chancellor. The order of reference was a general one, and of course comprehended all that was a dispute between the parties. But to obviate objections I have permitted the defendant to go fully into evidence, and also the complainant. It was proved by Mr William Eveleigh, in corroboration of the answers, that Mrs. Ann Eveleigh had hired out the slaves and plantation to her son Thomas by the year, at the time the corn was bought, viz. in December 1817. It was also proved that Thomas Eveleigh, as

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well as William Eveleigh, had no property of his own, and no private credit; and that Thomas Eveleigh had constantly been for a number of years the general agent of his mother, and transacted all her business in relation to the trust estate, made purchases on behalf of it, and gave his own notes, which were never disavowed by his mother, but were paid out of the trust estate; and this procured him credit for all the purposes of that estate. No notice was given to the world that Mrs Eveleigh had hired out the slaves to her son Thomas, and that he was to be looked to for the payment of supplies furnished to the trust estate. There was contrary evidence of what took place at the purchase of the corn now in question. But the weight of evidence was, that when the corn was purchased it was stated by William Eveleigh, who had charge of the plantation and slaves, that it was for the use and subsistence of the slaves of his mother's estate; and it was both proved and admitted that the corn was applied to their use; there being no provisions on the place at that time, to wit, in December 1817.

On considering the circumstances of this case, I am of opinion that the trust estate is liable for this debt. It would be a fraud on the public to protect a trust estate from such a demand. It has been repeatedly settled that trust estates are liable for debts contracted for their use, and indeed for their existence, as in this case, *Cater v. Eveleigh*, 4 Desaus. Rep. 19 [6 Am. Dec. 596], and *James v. Mayrant*, 4 Desaus. Rep. 591 [6 Am. Dec. 630]. It would be destructive to trust estates if they were not so liable, as it would take away all credit when the slaves might be perishing for want of food, or dying for want of medical aid.

It is therefore ordered and decreed, that the trust estate be liable for the payment of the debt proved in this case, for so much of the corn as went to the use of the trust estate, to wit, the sum of \$315.39½ with interest from the 1st of January 1818, and costs of suit.

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\*From this decree there was an appeal, but the decree was affirmed for the reasons assigned by the Chancellor.

Decree affirmed.



## I McCord, Eq. 270

Trustees of REBECCA FRAZIER v. NATIAN CENTER and Executors of HALL.

(Columbia. Jan. Term, 1826.)

[*Husband and Wife* ⇨179.]

How far a married woman may be considered as capable of disposing of property settled on her for her separate use not yet perhaps finally settled in this state.

[Ed. Note.—Cited in *Graham v. Graham's Ex'rs*, 3 Hill, 148.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 711, 939; Dec. Dig. ⇨179.]

[*Husband and Wife* ⇨124.]

A feme covert, with the consent of her trustee, may vest her own separate funds in any way she may think best.

[Ed. Note.—Cited in *Dunn v. Dunn*, 1 S. C. 355, 356.

For other cases, see *Husband and Wife*, Cent. Dig. § 451; Dec. Dig. ⇨124.]

[*Liens* ⇨12.]

A party will not be divested of a prior lien unless there has been some fraud or deception in the transaction.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. §§ 40-50, 52-55; Dec. Dig. ⇨12.]

[*Mortgages* ⇨158.]

A covenant to make titles upon a purchaser's paying the purchase money is a mutual covenant, and the former can not be compelled but upon the performance of the latter; and a purchaser under such circumstances can not give any lien on such lands until he has paid all the purchase money.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 342; Dec. Dig. ⇨158.]

[*Dower* ⇨15.]

The wife not entitled to dower of lands mortgaged for the purchase money.

[Ed. Note.—Cited in *Douglass v. Dickson*, 11 Rich. 423.

For other cases, see *Dower*, Cent. Dig. § 57; Dec. Dig. ⇨15.]

[This case is also cited in *Clark v. Makenna*, Cheves, Eq. 164; *Hastie & Nichol v. Baker*, 3 Rich. Eq. 215, on the *jus disponendi* of separate estates.]

In June 1818 Isaac Frazier conveyed a house and lot in the town of Columbia to one John W. Wilkins. On the 20th of June Mrs Frazier, between whom and her husband there was no good understanding, she being badly treated, renounced her dower in the premises to Wilkins. Wilkins, to secure to Frazier the payment of the purchase money, on the 21st executed a mortgage on the premises to Frazier, with two bonds each for \$2,500, one payable in twelve months, the other in two years. On the 10th day of July Frazier wrote an assignment on the latter bond to John Bynum in trust for his wife, in consideration, as stated, of her relinquishment of dower to Wilkins. On the 30th of July, twenty days later, Frazier entered into an agreement with the defendant Center to buy from Center the house and lot called Reeve's tavern, and stated that he had two bonds on Wilkins for \$2,500 each, which he would give in payment and \$1,000 in cash, before titles

were to be delivered. On the 1st of April 1819 Center executed a conveyance of Reeve's Tavern, and left it in the hands of Robert Stark, Esq. the solicitor of Center and Fra-

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zier, to be kept in his hands \*until Frazier paid up the purchase money in pursuance of his contract, and then to be delivered to him. Things remained in this way for some time, when, Wilkins not paying up the bonds, they, with the mortgage, were placed with the consent of Center by Frazier in the hands of Mr Stark, where perhaps they had remained from the time they were executed, and which had never been delivered to Center, for the purpose of foreclosing the mortgage on Wilkins. The mortgage was foreclosed, and at the sale of the premises Ainsley Hall, the defendant's testator became the purchaser. The parties, Center, Frazier, Bynum and Hall, after the sale met at Mr Stark's office to settle all their claims, and there, for the first time, Center became acquainted with the fact that Frazier had assigned one of these bonds to Bynum in favour of his wife. He complained of the fraud, and refused to permit his titles to be delivered to Frazier for the Reeve's Tavern, until he complied with his contract and paid him up the purchase money, and threatened to rescind the contract unless Frazier would make some satisfactory arrangements for the payment of the money. Frazier then borrowed the money of Bynum which he claimed on one of Wilkins' bonds, for Mrs F. and with this money and some other means, Frazier paid up to Center all of the purchase money but one thousand dollars, to secure which sum, Center took a bond and mortgage from Frazier on the Reeve's Tavern, the titles to which he then delivered at the same time to Frazier. This occurred on the 14th of February 1821. Immediately after giving this mortgage to Center for the part of the purchase money thus remaining unpaid, Frazier executed another bond and a mortgage on Reeve's Tavern to John Bynum, in trust for Mrs Frazier, to secure the payment of the sum of \$2,959.37½. Center's mortgage was recorded the 19th of February 1821, and Bynum's on the 21st. Some time after this Center filed

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a bill to foreclose his \*mortgage, and, at the sale of the premises under the decree of the Court, Hall became the purchaser at \$3,100. On a motion made before Chancellor Thompson to open the biddings, the motion was refused, and upon appeal to the late Court of Appeals in Equity, Chancellor Thompson's decree was set aside, and the biddings opened, on the ground that the property did not sell for enough, and that one Justin Dyer had offered a larger bid. The Court ordered no deposit, and had no other evidence of Dyer's offer than Frazier's affidavit. The premises

were again sold, and produced upon the resale only \$1,100, something less than Center's mortgage. Mrs Frazier's trustees, the present complainants, then moved to set aside the sale again, on the ground that Frazier made a noise at the sale, and thereby injured the sale; and again took up the idea of inadequacy of price.

Chancellor De Saussure, who heard that motion, refused it, and stated that Frazier had committed a fraud on the Court on the former motion, Dyer having run away and no higher bid offered. The complainants now filed their bill to set aside Mr Hall's bid and to obtain a foreclosure of their mortgage on Reeve's Tavern; contending that they had a prior lien to Center's. The bill prayed that Center and Hall might be decreed to pay the debt to Mrs Frazier.

Thompson, Chancellor. The argument of the counsel for the complainant is predicated on the idea, that Mrs Frazier, in consequence of her trustee having taken a previous assignment of the note, had a prior equity to Center, and also the purchaser Hall. The Court is of a different opinion. This case has heretofore been before the Court, and its merits decided on. It has, however, assumed a different shape; but it cannot escape the observation of the Court, that it is only mutato nomine. It is contended that Mrs

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Frazier's renouncing her dower \*to the house sold by Frazier was a sufficient consideration for the mortgage. This cannot be the fact. The house purchased of Center was worth twice as much as the one sold by Frazier; and as the right of dower was entirely contingent, depending altogether on the survivorship of Frazier and his wife and in the event of her being the survivor, her claim was only one third of the lot sold during her natural life: it raises a strong presumption that the mortgage was founded in fraud.

The circumstance of their being dated simultaneously is also another strong badge of fraud. And, although it has been strongly contended that Mrs. Frazier has a prior equity, the argument must fall to the ground. The titles executed by Center to Frazier were intended to vest the fee in him to enable him to mortgage; and if the mortgage to Bynum was antecedent, it was ineffectual; because until Center had executed titles to Frazier he had no power of mortgaging. If afterwards, it was fraudulent and void. I am of opinion, that the institution of this action is a shameful attempt to commit a most egregious fraud; and order and decree that the bill be dismissed, with costs.

The complainants appealed, and made the following points:

That Mrs. Frazier could not, even with the consent of her trustee, change the security which she had for debt; and that Mr. Hall purchased the house of Watkins, subject to

that incumbrance, and had now become liable to pay her debt.

That if the parties had a right to make that arrangement, Mrs. Frazier's mortgage on Reeve's Tavern ought to be preferred to Center's, and that Mr. Hall was therefore liable on that ground.

Harper and Clifton argued for the appellants.

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\*McCord and Preston for the defendants were stopped by the Court.

*Curia, per NOTT, J.* It was stated in the course of the argument that when the house, which had been sold by Frazier to Wilkins, was sold for the purpose of foreclosing the mortgage, Hall became the purchaser; that he paid the money to Frazier, knowing that Mrs. Frazier had an assignment of one of the bonds, and that he therefore made himself liable to pay her demand.

But that is certainly travelling out of the bill, which admits the payment of the money to Mrs. Frazier; for it expressly states that Frazier, "for the purpose of making payment for the same (that is Reeve's Tavern) borrowed of the said trustee (of Mrs. Frazier) the said debt, (which was Wilkins' debt) and secured the payment thereof by a bond and mortgage of the said houses and lots so purchased." It is, however, of but little importance; for it would only result in the question, whether Mrs. Frazier could, with the consent of her trustee, bind herself by the arrangement which was made at that time, as stated in the bill. And as that question will come up again in that part of the case which relates more particularly to Center, the opinion of the Court with regard to him will decide the question with regard to Hall also.

Whether the money due on Wilkins' bond was actually paid to Bynum at the time the house was sold, or whether it was only considered as paid for the purpose of enabling Frazier to effect the purchase of Reeve's house, is perfectly immaterial as regards the present question. It was actually paid into the hands of the Commissioner, of which Mrs. Frazier and her trustee both had notice. She had a right therefore to demand the money; and no person could have prevented her from receiving it. She however voluntarily agreed to lend it to her husband, upon the

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consideration that he \*would substitute his bond secured by a mortgage on Reeve's house.

How far a married woman may be considered as having the disposition of property settled on her for her separate use is a question perhaps which is not yet finally settled in this state. The subject is so fully considered in the able opinions in the case of *Ewing v. Smith*, reported in 3 Desaussure's Reports, 417, [5 Am. Dec. 557] that I shall



not have occasion to resort to any other authority. It appears from the cases there collected to be the well settled doctrine in England, that a feme covert has the exclusive right to dispose of such property as is settled to her separate use. From the time of *Norton v. Turvill*, 2 P. Wms, 144, which was decided in the year 1723, up to the case of *Ellis v. Atkinson*, 3 Bro. C. C. 565, decided by Lord Thurlow in the year 1792, being a period of near seventy years, the whole current of decisions is that way. Lord Hardwicke, in the case of *Grigby v. Cox*, 1 Ves. Sen. 517, says, "The rule of the Court is, that where any thing is settled to the wife's separate use she is considered as a feme sole, may appoint in what manner she pleases, and unless the joining her trustees is made necessary, there is no occasion for that." There was a short period of about ten years, from the resignation of Lord Thurlow until Lord Eldon came into office, during which Lord Alvanley, then Master of the Rolls, and Lord Rosslyn seemed disposed to question the correctness of those decisions, and were unwilling to consider them as authority. But Lord Eldon has since recognized their authority, and there is now no principle better established in the English Courts. The same doctrine has been recognized in the High Court of Errors and Appeals in New York, in the case of *Jacques v. Methodist Episcopal Church*, 17 Johns. Rep. 548.

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\*It is true that in the case of *Ewing v. Smith* a majority of the Chancellors held, that the decisions of the English Courts of Equity were not of binding authority in this state. In that case it is held that a married woman, to whose separate use property is settled, has no further control over it than is conferred by the deed of settlement: and therefore a bond given by a married woman for the debt of her husband, with a view of charging her separate estate, was void. It is not my intention now to enter into a consideration of the question, because it is not necessary to the decision of the present case. For no Court has ever gone so far as to decide that a feme covert could not, with the consent of her trustee, vest her own separate funds in any manner which she might think best calculated to promote her interest. In the case of *Cater v. Eveleigh*, 4 Desaus. Rep. 19 [6 Am. Dec. 596], it was held, that where the husband, acting as agent for the trustees, had purchased a cotton gin for the use of the trust estate, the trust estate should be chargeable with it, although he had given his own note for it, and had been sued at law to insolvency. In the case of *James v. Mayrant*, 4 Desaus. Rep. 591 [6 Am. Dec. 630], a similar decision was made; and this Court, during its present sitting, has supported a decree of Chancellor De Saussure to the same effect, in the case of *Montgomery v. Eveleigh* [1 McCord, Eq. 267].

Now, what is the case under consideration? Wilkins' bond was actually paid. The trustee unquestionably had a right, particularly with the consent of the cestui que trust, to lay out the money in such manner as he might think best calculated to promote her interest.

In the case of *Fraser v. McPherson and Ford*, 3 Desaus. Rep. 393, the Court recognized a right in the trustee to vest the funds of the trust estate in the purchase of negroes. And there can be no doubt but that he would have the same power to lay it out in the purchase of houses and lots, bank stock, or

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other \*valuable property. In the present case it was thought proper to lend the money to the husband, and to have it secured by a mortgage on the house and lot in question. And there can be no doubt, that at the time it would have been thought a judicious investment. It effected a reconciliation with her husband; it furnished the best possible security for his future good behaviour; and nobody doubted at that time but that the security was ample. The house was considered at least worth \$6,000, and was under no incumbrance except the mortgage to Center for \$1,000, with every probability that that would be removed. The loss of Mrs. Frazier therefore has not resulted from any fraud of the defendants Hall and Center, or misapplication of the funds by the trustee, but from a combination of circumstances since, for which they are not answerable, and to which it is not necessary now to recur. I am of opinion, therefore, that the complainants are not entitled to succeed on that ground.

It only remains to inquire whether the mortgage to Mrs. Frazier is entitled to a preference to that of Center. It is here to be remarked, that there is no pretence for the allegation in the bill that the debt to Center was paid off, and that the mortgage to Center was given for money afterwards lent to Frazier by Hall. It is now understood and admitted, that the mortgage to Center was given to secure the balance of the purchase money of the house sold by him to Frazier.

But it is contended that the contract between Center and Frazier contained separate and independent covenants. One on the part of Center to sell and convey the house and lot, and the other on the part of Frazier to pay according to the terms therein stipulated. That the covenant of Center vested an equitable title in Frazier; and that as Mrs. Frazier contracted on the faith of that covenant, equity will give her a preference.

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\*Second. It is contended that according to the original contract, Frazier was to pay Center at the time the titles were made. Mrs. Frazier had a right therefore to suppose when she agreed to take a mortgage on the house, that it would be unincumbered; and

that as Center agreed afterwards to give a credit and take a mortgage on the house, he must be considered as having waived his right to a preference.

To both those propositions it is sufficient to oppose the answer of Center, who swears positively that his mortgage was the first executed. That fact gave him a legal priority, of which the Court of Equity would not undertake to divest him, unless there had been some fraud or deception in the transaction. But there is no foundation for such a supposition, as it is apparent that the whole arrangement was made with the consent and knowledge of all the parties; which consent extended as well to the priority of the lien as to the other parts of the transaction.

But independent of the fact that Center's mortgage was the first in the order of time, let us consider the subject on the ground of equity alone. There are natural covenants to be performed at the same time. On the one hand, the covenantor agrees to execute titles to a house and lot; on the other, the purchaser agrees to pay the purchase money or other consideration. Each was to be in consideration of the other, and neither of the parties intended to rely on the credit of the other. They were then dependent covenants. One was not to be performed without the performance of the other. And a different construction, to use the language of Lord Kenyon, in *Goodisson v. Nunn*, 4 Term Rep. 764, would "outrage common sense." Besides, the trustee of Mrs. Frazier could not look upon the covenant without seeing, that Frazier had obligated himself to assign to Center the very bond that he had already transferred to him. And if he gave up that bond with a

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view of getting the advantage, which is not contended for, it was as great a fraud in him as the first was in Frazier. And this Court cannot lend its aid to violate the first principles of common honesty. I do not suppose however that any such thing was intended, or that it was then supposed that such a question would ever occur. The security was then thought ample, and they were probably indifferent about the priority.

The second question admits of the same answer; and Mrs. Frazier saw that her husband had entered into a covenant which he could not perform. She had the means of affording him assistance, and voluntarily did so. She did not, as in the case of *Ewing v. Smith* agree to sacrifice her separate estate to save him. But she agreed to lend him the money upon condition that it should be secured to her in the best possible manner, as was then supposed, that could be devised. An investment in negroes or bank stock would have been thought at that time more precarious. She had a deep interest therefore in bringing about the arrangement. Center was comparatively disinterested: he already had good security in his own hands, and was not

disposed to let go his hold. Indeed the contract afterwards made was rather changing the form than the substance of the security.

The delivery of the titles, and the execution of the mortgage, can be considered but as one act. And there can be no principle of equity, even if she had not been a party to the arrangement, by which she could have come in to claim a preference. Even at law, Mrs. Frazier would not have been entitled to her dower in the premises. *Bogie v. Rutledge*, 1 Bay, 312. So that whether we consider the question upon the ground of contract, or upon the principles of law or equity, the complainants cannot succeed.

The motion therefore must be refused.

Decree affirmed.

### I McCord, Eq. \*280

\*M. GALPHIN, in His Own Right, and as Guardian of G. Galphin, and C. SCRIVEN and B., His Wife, v. B. M'KINNEY and C. BREITHAUP.

(Columbia. Jan. Term, 1826.)

[*Executors and Administrators* ⚡404; *Principal and Surety* ⚡118.]

Lands in this state are assets for the payment of debts; and where the executor had given his bond with a security to the Commissioner for a sum due on a purchase at his sales, which sum upon a reference appeared to belong to the estate of his testator, and the executor afterwards obtained an order of Court to have his bond delivered up to him, it was held that the surety was thereby discharged from liability on the bond, the executor becoming insolvent; as the executor had a legal right to receive the money due on the bond, and therefore to cancel it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1611; Dec. Dig. ⚡404; *Principal and Surety*, Cent. Dig. § 286; Dec. Dig. ⚡118.]

[*Executors and Administrators* ⚡438.]

An heir at law need never be made a party or have notice of any suit relating exclusively to the personal estate of a deceased person.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1772; Dec. Dig. 438.]

[*Executors and Administrators* ⚡339.]

If the executor plead plene administravit at law, and the plaintiff replies that there are lands, the Court will order them to be sold without inquiring into the truth of the plea.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1417-1424; Dec. Dig. ⚡339.]

[*Executors and Administrators* ⚡329.]

Lands may be sold under a fi. fa. against an administrator, although he did not plead plene administravit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. ⚡329.]

[*Executors and Administrators* ⚡531.]

If no fraud was practiced on the Court in obtaining the order, it will discharge the surety.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2406-2430; Dec. Dig. ⚡531.]



## [Equity ⇨61.]

Where equities are equal the Court will not interfere.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 182; Dec. Dig. ⇨61.]

## [Principal and Surety ⇨104.]

If the sureties apply to the creditor to enforce payment from the principal, and time is given, it will exonerate the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. ⇨104.]

## [Principal and Surety ⇨104.]

Even at law, giving day to the principal will in many cases exonerate the surety.

[Ed. Note.—Cited in Wayne v. Kirby, 2 Bailey, 552.

For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. ⇨104.]

## [Executors and Administrators ⇨531.]

Where the bond is given to the officer of the Court, the surety may apply to the Court to have it enforced; and if the bond is due by an executor, the Court will order it to be delivered up to the executor upon terms which will secure the heirs and legatees. Not requiring those terms will not prevent the discharge of the surety if the bond is delivered up.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⇨531.]

## [Executors and Administrators ⇨531.]

When the Court places the fund again into the hands of the principal it discharges the surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⇨531.]

## [Executors and Administrators ⇨531.]

The Court should construe its own acts most liberally in favour of the surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⇨531.]

## [Principal and Surety ⇨115.]

The mere loss of a bond will not discharge the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. ⇨115.]

## [Equity ⇨61.]

[An executor gave bond with security for a sum due on a purchase at his sales, which sum, on a reference, being found to be due to his testator's estate, the executor obtained an order of court to have the bond delivered up to him. There was no collusion between the executor and his surety, nor fraud on the court. *Held*, that, the delivery of the bond being in compliance with the court's order, an heir of such testator was not entitled to relief in equity against the executor and his surety on such bond, as the executor had as strong and equitable a right to protection from the court as such heir, and, equities being equal, the court will not interfere.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 182; Dec. Dig. ⇨61.]

## [Principal and Surety ⇨115.]

[An order of court, by which a collateral security for a debt has been lost, will not be permitted to prejudice a surety for the debt.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 258; Dec. Dig. ⇨115.]

The bill stated that by virtue of a decree of the Court of Equity of February 1818 at Edgefield, the Silver Bluff lands, situated on Beach Island, were sold by the Commissioner in Equity for Edgefield district, for one third of the purchase money in cash, and two thirds to be paid in one and two years; and the parties concerned were directed by the decree to account before the Commissioner, that he might ascertain, after the mortgages and other incumbrances were satisfied, to whom the residue of the money, arising from the sale, should belong. At the sale made by the Commissioner, B. M'Kinney became the purchaser at the price of \$35,000, and he paid one third thereof to the Commissioner in cash; and the said B. M'Kinney, and C. Breithaupt as surety, gave their bond and mortgage in the penal sum of \$46,666.67 for the balance of the purchase money. That the Commissioner made his report, by which it appeared that the demands, which the Silver Bluff lands were sold to satisfy, amounted to \$10,000; so that the money paid in cash was sufficient to pay off the same; and that the balance of the purchase money was due to the heirs of Thomas Galphin, deceased; that at the sitting of the Court of Equity in February 1820, at Edgefield, the said B. M'Kinney and C. Breithaupt improperly and fraudulently, without the knowledge, and contrary to the wish, of complainants, obtained an order of the Court to have the bond delivered up by the Commissioner to the said B. M'Kin-

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ney, as executor of the \*said Thomas Galphin deceased, which was accordingly delivered to the said B. M'Kinney, as executor of the said Thomas Galphin's estate; and the said B. M'Kinney and C. Breithaupt now refused to pay the balance of the said bond. The prayer was for relief.

The answer of B. M'Kinney and C. Breithaupt admitted the sale of the land in question, and the purchase thereof by B. M'Kinney; and that he and C. Breithaupt gave their bond as charged in the bill; and that the sum paid in cash was sufficient to satisfy the incumbrances on said estate. The answer further admitted that B. M'Kinney obtained an order of the Commissioner in February 1829 for the delivery of the bond up to the said B. M'Kinney. But they denied the charge of having obtained the order by fraud; and insisted that B. M'Kinney, as the only qualified executor of Thomas Galphin deceased, was legally entitled to the possession thereof; and they further insisted that the order of the Court was a conclusive bar to the claim of the complainants; and they regarded it as very extraordinary, that the complainant, M. Galphin, should seek to establish this bond against them, when he claimed a part of the land by a title adverse to that under which the land was sold, and

was, at that time, in possession of that part thereof.

The answer also stated, that at the time this order was obtained, the pecuniary resources of B. M'Kinney were very ample; and he was able and willing to have indemnified his co-defendant from his suretyship to said bond; and when the bond was delivered up, the defendant, C. Breithaupt, required no other indemnification; but now, if the said bond be set up and payment required, C. Breithaupt would be obliged to pay the money, from the unfortunate reverse in the circumstances of B. M'Kinney.

The defendant, B. M'Kinney, as to so much

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of the \*bill of complainant as called upon him to account as executor of Thomas Galphin, answered, that several other persons were entitled to distributive shares of that estate besides the complainant, to wit, Ann M'Kinney the wife of defendant, George Galphin, and Joseph Grant; and he prayed that he might have the benefit of that fact as if pleaded. He also further answered that he and the complainant, M. Galphin, had been made defendants to a bill filed by Frederic Leavenworth and John Hagood, judgment creditors of the said Thomas Galphin, deceased, requiring them to satisfy said demands; and he prayed to be allowed to retain the amount of those demands. He also filed an account, as an exhibit shewing his transactions with the estate of Thomas Galphin, by which it appeared, as he insisted, that he was a creditor of the said estate to a large amount. He insisted that he performed great services, paid large sums, and incurred great trouble and expense in settling the affairs of the estate of Thomas Galphin, for which he had received no compensation; and he prayed to have the benefit thereof in a settlement of the estate.

At the hearing of the cause the will of Thomas Galphin was produced in evidence, dated 5th of May 1812.

Mr Brooks, the Commissioner, was examined as a witness. He testified, that an order was obtained for the delivery of the bond up to B. M'Kinney in February 1820. He thought, but was not sure, that Colonel Breithaupt was present. The bond and mortgage was in possession of the witness. It was not paid but was delivered up under the order to B. M'Kinney, as executor of Galphin. He gave a receipt for it to the witness, and signed the receipt as executor of Galphin. The proceeding by which the order was obtained was ex parte. The Galphins were not present, and no opposition made on their behalf. The witness thought it extraordinary that it

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was given up. After the bond was \*given up, B. M'Kinney mortgaged the land to creditors of Lis (Boyd and Reid), and it had since been sold under that mortgage, and the money

paid over to those creditors. The children of Galphin would have no resource, unless the bond be set up against the security, as B. M'Kinney was insolvent. Breithaupt knew of all the proceedings: he was the master spirit. He acted as the agent of Boyd and Reid; and witness paid him the money, on the resale of the Silver Bluff lands, for Boyd and Reid. He was also the agent of Mr Poinset, the creditor, at whose instance the Silver Bluff lands were originally sold when B. M'Kinney purchased them, and gave bond, with Mr. Breithaupt as security.

Mr R. Wilde testified, that in February 1820 the property of B. M'Kinney was not sufficient to pay all his debts. He did not know or believe he had any property, unincumbered, to pay a debt of \$20,000. B. M'Kinney had lands in Florida, which were bound by liens to particular creditors. He also sent some negroes to Florida, but they were attached by other creditors. He had property under his control, he believed, equal to \$25,000; and there were large debts due to him, perhaps to the amount of \$90,000, by Groce & Co. and Sims and others, which were, however, insolvent houses. He believed B. M'Kinney had not received any part thereof.

Colonel J. M'Kinney testified, that he thought B. M'Kinney had some property not mortgaged, which might have been sufficient to indemnify a security for \$20,000; such as property in Florida, ships, &c.; but all his visible and tangible property in Georgia was under lien.

In the arguments for the defendants, it was conceded that the principal debtor, B. M'Kinney, was liable; but it was contended that the order of Court for the delivery of the bond was fairly obtained, and operated as a

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dis\*charge to the surety. The answer denied fraud, and insisted that the bond could not be revived against the surety Breithaupt. That sureties were not liable beyond the law; and as the remedy at law was gone in this case, the Court would not give a remedy beyond the law. That the surety had a good counter security in the mortgage to the Commissioner, which was also given up, and that unless that could be revived, the Court would not hold him responsible on the bond; and that, at all events, the surety would be entitled to the benefit of all payments made and discounts which B. M'Kinney might have against the estate of Thomas Galphin.

For the complainants it was argued that the bond and mortgage were given up to B. M'Kinney, as executor of Thomas Galphin, and not intended as a discharge to be destroyed. That if the executor did destroy the bond and mortgage delivered to his custody, he acted improperly; and such act would not amount to a discharge of the debt, or a release of the liability of the surety. That the



order of Court would not, at any rate, affect persons not parties to the suit; and that the mortgage of M'Kinney to Boyd and Reid not being recorded, was void as to all other creditors.

De Saussure, Chancellor (after stating the case). In considering this case, the first and indeed the principal question is, as to the nature and effect of the order of Court, made in February 1820. It directs that the bond of M'Kinney and Breithaupt should be delivered up to M'Kinney, as executor of the estate of Galphin; and he signs the receipt as executor. There is no pretence that the bond is paid off; or that the order expresses any intention, or furnishes any implication of an intention, that in giving directions to deliver the bond to the executor, it was to be cancelled. Nor will the Court permit the order to

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be so used. Indeed there is no \*point on which the Court should act with more decision, than when it is called upon to prevent or correct an evil or abuse attempted to be educed out of its own proceedings.

In his answer the defendant M'Kinney denies fraud, and insists, as sole qualified executor of Thomas Galphin, he was legally entitled to the custody of the bond. Being then legally in custody of the bond, does this amount to a discharge of the debt and a cancelling of the bond? It has been conceded, and rightly, that the order and delivery of the bond did not discharge B. M'Kinney, the principal debtor, but that it discharged the surety, which cannot be contended.

The debt and liability for it are one thing—the evidence is another. The evidence may be destroyed, and yet the debt subsist and be sustained by other proofs. Accordingly, it is distinctly laid down by Mr. Maddock, in his Treatise on Equity, that the Court of Equity will not only give relief against the principal in a bond, where it is lost, burnt or cancelled by accident or mistake, but will set it up against the surety in such bonds. 1 Madd. Cha. 26. 3 Atk. Rep. 93, and 9 Ves. 464. So in *Lee, Comptroller General v. Waring and his Sureties*, 3 Desaus. Rep. 57, it was decided, that though the original bond was lost, so that no action could be supported at law, and a nonsuit was suffered there, yet the loss or destruction did not release the sureties. Their demurrer, as well as that of the principal debtor, was overruled. This was decided, on solemn argument, by the Court of Appeals, though there were strong objections to the bond itself, as varying from the bond prescribed by law. It appears that sureties can not have the benefit of discharges, even when intended to operate as such, if they are improperly obtained. But in the case we are considering, the order of the Court, directing the delivery of

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the bond to B. M'Kinney, as exe\*cuter of the

estate of Galphin, was not intended to operate as a discharge of the debt; for there was no proof of payment made; nor was it put to the Court, that in making that order it was intended to cancel the bond and release the surety. It was delivered to the executor eo nomine, for the benefit of the estate, and if he destroyed it he was guilty of a breach of trust; and a breach of trust will form no foundation on which he could obtain a discharge of himself or his surety. The surety, it is in proof, knew of all these transactions, and especially that the debt was not paid. And if he consented to the destruction of the mortgage, to enable M'Kinney to give a new mortgage of the same land to another creditor, Boyd and Reid, who was represented by, and acted and acting through, the surety Colonel Breithaupt, it was at his peril; and if by acting thus he defeated his own security, under the first mortgage (which operated as a counter security to him), he must take the consequences of his own indiscretion or precipitation. He, however, may endeavour to protect himself under the first mortgage, as second mortgages are taken subject to the operation of the first; and if they sell the property included in both, they sell, subject to the rights of the first, and the purchaser takes the property so subject. Indeed no more than the equity of the redemption ought to be sold where a prior mortgage is in force. To act upon the presumption, that the order in question operated as a discharge, was rash in the extreme, more especially as the order did not even direct the mortgage to be given up. It is with regret that the Court ever witnesses sureties being made losers by their engagements. But if their engagements bind them, the Court can not and ought not to absolve them. The regret is diminished in this case by the answer and the account filed by the defendant M'Kinney, which, if correct, shew that there may be

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nothing due on the bond; \*and the surety will be entitled to the benefit of every payment made by the principal and of every discount he may be able to establish. That must be inquired into.

It is therefore ordered and decreed, that it be referred to the Commissioner to examine and report on the state of accounts between B. M'Kinney, the executor, and the estate of Thomas Galphin; and that he allow, as credits on the bond, all payments made thereon, and all discounts, properly established by B. M'Kinney, applicable to the bond debt; and that the defendants do pay such balance as may be reported to be jointly due on the bond. Such balance, when recovered, to be applied in the first instance to the payment of the debts of Thomas Galphin, according to their respective rights, under his will, or as distributees.

The Commissioner will further inquire and

report on the fact alleged, that part of the Silver Bluff lands, sold as Thomas Galphin's estate and purchased by B. M'Kinney, did not belong to that estate; but is claimed and held by M. Galphin, as his private estate; and report, if any, and what deduction ought to be made, on that account.

M'Duffie, for the appellants (the surety). If not to exonerate the surety, what object had the order? The Court ordered the money in the Commissioner's hands to be paid to M'Kinney, as executor, without security. It might be argued that the Court would compel security, but this order was an answer to that. The mortgage was given up. It was an incident to the bond. What was the condition of the surety? He lost his only counter security; otherwise he might have secured himself by the land. He had been induced, by the order, to abandon his counter security. Would the Court permit the order of a competent tribunal to have that effect? The Court usually protects sureties, 2 Ves. Jun. 540. 4 Ves. 824. The surety is

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usually discharged by indulgence of \*the principal, or by any alteration of the circumstances by the creditor by which the surety may be in a worse condition. Would the Court alter that rule? But the Counsel agrees, it would injure the heirs of Galphin. Suppose it was improvident. The intention was to throw the heirs on the responsibility of the executor.

As to the ground of fraud. What motive was there to commit a fraud on the part of the surety? He had no interest. He might have made himself secure. He might rather suppose M'Kinney and his relations confederated to defraud the surety. The case might afford strong presumption.

W. Thompson, contra. If true, that the executor was in advance with the estate, there was no damage to the defendant. If the order was fairly obtained, it could not bind my clients who were not parties to it. Bonds cancelled by mistake, or lost, have been set up. The sureties were to be exonerated by acts of the obligees, as well against sureties as principals, 3 Atk. 90. 9 Ves. 465. 1 Madd. Cha. 23. Comptroller General v. Waring, 3 Desaus. Rep. 57. It was easy to shew a motive for fraud. It could only be to exonerate sureties. He was then the only person interested. M'Kinney had no interest. His liability continued the same. But Breithaupt had a motive. He was surety for a person insolvent. If the bond had remained there would have been no occasion for this proceeding. He certainly must have paid the bond if it had remained. Could Galphin have consented? If the bond had remained he could not have had the same opportunity of collusion. The motive was evidently fraudulent, for it was to exonerate a solvent surety to an insolvent principal. M'Kinney wanted to mortgage to others. It

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was to deprive near friends of a security in order to give it to others. The bond was given when B. M'Kinney was rich, and dis-

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charged \*when he was insolvent. There was no such application till M'Kinney became insolvent. Why was it not made before the bond had remained so long a time? It was not necessary there should be imputation of fraud. Fraud in the principal was sufficient. Fraud was to be imputed to the most interested. There must have been fraud somewhere. It deprived us of security. It was deluding. Would the Commissioner have taken M'Kinney's single bond? The parties interested would not have sold on those terms. To give forged bonds is a fraud. I have never known before of the Court's ordering bonds to be transferred from the Commissioner to the executor. Should not in fairness notice have been given to the parties interested? Was it so unimportant to them? When money is in the hands of the Commissioner it is never paid to the executor but by order of the Court. The executor had nothing to do with the proceeds of the real estate. Suppose the money paid to the Commissioner, would the Court have permitted it to go to the executor if the truth had been shewn? Even if he had a right to demand and receive it, might not the parties have resisted it? The order has been obtained by fraud; and if not, still it is not binding on those not parties to it. The order never intended the bond to be cancelled.

If the bond had been given to another obligor it would have shewn a clear intent to discharge; but when given to the executor, it admitted of a different interpretation. It was given to him as executor, and he had a right to the custody of it, next to the Commissioner. If it had remained, the Commissioner would have sued and collected it, though well secured. It might have been given to the executor to preserve and to indulge, but not to destroy. It was given for one purpose and used for another. Suppose the facts had been known to the Court,—and if not known it was a fraud—would the

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Court \*have granted the order? Is it possible that any Judge would make such an order? If Breithaupt has suffered injury, it is his own fault. He was agent for Polnset, and Boyd and Reid, to whom the land was afterwards mortgaged, and who had no security but M'Kinney, personally. He was then interested as agent, at least, to obtain this security for Boyd and Reid. Breithaupt was the mover of all these transactions. He has suffered no injury by being prevented from obtaining counter security, except as to the mortgage of which he has the benefit now. B. M'Kinney had no property to secure a debt of this amount.

The subsequent mortgage was not recorded



and the former not ordered to be given up. What authority was there then to cancel the mortgage? If destroyed without authority, it would still avail.

M'Duffie, in reply. The argument has been made on assumptions that Breithaupt was a party to the obtaining of the order. He was not more so than the complainants. If they wished to avail themselves of any such fact it must be proved. He had no possible interest in obtaining this order. M'Kinney's relation to these parties shews it. If one of two parties must be injured, he should suffer who is most intimately related in law to the party committing the fraud. M'Kinney was the agent and representative of the Galphins. There was no privity between Breithaupt and the cestui que trust. There is no doubt but lost bonds have been set up against sureties. But this is distinguishable from the ordinary cases. The principal debtor here was the agent and representative of the creditor. But the law quoted from Atkyns is denied; for a release obtained by fraud of the principal discharges the surety, and the creditor is responsible himself

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for being imposed \*on. Breithaupt had no interest, for he was as secure with the mortgage as if now discharged.

It is not pretended that there was more than a trifling balance due by B. M'Kinney. Securities to the Court of Equity were within its control: but there is no control over security given to the executor.

If third parties were injured by the order, others are not responsible. It must be presumed the Court found that the order could be safely made. M'Kinney, believing himself not indebted, wished to discharge his surety. Breithaupt had an interest, if you suppose B. M'Kinney insolvent and there was no other security; but there was ample security in the Silver Bluff lands. The money was ordered to be paid without security. It was asked why the bond was not ordered to be cancelled? It was not intended to be; because it was intended to be left answerable to Galphin's legatees and creditors. It had been given to him as executor. If the Court intended to indulge, it put it out of the power of any one to sue on the bond. This is the very principle upon which it has been held that a surety is discharged. It was put out of their power to sue.

As to Breithaupt's being not yet deprived of security. Of two unrecorded mortgages, the last takes the preference. It is a fraud on the second mortgagee.

Thomson referred to Williams v. Maxwell, where legatees recovered negroes sold by the executor.<sup>1</sup>

*Curia, per* NOTT, J. It appears from the proceedings in this case, that the bond in

question was given to the Commissioner, for the purpose of securing the payment of the money arising from the sale of the Silver Bluff to such person as upon investigation before him should appear to be entitled to

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receive it. Upon that investigation \*it appeared that all, except a part of the first instalment, was due to the estate of Thomas Galphin deceased. How this claim of Galphin's arose does not very distinctly appear; and perhaps, it is not necessary that it should in the investigation of the question now under consideration.

The bill states that the money was due to the heirs of Galphin; and being the proceeds of the sale of land, it occurred to the Court, at the argument of the case, that perhaps it ought to be considered as the real estate of Galphin, which should be paid to the heirs and not to the executor. That doubt created the only difficulty which has arisen in the case. But I am not prepared to say, that it would have altered the result. For lands are assets in the hands of executors for the payment of debts. And if it were clearly ascertained that this money ought to be considered as a part of the real estate of Galphin, and that the Court of Equity thought proper to order it to be paid over to the executor for the payment of the debts of the estate, I am disposed to think that it ought to exonerate the security. However, I am satisfied that that question cannot arise in this case; and therefore it is not necessary to express any opinion upon it. The bill barely states that the money was due to the heirs of Galphin but it does not state how that claim arose; nor was any proof of the fact offered to the Court. On the contrary, the bill further states, or rather it appears from the first decree in the case, that complainants' ancestor had sold the land to the Ramsays and Goodwyn. Besides, it has not been contended in the argument that it ought to be considered as real estate; nor has the decree put it on that footing.

It appears therefore, from all the circumstances of the case, that the money was due to the executor of Galphin, and not to the heirs. Barney M'Kinney, the defendant and purchaser of the land, was the executor of Galphin, so that the money was actually

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due to himself. Being \*so entitled he applied to the Court of Equity to have the bond delivered up to him, which was accordingly done. It will not be denied, that *prima facie* the executor is entitled to all the funds of the estate. The testator had placed that confidence in him, and no reason has presented itself to my mind why the Court should not? As the whole matter was within the jurisdiction of the Court, and the executor being the proper person to receive the money, it would appear perfectly con-

<sup>1</sup>This case is not reported.

sistent with the relation of all the parties that the bond should be delivered up to him.

But the ground of relief relied on is, that he procured the bond to be delivered up by fraud. It is difficult to conceive how a man can be guilty of fraud in obtaining what is his own. Suppose Galphin himself had been alive and had purchased the land, would not the Court have ordered the land to be delivered up to him when it was ascertained that the money was due to himself? And has not the executor the same right? Suppose any other person had been the purchaser, would not the Court have ordered the money to be paid over to M'Kinney, or the bond to be assigned to him for collection? But where is the evidence of fraud? The only witness to that part of the case is the Commissioner, Mr Brooks. The whole of his testimony in relation to M'Kinney is, "that Mr. M'Duffie, on his behalf, obtained an order to have the bond delivered up. It was an ex parte application. The Galphins were not present." I do not observe in this testimony any appearance of fraud. It is not pretended that there was any misrepresentation. The grounds on which the motion was predicated, if any were stated to the Court, do not appear. It is probable that the Court considered him as executor entitled to the money, and therefore ordered the bond to be delivered up on that ground alone. It may perhaps have been stated that the estate was involved, and the

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money was \*required to relieve it from those embarrassments. The same is now stated, and the contrary does not appear. The complainants, it is said, were not present, nor had any notice of the application. But the executor was under no necessity to give them notice. Suppose the money had been lying in bank, he might have taken it out without giving notice to the heirs. Suppose an action had been brought on the bond, they would not have been parties, and a verdict for the defendants would have been a perpetual bar to their claim. The heirs need never be made parties, or have notice of any suit relating exclusively to the personal estate. An heir is never made a party where an executor is sued at law. If an executor plead plene administravit, the plaintiff need not controvert it; he may reply that there are lands, and the Court will order the lands to be sold to satisfy the debt without making any inquiry into the truth of the plea. The heir may afterwards call the executor to account, and shew that he had not fully administered; but that will not affect the creditor or purchaser. In the case of D'Urphey v. Nelson [4 McCord, 129, note], it appeared that an action had been brought against the administrators of D'Urphey; they had neglected to plead plene administravit, and had thereby admitted assets in their hands. The plaintiff took judgment and issued execution against them; but

not being able to find any goods and chattels on which to levy, he levied on the land of D'Urphey, and had it sold. It was purchased by Nelson. An action was brought by the heirs of D'Urphey against Nelson for the land. The Court held that the proceedings were regular, and that lands were assets in the hands of administrators, and were as liable to be sold under a fi. fa. as the personal estate. The case under consideration is still stronger. The order for the delivery of the bond was the immediate act of the Court, and not of the party. The Court was not deceived, because it was not pretended that

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the \*heirs of Galphin had notice. After the closest examination I have not been able to discover a scintilla of fraud on the part of M'Kinney.

Let us now examine the facts in relation to Breithaupt. With regard to him also Mr. Brooks is the only witness. He does not even know "that Breithaupt was in the state when the order was made. He thinks he was present, but is not certain. Breithaupt was the agent of Poinset, at whose instance the land was sold when it was purchased by M'Kinney. He was also the agent of Reid and Boyd, to whom it was afterwards sold. Breithaupt knew all these proceedings, and was the master spirit. M'Kinney is now insolvent; and the complainants' only resource is against Breithaupt." That is all the evidence against Breithaupt. There is something high sounding in the words master spirit, as if some meaning was lurking under them, which has not been developed, and therefore is left to be inferred. But we cannot condemn a man as guilty of fraud, without evidence somewhat more satisfactory than this. Colonel Breithaupt was indeed acquainted with all the circumstances connected with the transaction. He was the agent of Poinset, to foreclose whose mortgage the land was sold to M'Kinney. The money however, which was paid at the time of the sale, discharged that defendant, and there was an end of his agency. He then became security for the payment of the balance of the money, and a mortgage was taken as a further security for the same. But he had no agency or interest in that part of the transaction. The land was afterwards mortgaged by M'Kinney to Reid and Boyd, to secure a debt due by him to them. But that was not done until after the bond was delivered up, and Breithaupt released from all responsibility, as he then supposed. He was then appointed the agent of Reid and Boyd, for the purpose of taking a mortgage of the land to secure their defendant, and was also their agent when it was afterwards sold to

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\*satisfy that mortgage, and received the money for them. He may indeed have been their agent before, but it does not appear to me that



it would affect the question. He could not accept a mortgage for the land, while he knew it was under another incumbrance.

He might safely do it when that was removed; and it is not improbable that that was one of the objects of M'Kinney in obtaining an order for his bond to be delivered up. But admitting the fact to be so, it furnishes to my view no evidence of fraud. M'Kinney wished to secure the debt to Reid and Boyd, and perhaps had no other effectual means of accomplishing the object but by mortgaging this land. It was important to him therefore to remove that incumbrance. But he resorted to no subterfuge or deception to effect it. It might have been an incautious order in the Court, but still the defendant is entitled to the benefit of it. And even if the motive in obtaining the order could be any evidence of fraud in M'Kinney, it could not be visited on Breithaupt. It will be observed, that the ground of complaint is a fraud practised on the Court, and not a fraud in the executor of the estate of Galphin. These are two distinct questions. Admitting for instance that M'Kinney was actuated by the most fraudulent views in getting up his bond, (of which however I do not see any evidence) and admitting he has most wantonly wasted the estate, (of which there is as yet no proof) if he has practised no deception on the Court, the order of the Court will protect the surety. And it is most manifest that there was not one material fact connected with the transaction which was not as well known to the Court that made that order as to either of the parties to be affected by it. The error therefore was in the Court, if any error there was, and not in this defendant. And he certainly, even in that point of view, has as strong an equity on the Court under whose

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authority he acted as the \*complainants can have; and where the equities are equal the Court will not interfere. It is by the act or order of the Court that he has been deprived of his indemnity; and surely that same Court will not make him liable for an act of its own.

But let us now examine that order and see whether it was, as Mr. Brooks seemed to think it, a very "extraordinary order." If the bond had been payable to a private individual, Colonel Breithaupt would have had a right to apply to the obligee to enforce the payment of the money by the principal; and if he had then extended the time of payment it would have exonerated the surety. That I take it now is an established principle in the Courts of Equity. *Burn v. Administrators of Poaug*, 3 Desaus. Rep. 604. *Gifford's Case*, 6 Ves. 809. *Rees v. Berrington*, 2 Ves. Jun. 542. *Nesbit v. Smith*, 2 Bro. C. C. 579. Even at law giving day to the principal will in many cases exonerate the surety. *English v. Darley*, 2 Bos. & Pul. Rep. 60. *Clark et al. v. Devlin*, 3 Bos. & Pul. Rep. 363. *The King v. The Sheriff of*

*Surrey*, 1 Taunt. 159. *Bowsfield v. Toweer*, 4 Taunt. 458.

Suppose Colonel Breithaupt had come into Court and insisted upon having suit brought against the principal, or that he should be exonerated; what could the Court have done? It could not have kept the funds of an embarrassed estate locked up in its own coffers, out of reach of the executor. If it had extended the credit to the principal it would have exonerated the surety. It would therefore have done precisely what it has done in this case, viz. "order the bond to be delivered up." To be sure the Court might have required terms which would have secured the heirs and legatees in the event of a mal-administration on the part of the executor; but that was a matter for the consideration of the Court, and not for these defendants. I have now examined this part

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\*of the case with the attention which appeared to me due to the novelty and importance of the question. And the result of my investigation is, that there was no such evidence of fraud in the transaction as to render either of the defendants liable on that ground.

But the Chancellor does not place the case on the ground of fraud at all. "The order of Court, it is said, directing the delivery of the bond to C. M'Kinney, as the executor of the estate of Galphin, was not intended to operate as a discharge of the debt, for there was no proof of payment made; nor was it put to the Court that in making that order it was intended to cancel the bond and release the surety." With the most respectful deference for the opinion of the learned Chancellor who delivered that decree, I cannot bring my mind to concur in that construction of the order. Delivering the bond to the obligor must of itself imply an intention to place it entirely at his disposal. What other intention can possibly be conceived? It is said, "It was delivered to him as executor eo nomine, for the benefit of the estate, and if he destroyed it he was guilty of a breach of trust." If it was delivered to him for the benefit of the estate, it was for the purpose of enabling him to appropriate the money due upon it to the payment of the debts and legacies of the estate. It was then giving the entire credit to the principal; and the Court would violate its own rules not to construe it into a release of the surety. The destruction of the bond was no breach of trust, because being in the hands of the obligor it became a dead letter. The misapplication of the fund might have been a breach of trust; but Breithaupt was not answerable for that. He was not security for the faithful administration of M'Kinney. But if the order to deliver the bond did not of itself import a discharge of the debt, the release of the money due on the first instalment was an unequivocal expression of such

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intention. I think therefore, \*that Colonel Breithaupt had a clear and undoubted right to consider himself as released from that bond. And even if there had been any thing ambiguous in the order, I think the Court considering it as its own act ought to construe it most liberally in behalf of the surety. It is said, that if Colonel Breithaupt consented to give up the mortgage which was his own indemnity, he must take the consequences of his own indiscretion. But there is no evidence that the mortgage was given up by the consent of Colonel Breithaupt. It was the voluntary act of the Commissioner, who would not have asked his consent, and which he had no right to oppose. The Commissioner, I think very correctly, considered the mortgage as an incident to the bond, and as the principal was destroyed the incident went with it. *Green v. Hart*, 1 Johns. Rep. 580. *Runyan v. Mersereau*, 11 Johns. 534.

And I think that the same principle which would make Breithaupt liable on the bond would make the Commissioner liable to him for depriving him of his security by giving up the mortgage. Now if Breithaupt should file a bill against the Commissioner for giving up that mortgage by which he became liable to pay the debt out of his own estate, would not that order of Court be his protection? And if a protection to him, why not to Breithaupt?

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That the mere loss or destruction of a bond will not discharge a surety is a proposition too plain to require authority in its support. That is not the ground on which the defendant rests his defence. But it is, that he has been discharged by the bond having been delivered up to the principal obligor, who was entitled to recover the money due upon it. That it was ordered to be delivered up by a Court of competent jurisdiction, with a full knowledge of all the facts and circumstances. That he has thereby been deprived of the indemnity which he

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\*then had. And that he ought not to suffer by an act of the Court, in which he had no agency, over which he had no control, and in opposition to which he had no right to interfere. That if the same thing had been asserted on his own application, it would have been nothing more than he had a right to ask, and what the Court would not have refused without affording him some other adequate protection. Sureties are always looked upon with peculiar indulgence in a Court of Equity; and it appears to me that it would be treating Colonel Breithaupt with unprecedented rigour to set up the bond against him. I think therefore, that the decree against him ought to be reversed, and the bill as to him dismissed with costs.

Decree reversed.



# CHANCERY CASES

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

IN APRIL, TERM, 1826.

JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

I McCord, Eq. \*301

\*GEORGE TRESPOT v. JOHN SMYTH et al.  
(Charleston. April Term, 1826.)

[*Principal and Surety* ⇨200.]

To a bill by a co-surety to make another contribute, it is necessary to make the principal debtor a party.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 645; Dec. Dig. ⇨200.]

[*Discovery* ⇨17.]

To bills for relief all persons interested must be made parties but not so as to bills for discovery.

[Ed. Note.—Cited in *Terry v. Calnan*, 4 S. C. 514; *Leroy v. City Council of Charleston*, 20 S. C. 78.

For other cases, see *Discovery*, Cent. Dig. § 18; Dec. Dig. ⇨17.]

[*Equity* ⇨94.]

Where a person is obliged to go into equity against one of several debtors, he must make all parties though he might have held one at law.

[Ed. Note.—Cited in *Terry v. Calnan*, 4 S. C. 514; *Susong v. Vaiden*, 10 S. C. 255, 30 Am. Rep. 50; *Leroy v. City Council of Charleston*, 20 S. C. 78.

For other cases, see *Equity*, Cent. Dig. §§ 246, 252; Dec. Dig. ⇨94.]

The bill stated that complainant together with Eliza Ashley Smyth now Eliza Ashley Bauxbaum, became joint sureties for John Smyth on a gaol bounds bond. That the said John Smyth having forfeited the condition thereof, the same was assigned by the sheriff of Charleston district to Thomas Wigfall, surviving executor of John Wigfall deceased, the plaintiff in the action at law, who instituted an action thereon, recovered judgment, and issued an execution for the recovery of the amount thereof. This bill was brought

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for the purpose of recovering of John Smyth the amount thus paid by complainant for him, or to compel Eliza Ashley Bauxbaum to contribute her proportion of the debt. The bill also prayed a discovery as to a marriage settlement executed by Eliza Ashley Smyth and Robert Bentham and Martin Strobel; and that so much of the trust property might be made liable as would amount to the contributive share of the said Eliza Ashley Bauxbaum.

To this bill the defendants all demurred. The defendant John Smyth on the ground that there was plain and adequate remedy at law, and the other defendants on the ground that there was another bill depending, embracing all the facts of this case, or which ought to embrace them.

Thompson, Chancellor. With respect to the demurrer of John Smyth it must be sustained. It is true that the Court will interfere between principal and sureties, but is equally true that Courts of Law can do so too; and in this case the remedy at law was plain and adequate, by an action of assumpsit for money laid out and expended. The act of assembly, which is nothing more than the echo of the old law upon the subject, confines each Court to its known and established jurisdiction; lest the encroachments so frequently made by Courts of Equity might ultimately swallow up the common law jurisdiction.

The demurrer of the other defendants stands on different grounds. If they intended to avail themselves of there being two suits for the same cause of action, they should have done so by plea, and not by demurrer.

These demurrers must therefore be overruled, and the defendants ordered to answer over. &c.

The complainant appealed on the ground, that John Smyth, being the principal debtor

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was necessarily made a party, in order to protect the rights of all concerned, and to prevent a multiplicity of suits.

Pepoon, for the motion. The only question in this case is, whether to a bill filed by one co-security to make another contribute it is necessary or admissible to make the principal debtor a party. He cited 2 Madd. Cha. Rep. 192. 451, 3 Atk. 406, 2 Atk. 436, 2 P. Wms. 313, 2 Dick. 738, 16 Ves. 326.

*Curia, per* NOTT, J. It is a general rule in equity where a bill is brought for relief that all parties materially interested in the subject of the suit, however numerous, ought either in the shape of plaintiffs or defendants to be made parties, in order to prevent a multiplicity of suits. 2 Madd. Cha. Rep. 179. 80. It is otherwise where a discovery only is sought. There it is sufficient to make those parties from whom the discovery is wanted. In this case John Smyth is the principal debtor and was therefore an indispensable party to the bill. 2 Madd. Cha. Rep. 192. 2 Ves. 95. One of the exceptions to the rule is where some of the obligors to the bond are sureties. There it does not lie in the mouth of the principal, who has nothing to demand over, to say that the surety ought to be made a party. *Cochburn v. Thompson*, 16 Ves. 326. The ground on which the Chancellor sustained the demurrer in this is, that the complainant might have maintained an action at law against the principal. That is true—and if the bill had been against John Smyth alone the demurrer would have probably been properly sustained. But where a person is obliged to go into Equity for relief against one of several debtors he must make all parties, though he might have sued one at law. Thus where a bill is filed against legatees or distributees of an estate for an account, the executors or administrators must be made parties, be-

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cause they may have paid the debt or have funds to pay with. Yet they might have been sued at law. So where a bill is brought against the representatives of a deceased joint obligor the surviving obligor must be made a party though he might have been sued at law. And it is not unusual, where there are several parties to a bill, that one or more of the parties might have been sued at law, if the complainant would have been satisfied with a judgment against those only. Indeed it is frequently a good ground of equity that you bring together in one suit several parties who could not be joined at law. The decree, therefore, so far as it relates to

the defendant, John Smyth, must be reversed, and the defendants must answer over. Decree reversed.

## I McCord, Eq. 304

EDWARD B. LINING v. JOHN GEDDES and H. CHALMERS.

(Charleston. April Term, 1826.)

[*Equity* ⚡43.]

Equity can only give relief where law cannot.

[Ed. Note.—Cited in *Wilson v. Hyatt*, *McBurney & Co.*, 4 S. C. 375; *Latimer v. Ballew*, 41 S. C. 520, 19 S. E. 792, 44 Am. St. Rep. 748.

For other cases, see *Equity*, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. ⚡43.]

[*Injunction* ⚡46.]

Equity will not interfere to prevent a mere trespass. There must be something particular in the case; as to quiet possession, prevent irreparable mischief, or the value of the inheritance put in jeopardy.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 98; Dec. Dig. ⚡46.]

[*Injunction* ⚡16.]

The remedy at law must be inadequate; as in waste, nuisance and irreparable mischief.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 15; Dec. Dig. ⚡16.]

[*Specific Performance* ⚡69.]

In what cases equity will order a delivery of a specific chattel.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 200-202; Dec. Dig. ⚡69.]

[*Nuisance* ⚡18.]

For equity to interfere in a case of nuisance, it must be such as could cause irreparable injury, and not a temporary obstruction, and before trial at law equity will not enjoin a party from putting up a fence or cutting a ditch across a road.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 49, 50; Dec. Dig. ⚡18.]

The substance of complaint in this bill was, that the complainant was entitled to a private right of way, which the defendants were about to obstruct. The bill prayed an injunction to restrain the defendants from proceeding to obstruct the way.

James, Chancellor. In this case, if the Commissioners of the roads had stopped up complainant's road, I would have thought him entitled to a writ of prohibition against them, as being an inferior Court, which would have been a summary proceeding. See the case of *The State v. R. F. Withers*. But

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as it is stopped up by a private individual I doubt very much whether such a writ can lie against him. Were I to direct an issue for complainant to bring a special action on the case at law he might be deprived of a present remedy, and might not in the end obtain complete redress. This case has, I think, been properly compared to that of a stoppage of ancient rights, of which the



books are full, and in which twenty years give a sufficient prescriptive right. Complainant has proved usage of the road in dispute for more than twenty years, therefore his right ought to be complete by prescription, and a grant ought to be presumed. It is in a great measure a new case in this country. No act of assembly has been cited. The constitutionality of interfering in this manner with private rights has not been fully argued, and I have many doubts upon the subject. But I think the complainant fully entitled to a decision of the Court of Appeals. Therefore it is ordered that the defendants be enjoined from stopping up the road in question until the further order of this Court.

This was an appeal by the defendants to reverse the Chancellor's decree.

*Curia, per* NOTT, J. The Chancellor has granted an injunction, and this is a motion to reverse that decision. The Chancellor who granted this injunction seems to have been impressed with the novelty and importance of the question, and although he granted the injunction, seems to have done so with that cautious doubt which such a case was calculated to excite. I agree with him that a want of jurisdiction is not to be inferred alone from the novelty of the question. For it is not every new case that involves a new principle. The fact, however, that no such question has ever before been agitated in our Courts is a strong reason why we should pause before we act; and that we ought not

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to proceed before \*we can see some clear and well grounded principle to authorize the procedure. The jurisdiction of the Court of Equity is an extraordinary jurisdiction. And it is only where the ordinary tribunals of justice cannot afford relief that a Court of Equity is authorized to interfere. Hence the well established maxim, that a Court of Equity cannot entertain jurisdiction of a cause where the party has a plain and adequate remedy at law. That is not only a well settled principle in England, but is recognized in this country, and re-enforced by an express provision of the act of assembly of this state passed in the year 1791. And even though it be admitted that that clause is nothing more than a recognition of the common law maxim, it must have been intended at least to give emphasis to a provision somewhat calculated to set bounds to the vague jurisdiction of that Court. The people of this state have a veneration for the principles of the common law; they have an attachment for the trial by jury which they will not readily transfer to any other tribunal. And whoever will trace the progress of equity jurisdiction, will find that it has been gradually advancing, step by step, to the consummation of its power, until there is scarcely a case in the annals of litigation over which its empire has not been extended. It is true that this juris-

diction is somewhat of that undefinable nature that renders it difficult to make out its bounds with such precision as to render them at first glance distinctly visible. But I am nevertheless of opinion, that by attention to particular cases as they occur, certain principles may be established, beyond which it will not be permitted to go, and within which the exercise of its power cannot be dangerous. The extent of the chancery jurisdiction on this subject is pretty fully discussed, and the history and progress of it traced up with a good deal of learning and research by Chancellor De Saussure in a note to the case of

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Shubrick v. Guerard, 2 Desaus. Rep. \*619. The subject has also undergone the review of Chancellor Kent in several cases before him in New York. Kane v. Vanderburgh, 1 Johns. Cha. Rep. 11. Stevens v. Beekman, 1 Johns. Cha. Rep. 318. Douglass and others v. Wiggin and another, 1 Johns. Cha. Ca. 435. Livingston v. Livingston, 6 Johns. Cha. Rep. 497. See also Eden on Injunctions, 157, under the head of injunctions to stay purpures and nuisances. In these authorities all the cases will be found collected in which the principle is involved, and although there is some little contradiction in the cases, we shall find the general rule to be, that a Court of Equity ought not to interfere to prevent a mere trespass. And though the old rule on that subject seems to be somewhat relaxed, and according to Lord Eldon injunctions are now granted more liberally than formerly, yet it appears to me that the principle is still preserved, and the greater liberality in granting injunctions seems to consist in the application of the rule to a greater number of cases than formerly, rather than in the extension of the principle itself. There must be, as Judge Kent expresses it, something particular in the case, so as to bring the injury under the head of quieting possession or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy. Livingston v. Livingston, 6 Johns. Cha. Rep. 501. See also 1 Madd. Cha. 138, tit. Injunctions to stay waste. The true ground is, that the injury must be of such a nature that the party cannot have adequate remedy at law. Whenever therefore the trespass amounts to waste, nuisance or other irreparable injury, the Court of Equity interposes by way of injunction and not otherwise. The same rule applies in the cases of specific performance. And although the cases of this description are not directly applicable to the case now under consideration, yet they may tend to illustrate the general principles

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of equity \*jurisdiction. The general rule in those cases is, that the Court will not direct the specific delivery of a chattel. And for the reasons before stated, because the party has plain and adequate remedy at law. Nor would the remedy be considered inadequate,

merely because the specific article might be made more convenient or gratifying to the party than damages for withholding or destroying it. To this rule however there are exceptions. In the progress of society cases will necessarily spring up, peculiarly applicable to a more advanced state of civilization, while others will be left behind which had their origin in an age comparatively rude and barbarous. Among others might be mentioned articles which have acquired an ideal or perhaps a real value from the peculiar situation of the owner, and for the loss of which no damages would be a compensation. Such as the Pusey horn, by which the complainant held his land. *Pusey v. Pusey*, 1 Vern. 273. Or the silver altar piece, being a matter of antiquity and curiosity, in the case of the Duke of Somerset *v. Cookson*, 3 P. Wms. 390. So in the case of *Fells v. Read*, 3 Ves. Jun. 70, Lord Rosslyn decreed the delivery of the silver tobacco box, which had for a great many years belonged to a society; because, from the nature of the thing, the value was inestimable. A similar decision was made by Lord Eldon in the case of *Lady Arundel v. Phipps*, 10 Ves. 148, which involved a question in relation to family pictures.<sup>1</sup> These are cases which have their foundation in the refinement of society, and those affections of the heart, which it would be a reproach to the country not to indulge. But still they depend on the plain tangible principle, that there is no adequate remedy at law—and the principle must not be extended to cases

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founded in weakness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favourite spaniel, or a lady's lap dog.

There is a class of cases to which it is contended the one now under consideration more immediately belongs, in which it is admitted a Court of Equity will interfere: I mean private nuisances. But the same rule applies even in those cases. The nuisance must be such as will cause an irreparable injury to an individual such as no damage would compensate. *Eden*, 157. 3 Atk. 751, 161. 16 Ves. 342. *Moore*, 145. 1 Bro. C. C. 588. 10 Ves. 194. It is not every trifling diminution of the value of property, nor a mere temporary injury, that will authorize the interference of the Court of Equity. *Eden*, 154, et infra. The cases where the Court has interfered are the stopping of ancient lights, diverting water courses, &c. But then the stoppage must be by some permanent wall or building, which would amount to a perpetual privation of enjoyment and which, therefore, could not be repaired in damages. The bare planting

of a tree, or hanging up a sign, which could easily be removed upon establishing the right at law, would not be sufficient. The same might be said of diverting a water course. It must be some work of a permanent nature, and not merely by throwing a log across a stream, which might be easily removed. Now, what is the nuisance here complained of which is about to be erected? The building a fence across a road, or cutting a ditch, either of which could be done in less time than a bill for an injunction could be drawn, and might be removed in less time than a motion for the dissolution of the injunction could be argued. It is not a case which requires the aid of this Court, and certainly not until the right has been determined at law. Neither are the circumstances such as to require the interposition of the Court until such trial can be

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had. \*The decree therefore must be reversed, and the bill dismissed with costs.

Decree reversed.

## I McCord, Eq. 310

ANN E. VAN RHYN *v.* Executors of  
THOMAS VINCENT.

(Charleston. April Term, 1826.)

[*Equity* ⇐87.]

Where a party has a mere legal demand, and equity takes jurisdiction merely for discovery, the defendant is as well entitled to the benefit of the statute of limitations as in a Court of Law.

[*Ed. Note.*—Cited in *Ex parte Hanks, Cheves*, Eq. 212; *Tate's Ex'rs v. Hunter*, 3 Strob. Eq. 148; *Hopkins v. Hopkins*, 4 Strob. Eq. 209, 54 Am. Dec. 663; *Lanier v. Griffin*, 11 S. C. 581.

For other cases, see *Equity*, Cent. Dig. §§ 242-244, 395; Dec. Dig. ⇐87.]

[*Trusts* ⇐365.]

Time is no bar between trustees and cestui que trusts only in cases of technical equitable trusts, but bars constructive trusts of which a Court of Law as well as of Equity have jurisdiction.

[*Ed. Note.*—Cited in *Thayer v. Davidson*, Bailey, Eq. 414.

For other cases, see *Trusts*, Cent. Dig. §§ 568-573; Dec. Dig. ⇐365.]

[*Equity* ⇐87; *Limitation of Actions* ⇐100.]

Equity is bound by the statute of limitations in all cases except such as trusts, frauds, &c. and in cases of fraud from the discovery.

[*Ed. Note.*—Cited in *Prescott v. Hubbell*, 1 Hill, Eq. 215; *McGowan v. Hitt*, 16 S. C. 612, 42 Am. Rep. 650.

For other cases, see *Equity*, Cent. Dig. §§ 242-244, 395; Dec. Dig. ⇐87; *Limitation of Actions*, Cent. Dig. §§ 168, 480; Dec. Dig. ⇐100.]

[*Limitation of Actions* ⇐53.]

Agents and factors spoken of by the statute of limitations must be such as are employed in the general mercantile concerns of the principal. It cannot apply to every special agent.

[*Ed. Note.*—For other cases, see *Limitation of Actions*, Cent. Dig. § 292; Dec. Dig. ⇐53.]

<sup>1</sup>See on this subject ante, *Rees v. Parish* [1 McCord, Eq. 56], and post, *Farley v. Farley* [1 McCord, Eq. 506] and *Robertson v. Bingley* [1 McCord, Eq. 333].



[Trusts ⇐33.]

Receiving a specific sum for another creates no trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 43; Dec. Dig. ⇐33.]

Quære, If the statute would not bar accounts between merchant and merchant where there have been no dealings for five years.

[Limitation of Actions ⇐102.]

[A. sent goods abroad by B., and, B. having died, the goods were disposed of by an agent, and the proceeds were transmitted to C., who had no previous connection with A. Held, that C. was not trustee for A., so as to relieve A.'s demand against him from the statute of limitations.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 494; Dec. Dig. ⇐102.]

By her bill complainant sought to recover from defendant £615 9s. 5d. the value of certain goods shipped on board a brig, of which John Vincent was master, for the African trade, on the 8th of June 1807. John Vincent, as complainant alleged, was to use his best exertions in disposing of the goods, and agreed to remit the proceeds to complainant, for which he was to receive compensation. John Vincent died on the coast of Africa, and the goods fell into the hands of his agents, who disposed of them to great advantage, and the proceeds were remitted to Thomas Vincent, his brother. Thomas Vincent, who had repeatedly promised to account to complainant for the proceeds of these goods, died in September 1818, and never did account, and this bill was filed, on the 1st of November 1820, against his executors. Defendants pleaded the statute of limitations. Complainant replied that the goods were received in trust by John Vincent, and to be accounted for, for a competent consideration, and that John Vincent's agent in Africa, and subsequently his brother, Thomas Vincent, who received the proceeds of the goods, and his executors, all stood in the shoes of John Vincent.

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\*James, Chancellor. "The bill so far as it is not contradicted by the plea is admitted to be true." Coop. Eq. Plead. 231. "But these facts are not contradicted by the plea, unless by protestation; the only use of which seems to be to prevent conclusion in another suit." Coop. Eq. Plead. 231. Now the fact of trusteeship being admitted is very material. This case may first be assimilated to that of Brown v. Litton, 1 P. Wms. 140, where a captain of a ship died leaving money on board. The mate became captain and improved the money. On allowance for his care, he was decreed to account for the profits and not the interest only. But as to the plea, it has long been the established doctrine of this Court that a trustee cannot take advantage of the act of limitations; because a breach of trust is considered a fraud. The case cited from Stiles v. Don-

aldson, 2 Dallas, 264, 1 L. Ed. 375, is in point. It arose upon a discount set up against a bond of accounts unliquidated and unsettled between the parties, as merchants, concerning the sales of merchandize made by the plaintiff in parts beyond sea, as agent and factor for the defendant; and there was a lapse of seventeen years: yet the Court of Common Pleas, in Philadelphia county, overruled the plea of the statute of limitations in bar of the account; and upon a writ of error the Supreme Court of Pennsylvania unanimously affirmed the decision. See, also, Faw v. Marsteller, 2 Cranch, 18, 2 L. Ed. 191; 4 Ves. Jun. 411. Therefore the plea of the statute of limitations, in this case, is overruled.

From this decree King, for the defendant, appealed. He contended that Thomas Vincent was neither expressly nor impliedly trustee of the complainant, and that the cause of action in this case was legally and equitably barred by the statute of limitations. He cited 1 Madd. Cha. 98, 99.

The Court are restricted to create constructive trusts, and even between them the statute will bar. 17 Ves. 96. Prec. Ch. 97

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99. 5 Ves. 759. 11 Ves. 93. It must be \*a technical trust to prevent the operation of the statute. 20 Johns. Rep. 576. 583.

Grimke, contra. The plea admits all the facts, but such as are denied by it. The protestation only serves the purpose of reserving to him the right of contesting the facts, if the plea should be overruled. Coop. Eq. Plead. 231. 5 Jacob's Law Dic. 239.

There can be no doubt, even at law, that John Vincent was complainant's trustee. Godfrey v. Saunders, 3 Wils. Rep. 94. Stiles v. Donaldson, 2 Dall. 264. To a bill for an account there is no plea of the statute. 1 Vern. 456. A factor is to be regarded as trustee. 2 Vern. 638. 4 Ves. 411. 1 Ch. Ca. 127. Cas. Temp. Finch, 125. 1 Ch. Ca. 21. 1 Eq. C. Abr. 303. 2 Vent. 345. Mande-ville v. Wilson, 5 Cranch, 15.

Curia, per NOTT, J. The position taken by the Chancellor, that the plea must be considered as having admitted as true every thing stated in the bill which is not denied is correct. But it is no where stated in the bill that the defendants' intestate was a trustee. That is only alleged in the replication, and a plea can never be supposed to admit the truth of the replication. If, however, from the facts of the case the Court should consider defendants' testator as trustee the conclusion will be the same. Now what are the facts in this case? The complainant shipped on board a vessel, of which John Vincent was master, certain goods for the African trade—the Captain was to lay out the goods to the best advantage and remit the proceeds to the complainant. He

died on the coast of Africa, and the goods fell into the hands of his agent, who disposed of them, and remitted the proceeds to defendants' testator for the purpose of accounting, and paying over the amount to the complainant. All this was known to the

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complainant at the time the transaction took place. The defendants' testator then was merely the receiver of so much money to the use of the complainant. And if the amount had been known she might have brought her action at law for money had and received; in which action the statute of limitations would have been a protection to the defendants. The trust then is not the foundation of the jurisdiction of the Court of Equity in this case, but the want of a discovery. And where a party has a mere legal demand, and the Court of Equity has a concurrent jurisdiction for the purpose of discovery, the defendant is as well entitled to the benefit of the statute of limitations in a Court of Equity as at Law. The mere change of forum cannot change their legal rights. *Roosevelt v. Mark*, 6 Johns. Cha. Rep. 266, 20 Johns. Rep. 208. *Kane v. Bloodgood*, 7 Johns. Rep. 90, 127, and the Index to 7 Johns. Cha. Rep. 162, 3. For although it is a rule in the Court of Equity that lapse of time will be no bar between a trustee and a cestui que trust, yet that doctrine applies only to technical equitable trusts, and not to those constructive trusts of which a Court of Law as well as a Court of Equity have jurisdiction. This case has been assimilated to the case of *Brown v. Litton*, 1 P. Wms. 140, where a captain died having on board a sum of money which he intended to have employed in some trade or speculation. The mate succeeded to the command and employed the money to great advantage. Upon his return home, the representatives of the captain filed their bill against him for the amount of the profits derived from the use of the money. The mate alleged that he was only liable for the amount of the money and interest. But the Chancellor held that he should account for the profits, after deducting a compensation for his trouble; and that was the only question in the case. In the present case it is not pretended that the defendants' testator has employed the money in any profitable speculation, but merely that

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he withheld payment and refused to account for the amount actually received. No confidence or trust was reposed in him by the complainant. The relation of trustee and cestui que trust, therefore, never subsisted between the parties more than between any other debtor and creditor. In the case of *Stackhouse v. Barnston*, 10 Ves. Jun. 466, the Master of the Rolls said, with regard to the statute of limitations though it does not apply to any equitable demand, yet equity adopts it, or at least takes the same limita-

tions, in cases that are analogous to those in which it applies at law. In the case of *Hoveden v. Annesly*, 2 Scho. & Lefr. 607, 630, Lord Redesdale says, "Courts of Equity are bound to yield obedience to the statute of limitations upon all legal titles, and legal demands;" and he thinks the statute must be taken virtually to include the Courts of Equity. There are a great many contradictory opinions in the old books on the subject—but it is now well settled that the statute applies as well to the Court of Equity as to the Court of Law, except in those cases which are excepted upon purely equitable principles, such as trust, fraud, &c. And even in cases of fraud the Court of Equity will allow the statute to run from the time the fraud is discovered. [*Wamburzee v. Kennedy*] 4 Desaus. Rep. 480.

It is contended, however, that accounts between merchant and merchant, their agents and factors, are excepted out of the statute of limitations, and that the defendants' testator is to be considered as standing in the same relation to the complainant as his brother, to whom the original adventure was confided. If the trust had necessarily devolved upon him and he had employed the fund pursuant to its original destination, as in the case of *Brown and Litton*, 1 P. Wms. 140, perhaps that conclusion would have followed. But I do not think that this case comes within the exception of the act which has been relied on. This cannot be consider-

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ed as an account between merchant and merchant. There have been no dealings, no mutual accounts, between complainant and defendants' intestate. Neither could he be considered as an agent or factor of his deceased brother. The agents or factors spoken of in the act must mean such agents or factors as had been employed in the general mercantile concerns of their principals. It cannot mean every special agent who may be intrusted with a specific power, and whose liability arises from some special undertaking unconnected with the general concerns of the party. The defendants' testator was not the agent or factor, nor can any constructive trust be raised in him from having the control or management of funds belonging to his brother's estate. His liability arises from the receipt of the specific funds belonging to the complainant from which the law raises an implied promise to account and pay without any regard to the source from whence the fund was derived. His liability would have been precisely the same if an African Prince had sent him a present to deliver to the complainant.

I do not intend it to be understood, however, that I am of opinion that the defendant would be entitled to the benefit of his plea even were this to be considered as an account between merchant and merchant. The construction of that exception in the



statute of limitations has divided the opinions of able judges. In 1 Madd. Cha. 99, it is said if all accounts have ceased above six years the statute of limitations is, it seems, a bar. *Barber v. Barber*, 18 Ves. 286, 6 Ves. 382. Chancellor Kent, in *Costers v. Murray*, 5 Johns. Cha. Rep. 522, has investigated the subject with his usual learning and research, and has come to the same conclusion. And I think the weight of authority is on that side of the question, though respectable opinions are opposed to it. Vide [*Mandeville v. Wilson*,] 5 Cranch, 15 [3 L. Ed. 23]; also *Catling v. Skoulding*, 6 Term Rep. 193. I do

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not intend therefore \*to express any opinion upon it at this time, because I do not consider the defendants' testator as standing in relation to the complainant. I will nevertheless observe that I do not at present see any good reason why merchants and factors, after all dealings have ceased by them, should not be as well entitled to the protection of the statute as other persons. They are as liable to the loss of papers and vouchers as others. All the reasons which lead to the passage of such an act at all would seem to require that they should have the benefit of it. The case now under consideration furnishes upon its face the best of all reasons why the defendants should be protected by the statute. The complainant and defendants' intestate lived together in Charleston for at least ten years after this transaction took place. She then suffered him to take his departure for the coast of Africa without an effort on her part to obtain any security for this debt. And now after his death, and after the statute of limitations has ran its course three times round, his executors, who cannot be supposed cognizant of such a transaction, are called upon to account. The circumstances of the case furnish the strongest possible presumption that the debt must have been paid. I think the plea ought to have been allowed; and I have seen but few cases where it appeared to me that the party was better entitled to such a shield. The decree of the Chancellor must therefore be reversed.

Decree reversed.

## I McCord, Eq. \*317

## \*JACOB LAZARUS v. THOMAS FLEMING.

(Charleston. April Term, 1826.)

[Equity ⇨379.]

An order directing an issue at law, upon reading the bill alone, set aside, to be reheard on bill and answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 805; Dec. Dig. ⇨379.]

The complainant filed a bill to be relieved from a judgment at law, on the allegation that the cause of action was tainted with usury. The brief stated that the bill was filed the 23d of December 1824. An answer

was filed the 3d of January 1825; and on the 7th of January 1825 his Honour Chancellor De Saussure, without looking into the answer or hearing any evidence, upon the mere statement of the bill, enjoined the defendant from proceeding to collect so much of the judgment as was charged to be usurious, and ordered an issue at law to try the fact of usury, in the face of an existing judgment.

This decree was appealed from, on the grounds that it was premature; that the judgment at law was a bar; and that the defendant had a right to be heard on the merits.

Hunt, for the appellant.

Petigru, contra.

The Court made the following order.

"Whereas it appears that the order of the Chancellor, directing an issue at law, was made upon hearing the bill alone, without having heard the answer." It is ordered, that that order be reversed, and that the case be sent back for the further consideration of the Chancellor, upon hearing the bill and answer.

Motion granted.

## I McCord, Eq. \*318

\*The Executors of JAMES GREGORY v. SARAH and ALEXANDER FORRESTER et al., Heirs and Legatees of C. C. Forrester.

(Charleston. April Term, 1826.)

[Descent and Distribution ⇨76.]

Personal property does not descend to the heir at law.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 252; Dec. Dig. ⇨76.]

[Executors and Administrators ⇨3.]

An executor or administrator is the only organ through whom the rights of the next of kin can be ascertained, and there must be administration.

[Ed. Note.—Cited in *Bradford v. Felder*, 2 McCord, Eq. 170; *Screven v. Bostick*, Id., 417, 16 Am. Dec. 664; *Villard v. Robert*, 1 Strob. Eq. 416; *Kaminer v. Hope*, 9 S. C. 258; *Trimnier v. Thomson*, 10 S. C. 182; *Smith v. Grant*, 15 S. C. 149; *Richardson v. Cooley*, 20 S. C. 350.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3-14½, 1782; Dec. Dig. ⇨3.]

[Executors and Administrators ⇨423.]

And generally an executor or administrator is the only organ through whom a creditor can get the funds of an estate, or to whom a debtor is answerable.

[Ed. Note.—Cited in *Bradford v. Felder*, 2 McCord, Eq. 170; *Screven v. Bostick*, Id., 417, 16 Am. Dec. 664; *Villard v. Robert*, 1 Strob. Eq. 416; *Kaminer v. Hope*, 9 S. C. 258; *Trimnier v. Thomson*, 10 S. C. 182; *Smith v. Grant*, 15 S. C. 149; *Richardson v. Cooley*, 20 S. C. 350.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

[*Executors and Administrators* ⇨423.]

Exceptions, where the executor is a bankrupt and will not act.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

[*Executors and Administrators* ⇨423.]

To enable a legatee to proceed against a debtor there must be some special circumstances, as collusion, insolvency, &c.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

[*Executors and Administrators* ⇨423.]

In what cases a bill may be brought by a creditor against a legatee.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

[*Executors and Administrators* ⇨423.]

A creditor may follow lands in the hands of an heir when the executor is dead or insolvent. But the bill should be brought in behalf of all the creditors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

[*Executors and Administrators* ⇨544.]

To make a party liable as executor de son tort he must be sued as executor.

[Ed. Note.—Cited in *Jones v. Jones*, 39 S. C. 255, 17 S. E. 287, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2599; Dec. Dig. ⇨544.]

[*Executors and Administrators*, ⇨129.]

Still unsettled how far executors and administrators may exercise control over the lands of their testator or intestate.

[Ed. Note.—Cited in *Boyd v. Sloan*, 2 Bailey, 312; *Lawton v. Hunt*, 4 Strob. Eq. 6.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 533-536; Dec. Dig. ⇨129.]

[*Descent and Distribution* ⇨125.]

Lands may be sold under a judgment obtained against an executor or administrator; but when there is no executor or administrator a bill will lie against an heir at law for the proceeds of lands which he had sold and received, the personal estate being fully administered.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 459; Dec. Dig. ⇨125.]

[*Account* ⇨25.]

The Court will not unravel an account of 20 years standing to give the party the benefit of a mere formal exception.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. § 146; Dec. Dig. ⇨25.]

[*Appeal and Error* ⇨169.]

[The court of appeals will not entertain a motion to reverse a decree of the circuit court, upon a ground not set up in the court below, unless it has been added by special permission of the court of appeals, or is such a matter as goes to the whole merits of the case, or would be ground for an arrest of judgment at law.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1018; Dec. Dig. ⇨169.]

[*Executors and Administrators* ⇨272.]

[Cited in *Hull v. Hull*, 3 Rich. Eq. 92, to the point that personalty of testator is primarily liable for payment of debts.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052-1057, 1059, 1065, 1068; Dec. Dig. ⇨272.]

This case came up upon the report of the Commissioner. He reported that the complainants' testator, through motives of friendship, became the guarantee of C. C. Forrester, to the house of Douglass and Shaw, of London. Remittances not having been made in the proper time, the debt was discharged by payments made by the complainants. It was for the purpose of recovering back the amount thus paid that this action was instituted. The Commissioner further reported, that the complainants' demand had been fully established, but that the estate of C. C. Forrester was insolvent, and his effects fully administered by his widow, the mother of some of the defendants, since deceased. And it became a question whether the complainants could obtain payment of the defendants from the proceeds of a tract of land of C. C. Forrester's which had been sold, and of which they received the proceeds. The Reporter could not obtain a more accurate statement of this case.

Thompson, Chancellor. The only point of any magnitude in this case is the solvency of the estate of C. C. Forrester. I have to regret that the evidence on this point is not sufficiently explicit. But in the absence of positive proof the Court may resort to presumption, and this decree will be founded partly on facts and partly on presumptions. The facts are, that the outstanding debts were to a very considerable amount, most of which were deemed good. Another fact is,

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that Mrs. Forrester, the executrix, paid over to her brother \$1500; also, that the house and lot in Hampstead were purchased with the funds of the estate of C. C. Forrester, and no satisfactory account is given of these particular items. The presumptions on which the Court relies are, first, that Mrs. Forrester, for the term of seventeen years, made no returns to the Ordinary. Secondly, that it does not appear that she had any separate estate which would have enabled her to leave her children a considerable fortune, unless it had been created by the application of the funds of C. C. Forrester. The objection to the £52 cannot prevail. It was a private account between Gregory and Forrester, which formed an item in the general account. The exception made by defendants with respect to the rate of interest must be overruled, it being the universal established principle that interest shall be allowed according to the rate thereof in the country where the contract was entered into. The Commissioner's report therefore, so far as relates to the solvency of the estate of C. C. Forrester, must be overruled, and the defendants are ordered to account and pay over to complainants such sum or sums as may be found due to them. In all other respects his report is confirmed. From this decree both parties appealed.



The defendants on the grounds,

First. That it was referred to the Commissioner to ascertain the solvency of C. C. Forrester's estate, who, after investigating all the evidence and hearing counsel, decided the estate to be insolvent: whereas the Chancellor has decided on a few documents, the presumptions arising from which were rebutted by other documents tendered to the Court which the Court considered not necessary.

Second. That the Court erred, in supposing

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that there \*was no evidence of Mrs. Forrester's having a separate estate distinct from the estate of C. C. Forrester; as the evidence before the Commissioner proved that she derived a large estate from others, unconnected with her husband.

Third. That the conduct of the complainants themselves afforded strong presumptions that they considered the estate of C. C. Forrester insolvent, both of them being the executors of his will and refusing to qualify on the same, having never made any claim either against the estate of C. C. Forrester, or against that of Mrs. Forrester, from 1814 to 1822, a space of eight years.

Fourth. That the claim was stale and ought to have been rejected altogether by the Court; the complainants having laid by till all the parties were dead who could have given satisfactory evidence of the transactions.

Fifth. That this bill was filed to recover a security debt which was alone mentioned in the bill, and that so much of the decree as allowed £52, a debt of a distinct nature, was erroneous.

Sixth. That the Chancellor himself stated verbally that he was not satisfied with his decree, and assented that such expression of his dissatisfaction should be made a ground of appeal.

The complainants appealed on the ground that no further account was necessary, but that the decree should have been final for the payment of the balance with interest out of any property of Mrs. Susannah Forrester.

Pepoon, for the defendants. One of the defendants is a minor, and entitled to avail himself of any exception which arises out of the case, without having pleaded it. 1 Madd. Cha. 338, 460. It is moreover a well settled doctrine that, in the progress of a cause, if it appears that the Court has not

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jurisdiction of the matter, the defendant may take advantage of it by a demurrer. To enable a creditor to pursue the funds of an estate it is indispensable that he should come into Court under an established legal demand. 4 Ves. 815. 13 Ves. 276. The defendants in this case do not represent the estate of C. C. Forrester, and it is impossible that the question "whether a debt was due

from that estate to complainants could be tried between the parties?" The present complainants claim as the executors of James Gregory. They are the only surviving executors of C. C. Forrester; and although they had not yet qualified, the right to qualify remains with them; and they might pursue the estate of their testator into whose hands soever it may have passed. Grimke's Law of Executors, 164, 166, 167. 2 Scho. & Lefr. 245. 12 Ves. 298. 3 Ves. & Beames, 72. When there is an administration, or when the estate is subject to administration, a suit cannot be maintained against the heir or distributee. 12 Mass. 398. When a bill prays for specific relief and contains no general prayer for relief, the complainant is not entitled to any other than the specific relief prayed for. Mitford, 31. 3 Ves. 413, 416. 4 Desaus. Rep. 344. 2 Madd. Cha. 434.

In this case the prayer is that the defendants should be made liable for the interest of the property which came into their hands and belonged to the estate of C. C. Forrester. Now although it was proved that they derived a considerable property, there is not a particle of proof that a single article of property which belonged to the estate of C. C. Forrester ever came into their hands; consequently the Court could not grant relief out of the funds of Mrs. Forrester's estate. The Master was not bound to accompany his report with the evidence, unless a rule of Court was obtained to require him to do so; and unless he is so required his report is assimilated to a special verdict, in which the Court must pronounce its judgment with-

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out regard to the facts. 2 Madd. Cha. \*505. 2 Johns. Cha. Rep. 498, 500, 543. 1 Atk. 453. 3 P. Wms. 142. Dick. 96. 6 Johns. Cha. Rep. 566, 592. 2 Har. C. P. 515, 522. In this case the evidence taken before the Master did not accompany his report; and the fact relied on in the decree presented only a partial view of the case; and did not justify the Chancellor in allowing the exception that the estate of C. C. Forrester was not insolvent.

The Court looks with jealousy on stale demands, and this case falls within that description. 1 Madd. Cha. 98.

The bill professed to claim only a remuneration of the money paid on the security debt due to Douglass and Shaw, and on looking into the bill it will be perceived that there is blended with it another demand of a different nature.

Grimke, for complainants. There is no fund now in existence which in specie belonged to the estate of C. C. Forrester. The argument therefore that complainants might pursue that fund must fail. There is nothing left to administer on.

When there is an administration, the heir or distributee may plead, that there is an executor or administrator, in bar to an ac-

tion at the suit of a creditor; but when there is no administration the heir or distributee becomes liable in respect to the funds which he received. The present defendants are the children of C. C. and Susannah Forrester, and would be entitled to the administration of the estate of the latter, and it is a rule that the Court will not turn the parties round to a troublesome and useless course, where the liability must ultimately attach? Again, defendants took their distribution subject to the equities of their creditors, and must be regarded as trustees to their use, and may be made liable; and the creditors may follow the estate wherever found. 1 Desaus. Rep. 427, 304. 3 Desaus. Rep. 245, 4 Desaus. Rep. 153, 207.

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2 Desaus. Rep. 523. What\*ever may be the practice in England and New York, it has been the invariable practice in the Courts here to require the Master to report the evidence, and to consider it without regard to the opinion of the Master. If Susannah Forrester was now the defendant, she would not be allowed to allege the insolvency of the estate of C. C. Forrester without an account of her administration, from which it would be manifested. The defendants stand in her place, and cannot be put in a better situation. But it is said that these defendants would not be liable to the devastavit committed by Bailey Forrester; it was however the duty of Susannah, who was the surviving executor, to call his estate to an account, and if she neglected to do so she would be liable. Again, whatever estate Bailey Forrester had at his death descended to defendants as his heirs at law; so that defendants represent both Susannah and Bailey. The report of the Master is founded on the fact, that complainants had not made out the solvency of the estate of C. C. Forrester; but it was incumbent on the defendants to shew the insolvency, and not on complainants to shew the contrary. The report is therefore without foundation. Susannah Forrester has rendered no account of her administration; and the legal presumption is that the estate was solvent. She paid a number of simple contract debts in full, furnishing a further presumption of that fact. It is proved that the Stony Creek lands, sold to General Cuthbert in 1820, were a part of the estate of C. C. Forrester, and that the fund arising from the sale has gone into the hands of the defendants, unincumbered by any other demand; and that fund is abundantly sufficient to pay this debt.

*Curia, per NOTT, J.* I think it is very obvious from the course of the argument, that views of this case have presented themselves

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to the minds of the counsel on \*both sides, which had not occurred to them in the Court below; and it has been the invariable rule

of this Court, not to entertain a motion to reverse the decision of the Chancellor of the Circuit Court, on a ground not taken in that Court, unless such ground has been added by special permission of this Court first obtained; or it appears on the face of the proceedings and goes to the whole merits of the case, such as a want of jurisdiction; or as in a Court of Law would be a ground in arrest of judgment. The principal ground relied on in the argument is, that the complainant, as a creditor, cannot maintain a bill against the defendants for an account. That where there is no executor or administrator, the party himself must administer to enable him to collect the funds of the estate. It is true that there is no principle of law better settled than that personal property does not descend to the heir at law. And although according to the act of 1791 real and personal are both distributable in the same manner, the personal estate does not technically descend. It vests in the executor or administrator for the purposes of distribution, who thereby becomes a trustee for those who are ultimately to receive it. He is the only organ through whom their rights can be ascertained, and the law requires the formality of an administration as necessary to the security of those rights.<sup>1</sup> In the case of *Humphries v. Humphries*, 3 P. Wms. 348, it was held that a bill for an account of the personal estate could not be maintained without administration actually taken out, although the person who had the right of administration was a party. In the case of *Ashhurst v. Eyer*, 2 Atk. 51, it is said that a bill for the discovery of assets was dismissed upon a plea that the administrator was not

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a party, although it was admitted \*that he was insolvent. In the same case, 3 Atk. 341, the Reporter remarks, that the plea was allowed: but it does not appear that the bill was dismissed. That is not material as it regards the principal question. It is sufficient that the complainant was not allowed to proceed without making him a party. And in the case of *Elliott v. Drayton*, 3 Desaus. Rep. 29, it was held, that an executor must be called to an account before a creditor could have recourse to a legatee. In *Cooper's Equity Pleading*, 34, it is said that all trustees, executors, &c. must be parties to a suit for the payment of legacies, annuities, marshalling of assets, &c. From all these authorities, as well as from the general principles of law, it is manifest, that an executor or administrator is generally the only organ through whom a creditor can get the funds of an estate, and is the only person to whom a debtor is answerable.

There are however special cases which form an exception to the rule. In the case

<sup>1</sup>See *Farley v. Farley* [1 McCord, Eq. 506], and *Bradford v. Felder* [2 McCord, Eq. 168], *Columbia*, January 1827.



of *Burrows v. Elton*, 11 Ves. Jun. 29, a creditor was allowed to file a bill in behalf of himself and other creditors, for the purpose of getting in the funds of the estate, and to have a receiver appointed, where the executor was a bankrupt, and would not act. But even in that case it was necessary to make the executor a party. In the case of *Alsager v. Rowley*, 6 Ves. 750, Lord Eldon said, there cannot be a bill by a legatee against a debtor except in a special case; for there can regularly be no suit against the debtor but by the executor, who has the right both in law and equity; but that in order to authorize such a proceeding there must be collusion, or insolvency, or some special case.

The next question is, what will constitute such special case, and does this come within the rule? In the case of *Heath v. Percival*, 1 P. Wms. 683, it was held that a bill by a creditor against a residuary legatee might be

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\*sustained without making the executor a party where he had been outlawed and after inquiry could not be found. And a bill may be brought against an heir for the discovery of real assets for the purpose of pursuing a debt, upon suggesting that the representative is contesting in the Ecclesiastical Court. *Plunket v. Penton*, 2 Atk. 51. It has been decided in our own Courts that a creditor may follow the land in the hands of the heir when the executor is dead and insolvent. *Higginson v. Air*, 1 Desaus. Rep. 427. And in the case of *Riddle v. Mandeville*, 5 Cranch, 330 [3 L. Ed. 114], it is said a bill may be sustained by a creditor against a legatee when the executor is insolvent, because he will be ultimately responsible. If that is a correct position then perhaps this bill may be supported on that ground; for the defendants are the heirs and personal representatives of *Bailey Forrester*, *C. C. Forrester*, *Susannah Forrester*, and *Alexander Forrester*, so that if either of those persons were liable, the responsibility must ultimately fall upon these defendants. But in that view of the subject, it would appear to me, it ought to be suggested that there are no other creditors, or the bill ought to have been brought in behalf of all the creditors.

It is contended that the defendants are liable as executors in their own wrong, and the act of 1789, 1 Brev. 337, is relied on in support of that ground. But that act does not declare what shall constitute an executor de son tort. It only provides, that where a person has made himself liable as such he may be sued and made answerable in the same manner as if he had been a lawful executor or administrator. But in that case he must be sued as executor. This bill, therefore, will not enable us to consider that question, nor has the evidence offered been such as to authorize us to conclude that the defendants could have been made liable in that

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character. Indeed it is obvious that the complainant did not originally contemplate such a ground of liability.

The strong ground on which the defendants appeared to rely in the Court below, and which is made the principal ground of appeal to this Court, and which appears to have been thought by the Chancellor an important one in the case, is, that Mrs. Forrester, the executrix of *C. C. Forrester*, had fully administered his estate. The Commissioner, after a critical investigation of the case, came to the conclusion that the estate had been fully administered. To that part of the report there was an exception which has been sustained by the Chancellor.

Many years have elapsed since the death of *C. C. Forrester*. All the parties are dead who might be supposed acquainted with the transactions of his estate. The defendants, one of whom is still a minor, could not be expected to possess the means of explaining complicated transactions of that sort. The Chancellor, however, appears to have been mistaken in supposing that Mrs. Forrester had no property, except what she derived from her husband, or from the proceeds of his estate. The circumstance of her having left considerable property to his children, therefore, does not authorize the inference that she had not fully and honestly administered. We are, however, now released from the consideration of that question, as it is admitted by the complainants that she had fully administered. And where the parties agree as to any particular fact which might otherwise appear doubtful and difficult to be ascertained, the Court will feel no obligation to inquire into the truth of the admission. The case therefore is stripped of many of the difficulties which appeared at first to have been presented to the Court, and most of the observations which have been made might have been spared, but for the purpose of settling some of the principles involved in the discussion.

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\*It still remains to be determined whether the complainants can avail themselves of the proceeds of certain lands belonging to *C. C. Forrester*, which, it appears by the report of the Commissioner, have been sold, and which have come into the hands of these defendants. On this question we can expect to obtain but little information from the English books; as lands in that country are not subject to the payment of debts, except in particular cases where the heir is bound by contract. But it appears by the case of *Plunket v. Penton*, above quoted, that a bill may be brought by a creditor against an heir for the discovery of real assets, where there is a contest in the Ecclesiastical Court respecting the personal estate. And in the case of *Higginson v. Air*, 1 Desaus. Rep. 427, it was decided, that a creditor might follow

the lands of the debtor into the hands of the heir when the executor died insolvent. That case appears conclusive of this; for although the executrix did not die insolvent, yet she had fully administered, and the creditor therefore had no resource except to the land which the executrix could not dispose of in the course of the administration, not being so authorized by the will. It is contended that by the act of 1759, P. Laws, 250, 2 Brev. 1, lands are made assets for the payment of debts, and are equally at the disposal of the executor as personal estate. How far executors and administrators have the management of, or may exercise any control over, the lands of their testator or intestate in this state remains, as far as I am informed, still to be settled. They cannot even sell the personal estate without permission of the Ordinary. The Ordinary is authorized to sell the perishable property only, except for the purpose of distribution or payment of debts. But from the nature of a part of the property of this estate the executor must necessarily exercise some control over the real

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estate. \*Slaves cannot in most instances be well employed, except in the cultivation of the land where the testator dies possessed of lands. They must therefore be employed under the superintendence of the executor. That would seem to impose upon him the necessity of employing overseers, paying taxes, receiving the profits, and generally superintending the whole economy of the plantation. But it gives no power to sell, nor does he derive any from the act of the legislature. The act makes lands, houses, &c. assets for the payment of debts in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and they may be seized on and sold for that purpose. The executor may be the organ through which the land may be sold, by obtaining a judgment for that purpose on a suit against him. If therefore there had been any executor or administrator, against whom an action could have been brought, the complainants might not have been driven to the necessity of resorting to the Court of Equity. It is said the complainants are the executors of C. C. Forrester, and although they have never qualified, they must be regarded as the legal representatives of the estate. Admitting that to be a correct position, it would not alter the case; for being the representatives of both estates they could not sue themselves. And the method which they have now adopted was the only course which could have been pursued. I am of opinion, therefore, that the bill was properly sustained. I do not however rest my opinion on the ground that these defendants must in any event be ultimately responsible, but upon the ground that the personal estate had been fully administered by the executrix in

her life time, and that the land was the only available fund out of which the debt could be paid. And the necessity of resorting to this proceeding is increased by the

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circumstances of the \*land having been sold and the proceeds paid over to the defendants. This view of the subject dispenses with the necessity of a particular consideration of the first, second, and third grounds of exception to the decree.

With regard to the fourth ground, this does not appear to be what in contemplation of law is considered a stale claim. The executrix continued making payments until the year 1814. In the year 1817 she died. The estate was probably considered at that time insolvent, and so it might have been, as it is now admitted that the personal estate was fully administered in her life time. In 1820 the land was sold at the instance of these defendants. That in all probability was the first intimation that the complainants had that such a fund remained for the payment of their debt. But still it was necessary first to call the administrator of Mrs. Forrester to an account. A bill for that purpose was filed in the year 1822, which abated by his death. In the year 1823 the present bill was filed. The complainants' testator has also died, so that there does not appear to have been any such want of vigilance on the part of the complainants as made it the duty of the Chancellor to reject the account on the ground of its being a stale demand.

The fifth exception to the decree is, that the bill was filed to recover a security debt, which is alone mentioned in the bill, and that so much of the decree as allows a fifty-two pound debt of a distinct nature is erroneous. By a reference to the account current rendered in this case, it appears that the whole of complainants' demand is for money paid by his testator to Douglass and Shaw, on account of the security debt, except £16 19s. 2d., the balance of a former account, of the nature of which we are not informed, and an item of £1 19s., being so much paid for C. C. Forrester for the storage of gunpowder. These are the only two items therefore which can be embraced in the exception. And it goes more to the

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\*form of the bill than to the substance of the demand; for the Commissioner reports that the account was clearly established, and it is not now pretended that it was not satisfactorily proved. But as it is contended that the object of the bill professes to be for advances made on account of the specific debt of Douglass and Shaw, and no other, the other charges ought not to be taken into the calculation. It appears that these items constitute the part of a general balance of an account brought down from the year 1804 to the 21st of February, 1814. Several pay-



ments have been made in the meantime. A balance has been struck at the time of each payment, allowing interest on those balances up to the time of the last payment. All the receipts, up to the 10th of April, 1810, inclusive, specify particularly that the payment was made on account of the debt due to Douglass and Shaw. If the account stopped here I should think it at least doubtful whether the disputed accounts could be recovered; because the payments having been made on account of the specific debt of Douglass and Shaw could not extinguish the other demand. And those demands not being specified in the bill ought not to have been taken into the calculation by the Commissioner. In February, 1814, Mrs. Forrester made a payment on the general account, without specifying to which particular part of the demand it should be applied. The interest on the whole account was then calculated and a balance struck. The complainant had a right to apply the payment to such part of the account as he thought proper. He did apply it to the extinguishment of the private debt, as appears by his charging the balance as due on account of the debt of Douglass and Shaw. Mrs. Forrester might perhaps then have objected to the payment of interest on that part of the account. Or she may have considered it one on which interest ought to have been paid.

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However \*that may be, she consented to have it settled in that manner. There was nothing unjust nor unconscientious in it. The Court will not suffer an account of twenty years standing to be unravelled at this late day, to give the party a benefit of a mere formal exception. The whole account may be considered as extinguished, except the balance of the European debt which is now sued for. The complainants therefore are entitled to a decree for that amount, with the interest upon it, to be paid out of the proceeds of the land which have come into the hands of the defendants since the death of the executrix.

It is ordered and decreed, that the defendants do account for the proceeds of the Stony creek land, with interest thereon, from the time the same came into their hands, and that it be referred to the Commissioner to ascertain the time when the same was received, and the amount received by each respectively. And that the same be paid over to the complainants, or so much thereof as shall be necessary to pay and satisfy their demand, with the interest due thereon, in proportion to the amount respectively received by each defendant. And that the costs be paid in the same proportion out of the said fund. And that so much of the Chancellor's decree as conflicts with this decree be reversed.

Decree modified.

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\*LEWIS ROBERTSON v. DAVID P. BINGLEY and HENRY LESLIE.

(Charleston. April Term, 1826.)

[Equity ⇨3.]

A new case may exist without involving a new principle.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 7–12; Dec. Dig. ⇨3.]

[Injunction ⇨38.]

Pending a litigation equity will interpose to preserve the property in dispute, if the Court where it is litigated has not competent powers to protect it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86–90; Dec. Dig. ⇨38.]

[Injunction ⇨38.]

It seems equity may interfere to prevent slaves being carried off pending an action of detinue for them; but not in cases of trover where the plaintiff sues for damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86–90; Dec. Dig. ⇨38.]

[Injunction ⇨152.]

On an order for an injunction to restrain a party from carrying off slaves, the Chancellor cannot order them to be sold or to be transferred to the complainant before the bill is heard.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. ⇨152.]

[Equity ⇨35.]

When a bill in equity is merely ancillary to a suit at law, if the latter abates the former does also.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 102; Dec. Dig. ⇨35.]

[Contempt ⇨49.]

An attachment should not be granted for a contempt where the bill is no longer pending.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 135; Dec. Dig. ⇨49.]

[Equity ⇨62.]

Equity can not violate the rules of law to give relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. ⇨62.]

[Appeal and Error ⇨68.]

No appeal lies from an interlocutory order, viz. such as do not put a final end to the case, or establish any principle which will finally affect the merits of the case or deprive the party of any benefit he may have at the final hearing.

[Ed. Note.—Cited in Murray v. Stevens, Rich. Eq. Cas. 208.]

For other cases, see Appeal and Error, Cent. Dig. § 344; Dec. Dig. ⇨68.]

[Appeal and Error ⇨70.]

An order to amend is interlocutory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 370; Dec. Dig. ⇨70.]

[Equity ⇨215.]

A defendant cannot demur and answer to the same matter, but may to different parts of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 488; Dec. Dig. ⇨215.]

[Equity ⇨237.]

An answer to the same part overrules the demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 492; Dec. Dig. ⇨237.]

[Equity ⚡184.]

An answer which puts the whole merits in issue is sufficient.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 422-425; Dec. Dig. ⚡184.]

[Equity ⚡215.]

Defendant may deny the discovery and demand to the relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 488; Dec. Dig. ⚡215.]

[Equity ⚡185.]

[Where defendant submits to answer, he must answer fully.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 428; Dec. Dig. ⚡185.]

[Injunction ⚡182.]

[Where an injunction was issued on a bill in the aid of an action of trover, the whole proceeding fell on the death of defendant.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 393; Dec. Dig. ⚡182.]

The circumstances of this case were the following. It appeared that about April term, in the year 1815, the complainant commenced an action of trover against one Edward Bingley, to try his right to certain negroes which he claimed under a deed of gift from Lewis Box, then deceased, of whom Bingley was the principal legatee and executor. While the action was pending, in November 1817, the complainant filed a bill in the Court of Equity setting forth that Bingley had conveyed the slaves away by way of mortgage to one ——— Daniel and ——— Leslie, for a debt which he owed them; and that John R. Cleary, the then sheriff of Charleston district, had them in execution, and was about to sell them in satisfaction of the debt. The complainant prayed that the defendants, Bingley and Cleary, might be enjoined from proceeding to sell under the mortgage; and that Bingley might be compelled to enter into security for the forthcoming of the said slaves, &c. Whereupon Chancellor Waties on the 12th of December 1817 ordered an injunction to restrain the defendants from selling the slaves Peter, Rind, Isaac, Plenty, and Charles; and that the defendant E. Bingley, and in his default the plaintiff, be entitled to take possession of the slaves upon entering good security, to be approved by the Commissioner of the Court, for their forthcoming upon the determination of the action at law; and in his default, if the plaintiff should enter into security as was ordered, the defendant should deliver him up the slaves and give him peaceable possession of them. And it

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was further \*ordered, that in case neither the plaintiff nor defendant Bingley should enter into such security, the slaves should be sold by the sheriff on the first Monday in February then next, and the money paid into the hands of the Commissioner of the Court, to be paid over to the complainant in case he should succeed at law. And if he should

not succeed at law, then to abide the further order of this Court.

Whether that bond was ever entered into or not, there was no evidence except the affidavit of Henry Leslie, the defendant.

Before the action at law was tried Bingley died. On the 16th of February 1819, about two or three months after the death of Bingley, Henry Leslie, one of the present defendants, made the following affidavit. "South Carolina, Charleston district, Henry Leslie, being duly sworn, deposeth that he was security to a bond conditioned for the forthcoming of certain negroes named in a bill of injunction filed by Lewis Robertson against Edward Bingley. That the said negroes were by the said Edward Bingley delivered into the custody of this deponent, in order to be forthcoming to abide the future order of the Honourable the Court of Equity, pursuant to order made by his Honour Judge Waties. That for two years past this deponent had retained said negroes to answer the condition of his said bond. That said Edward Bingley is now deceased, and his brother David P. Bingley has administered on his estate. That instead of reviving said suit, to secure which the said bond had been taken by order of this Honourable Court, Lewis Robertson did on Monday night, the 1st instant, clandestinely inveigle and carry away said negroes from the peaceable custody of this deponent and said administrator, with a view to elude the order aforesaid; and this deponent had good information that said Lewis was about to carry said negroes to

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Alabama. And he stated \*to this deponent that if pursued by this deponent and said administrator on said night he was prepared to shoot them. The said Lewis well knowing that the said bonds were in full force, and said property was kept in the state, according to the decree of the Court of Equity aforesaid. (Signed) Henry Leslie. Sworn to before me, this 16th of February 1819, Lewis Roux, Q. W." On that affidavit he obtained from Chancellor Gaillard on the same day the following order. "On motion of B. F. Hunt, ordered that the said Lewis do shew cause on Wednesday, the 17th instant, why he should not be attached for contempt of this Honourable Court for removing and secreting the negroes ordered by this Court to remain subject to its order."

What further proceedings took place in consequence of that order did not appear. It was, however, stated to the Court that Robertson was actually attached, and remained in gaol until the 19th of June, when upon delivering up the negroes to Leslie, the following order was made by Chancellor Gaillard.

"The defendant Robertson having complied with the decree of the Court, it is ordered, on motion of Mr. Elliott, that he be discharged from gaol by the sheriff on his paying the le-



gal fees incurred by his detention. June 4th 1819." After this discharge from gaol it appeared that Robertson commenced an action of trover against David P. Bingley, who it appeared administered on the estate of Edward Bingley, for the same negroes. And in September 1821 he filed the present bill against Bingley and Leslie. This was called a bill of revivor, and after stating all the proceedings heretofore detailed, the complainant prayed, among other things, that the proceedings, both in this Court, and that at law, might be revived; that the defendants might discover the issue of the said slaves and their names, that they might be ordered to give security for their forthcoming, &c.

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\*The defendant Leslie, in his answer, said that he purchased the negroes in question of Edward Bingley in 1816, for a full and valuable consideration, without notice of complainant's claim. That there was no issue, and submitted by way of demurrer, that the Court of Equity had no jurisdiction. To this answer the complainant's solicitor took the following exceptions.

First. That he had not answered so much of the bill as stated that complainant commenced his action at law in Colleton district, to recover the negroes named in the bill from Edward Bingley.

Second. That he had not answered so much of the bill as stated that complainant afterwards filed his bill against Bingley and Henry Leslie, and that the Court enjoined the defendants from selling the property, and ordered security to be given for the forthcoming of the negroes, on the determination of the action at law.

Third. That he had not answered, whether Henry Leslie did not enter into a bond with Edward Bingley to the Commissioner of this Court, conditioned for the forthcoming of the negroes, on the determination of the action at law.

Fourth. That he had not answered to so much of the bill as stated, that after the death of Edward Bingley he the said Henry Leslie made application to this Court setting forth, that he was in possession of the negroes above mentioned under the order of this Court. That complainant had taken them out of his possession, and praying that complainant might be attached for contempt of the order of this Court in doing so, and that complainant was thereupon attached.

Fifth. That he had answered so much as stated that complainant in order to purge his contempt was compelled to restore the negroes; that they were restored to Henry Leslie's possession, and thereupon complainant was discharged.

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\*Sixth. That he had not answered whether the said negroes were in his possession, or in whose possession, or where.

In all which particulars the complainant

humbly insists, that the said Henry Leslie's answer is evasive and insufficient. Wherefore he excepts thereto, and prays that the said answer may be taken off the file, that the defendant may be compelled to put in a full and sufficient answer.

The above exceptions, after having been argued before the Commissioner, were sustained, and it was ordered that the defendant should answer more fully as required by the six exceptions.

The exceptions were again argued before Chancellor De Saussure.

Chancellor. This cause came on in rather an unusual way, certainly not on its merits, but on exceptions to the answer of Leslie one of the defendants, which it will be proper to decide on. There is, however, a plea to the jurisdiction and a demurrer, which must first be disposed of; for if either of them be maintained there will be an end of the case. The rule is, as was contended for by the counsel for the complainant, that a demurrer and an answer ought not to be put in together; and the answer overrules the plea, because the plea or the demurrer is to shew that the defendant is not bound to answer. In *Taylor v. Milner*, 10 Ves. 444, it was decided that if a defendant even obtains an order for time to answer, he cannot put in a demurrer with his answer, unless in special cases and with leave, or the demurrer will be set aside. And the rule is settled, that though probably the defendant might have objected to answer at all, yet having answered, he is bound to answer fully, and make a full disclosure. *Taylor v. Milner*, 11 Ves. 41. Sir W. Grant, the

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Master of the Rolls, in his judgment in this case, said that it was too late to argue, whether, upon the case made by the bill then before him, the complainant was entitled to a discovery or not; for there is no difference whether the Court has determined that the bill is such as the defendant must answer, or whether the defendant has, by his own conduct, precluded himself from raising that question. It is now determined (he says) that the defendant must answer. That he must answer fully is a necessary consequence. See also — *v. Harrison et al.*, 4 Madd. Cha. Rep. 252, where the answer denied the partnership alleged in the bill, and refused to set forth any account. On exceptions to the answer for insufficiency in not having set forth the accounts, the Vice Chancellor said, that point was decided. If the defendant answer, he must answer fully. The defendant should have pleaded. The demurrer therefore must be put out of the way, and the exceptions to the answer must prevail if the answer be insufficient, unless the objection to the jurisdiction of the Court, on the ground that there is plain and adequate remedy at law should prevail. On examining the circumstances they will be found to form a complete case. Robertson claims under a

bill of sale of long standing, which defendants allege was voluntary, and to an infant, and that no possession followed the gift. On the other hand, Edward Bingley had pretended to mortgage the slaves to Henry Leslie one of the defendants for a debt. The facts being complicated and the remedy at law difficult, Robertson filed a bill in equity, and an order was made by Judge Waties for a special injunction, by the terms of which the possession of the slaves was directed to be placed in the hands of the defendant Henry Leslie, on his giving security to abide the event of the suit at law. Under that decree Leslie got possession of the slaves, and even caused Robertson to be imprisoned for violating that order. Thus acting under and

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having the full benefit of the order of the Court whose jurisdiction he now disputes, Leslie pretends to have obtained a right to the slaves under a mortgage from Edward Bingley. Meanwhile, availing himself of the possession of the slaves obtained by the order of this Court, he has gone out of the limits of this state, and carried off the slaves. Under all these circumstances, I think the jurisdiction of this Court ought to be maintained, or the remedy of the complainant, if his claims are well grounded, would be eluded by the defendants, under the advantage they have obtained by the order of the Court exercising jurisdiction on the case. This would be intolerable; for it is manifest that the complainant would have no remedy in this state if this bill be dismissed.

As to the exceptions themselves to the answer of Henry Leslie, it is a well settled rule that if the defendant answers at all he is bound to answer fully. Some of the exceptions might, to be sure, be considered as relating to matters which were comprehended and sufficiently established in the records and proceedings and orders heretofore made, that it might be supposed that it was unnecessary to answer these matters alleged in the bill. There are, however, such matters of fact growing out of these records and orders and proceedings, and so mingled up with the records, that to make out an entire, full and consistent case, it was proper for the defendant to have answered them. I therefore concur with the Commissioner in Equity in ordering, that the exceptions be sustained, and the defendants be ordered to answer fully as to the points excepted.

The defendant appealed, and moved that the decree of the Chancellor might be reversed on the following grounds:

That the case was a plain action of trover, and the Court of Equity had no jurisdiction.

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\*That the grounds of demurrer were sufficient, and supported, as they ought to have been, by the answer; and should have been sustained. And

That the answer was sufficient.

On the part of the complainant, it was objected, that this was an appeal from the order of the Chancellor directing the defendant to answer more fully, which, being a mere interlocutory order, was not the subject of an appeal.

Hunt, for the motion. All the confusion of the case arises from the Judge's not insisting on hearing the questions in their order: 1st. The plea. 2d. The demurrer. 3d. The answer.

But although there were a plea and demurrer, he allowed the complainant to compel an answer, and then to except to its sufficiency. A demurrer must be supported by an answer, and that sworn to. *Pogson v. Owen*, 3 De-saus. Rep. 36. A plea is sometimes supported by a full answer. The decree mis-states the reason of filing the bill, and of the special order. It was not because the facts were complex, but to procure security for the forthcoming of the property. The Chancellor mis-states the fact, that the slaves were directed to be placed in Leslie's hands; he was but the security of Bingley. The bill against Edward Bingley was filed the 25th of November 1817. The bill of revivor, as it is called, was filed the 12th of September, 1821. Box died in 1815. The first suit at law was in 1815. The prayer of the bill was that security should be given, and it was given. Leslie was not a party to this suit, but was security for Bingley; and if the bond is forfeited, he may proceed. No suit at law has been brought against Leslie. The bill of revivor states that the claim of complainant was never disputed. As to the answer—"If

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the defendant denies some substantive fact which, if admitted, would give relief until the truth of that fact be disposed of, no further answer shall be compelled," per Lord Eldon in the case of *Dolder v. Lord Huntingfield*; and see *Donegal v. Stewart*, 3 Ves. 446, and *Phillips v. Carey*, 4 Ves. 107.

It is only necessary that the defendant should answer the leading fact; but if he answer as to that, he may demur or plead as to the rest. 11 Ves. 383. Defendant need not answer what is matter of record. Our Court of Equity is of limited jurisdiction; and therefore consent cannot give jurisdiction.

Where a defendant insists in his answer on the statute of limitations, it is the same as if pleaded, 2 P. Wms. 145. Defendant is not bound to answer any thing which is wholly immaterial to the relief prayed. *Agar v. The Regent's Canal Company*, Coop. Rep. 212. A defendant, stating a purchase for valuable consideration without notice, is not compelled to answer further. *Jerrard v. Saunders*, 2 Ves. Jun. 454. "The true tests, whether questions are to be answered or not, are, 1st. Whether the answer might lead to crimination. 2d. Whether they are relevant, and



may be material to the case of the plaintiff." *Mont v. Scot*, 3 Price's Rep. 477.

The ground taken is as follows. Complainant brought an action of trover for certain negroes, and filed a bill against the defendant Bingley, to restrain him from taking the negroes out of the state pendente lite. On this bill an injunction was granted. It prayed no relief, and no subpoena was served; but Leslie became the security to the injunction bond. Bingley died, and the suit at law abated; no proceedings were for some time had, and Leslie, who claimed the negroes sued for by virtue of a purchase from Bingley prior to the suit of Robinson, left the state and took the negroes with him. Then the complainant to the original bill filed a bill of revivor, and published a notice

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for Leslie to make him a party, \*and to get the benefit of the original order for an injunction. He contended that the first bill was bad, as it stated no equity, and the Court had no jurisdiction. It was a plain question of title, and the appropriate remedy was at law, and the appropriate security bail to the action. That Leslie was no party to the bill, and therefore it could not be revived against him. That, in his answer to the bill of revivor, he stated enough to induce the Court to dismiss the bill, and that therefore the order for him to make further answer was wrong. That it was an absurdity to compel a defendant to make any further answer than to state enough to entitle him, at all events, to a decree. That having answered thus much he had pleaded in bar and demurred to complainant's own case as made; and he now appealed to this Court to dismiss the bill, which would settle all questions as to the pleadings.

Petigru, Att. Gen., contra. The grounds on which complainant claims relief have been misconceived. It is said that the order of 1817 for the special injunction was not warranted either by the rules of law or equity, and this bill being founded on it must fall with it. Defendant acquiesced in it, and availed himself of it to regain the possession of the negroes when complainant had taken them away; and the object of the bill is to place complainant in the same condition in which the proceedings in that case left him.

Pending a litigation the property in dispute is often in danger of being lost or injured, and the Court of Equity would lend its aid to prevent it. *Mitford*, 109. 9 *Wheat*. 738. This case is made by the first bill against Edward Bingley. The original order was therefore within the legitimate powers of the Court. On the faith of the bond given by him, with Leslie as security, the property was left in his possession; and nothing

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could discharge \*Leslie from this liability but the return of the property after the re-

covery against David P. Bingley. The case of *Pulteney v. Warren*, 6 Ves. 73, is analogous to the present and illustrative of the extent of the equity jurisdiction.

If the defendant answers he must answer fully. It is a solecism in pleading to say that a defendant should answer, to say that he would not answer. *Coop. Eq. Pl.* 312. 1 Ves. 41. *Beames' Pleas in Equity*, 38. 4 *Madd. Rep.* 452. A defendant cannot answer and demur to the same bill, or to the same part of it. 6 *Johns. Cha. Rep.* 214.

The order that the defendant should answer over is merely interlocutory; and if this motion is entertained it will follow that an appeal will lie for every interlocutory order, which would be attended with great delay and inconvenience.

Hunt, in reply. The only cases in which the Court of Equity will interfere to prevent a loss or destruction of property in litigation in law are those in which the proceeding is in rem. *Eden on Injunctions*, 196. And even in those cases the Court will not interfere when the answer denies complainant's right of property. Equity is reluctant to interfere with suits depending at law, and will not interfere when the legal rights are disputed. *Eden on Injunctions*, 358.

*Curia, per NOTT, J.* It would seem to me to be the most regular first to dispose of the question with regard to the right of appeal. But as that objection was not made until after the question of jurisdiction had been fully argued on both sides, it will be so much time lost to send the case back upon a mere matter of form, in order to let the same question come up again in another shape. I will therefore proceed to consider the principal question, as it appears on the face of the

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proceedings, without regard to the regularity of the proceedings themselves. That will require us to go back to the original action at law to inquire into the regularity of the first injunction and the proceedings connected with it. And here it will be observed that in the first instance the complainant did not pretend that his claim was of such a nature as to give jurisdiction to the Court of Equity. It was an action of trover to try the right of property. The aid of the Court of Equity was required merely as ancillary to the Court of Law, to restrain the defendant from parting with the property in contest, so that he might have the benefit of his judgment if he should succeed in establishing his right. And that at once presents the question, how far the Court of Equity has a right to interpose its authority in such a case?

That is a question of no inconsiderable difficulty and importance. I do not recollect ever to have heard of an injunction having been issued in this state to restrain a defendant in an action of trover from parting with

the property until the right had been tried at law. No instance of such a case has been produced from the English books. And if such a one can be found, I am induced to think the scrutinizing eye of the Attorney General would have fallen upon it. It does not indeed follow, even though no such case can be found, that the power does not exist. If from analogy the case can be brought within the principles of equity jurisdiction, the authority of the Court ought to be maintained even though the power may not heretofore have been exercised. A new case may exist without involving any new principle. If it be true, that in an action of trover the effect of a judgment of law may be eluded by a transfer of the property the moment it is about to be obtained, and that a person may thus be running a perpetual race in pursuit of justice without ever being able to overtake it, there is certainly a great defect in

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our system of jurisprudence, which \*calls loudly for redress. And if the Courts of Equity can, consistently with the settled doctrines of that Court, restrain the person in possession from transferring the property until the right can be determined, I am not disposed to be the first to say they shall not exercise it. And although I have not been able to find any case directly in point, there are many cases, both in the English and American books, bearing so strong a resemblance to such a case that, in point of principle, it will be somewhat difficult to draw a line of distinction between them. Mr. Mitford (now Lord Redesdale) in his Treatise upon Pleading in the Court of Chancery, 108, says, "Courts of Equity will in many cases act as ancillary to the administration of justice in other Courts, by removing impediments to the fair decision of a question." And in illustration of the rule he says in the next page, that pending a litigation the property in dispute is often in danger of being lost or injured, and in such cases a Court of Equity will interpose to preserve it, if the powers of the Court in which the litigation is are insufficient for that purpose. Thus, during a suit in an Ecclesiastical Court for administration of the effects of a person dead, a Court of Equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined. So an injunction will be granted to restrain the endorsement or negotiation of a negotiable note, or to restrain the transfer of stock. *Eden on Injunctions*, 210, 11. Lord Chedworth v. Edwards, 8 Ves. 46. If it be said, that it is allowed in England in those particular cases from motives of policy peculiar to that country, I answer, that the negro property of this country has as high claims to supremacy over every other personal chattel as bank stock or negotiable paper can have in England. It is therefore at least worthy of consideration, whether a Court of Equity

may not, in perfect consistence with settled

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principles, interfere in those cases. \*Perhaps a distinction may be taken between cases where the specific property is sought for as in detinue, from those cases where damages alone can be recovered as in trover. For in trover the specific property would not be liable to the judgment in preference to any other, even if the party should be restrained from parting with it during the litigation; and there may appear some inconsistency in requiring the party to give security to have the property forthcoming at the termination of the suit, when it is not the object of the action to obtain the property itself but damages for the conversion. It might seem, therefore, more congenial with the spirit of equity jurisdiction, to limit it to the action of detinue, and all the advantages would be attained; for there are few cases, if any, where trover will lie, that detinue may not be maintained. But it is not my intention at present to express any decided opinion on the subject; because I do not consider it necessary to the decision of this case. I will not, therefore, say that the Chancellor did wrong in granting the injunction to restrain the defendant from parting with the property. But, perhaps, that was as far as he ought to have gone until the answers of the defendants came in. The authority to grant injunctions is one of the highest prerogatives of the Court of Chancery. It ought therefore to be exercised with a due regard to the rights of all the parties in interest, and with that degree of caution which, if possible, will leave all those rights unimpaired. Whether, therefore, that part of the order which directs the property to be transferred to the complainant, or to be sold in the event of the security not being given, upon the mere ex parte statement of the complainant, without affording the defendants an opportunity of being heard, was not premature, is at least questionable. These observations, however, are made more with a view to the practice in future in similar cases, than on account of any influence which they can

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have on the \*decision of this case; for the parties all acquiesced at the time, and the period has long gone by when the exception ought to have been taken if any had been intended. Before the answers of the defendants were put in, or even the subpoenas served on the action, Bingley, the defendant, died. By his death the suits both of law and equity abated. And in my opinion, so far as regards any thing which has been done since, all the proceedings may be considered as buried with him. There must have been necessarily an end of all those proceedings, because the action at law was for a tort which died with the defendant, and could not survive to his representative. And I have already shewn, that the bill in equity was without foundation



when the action at law was gone; for being merely ancillary to the action at law the incident went with the principal.

This would bring me to the consideration of the proceedings, founded on the affidavit of Leslie, relative to the clandestine possession alleged to have been taken of the negroes by the complainant. But I will pass over that part of the case for the present, for the purpose of going into the consideration of the bill which is now before us. Enough has been said to shew that this can not be considered as a bill of revivor. The action against Edward Bingley was an action of trover which, being a tort, died with him: it did not survive to his representative. If the defendants or either of them have intermeddled with the property of the complainant, they are individually liable, but they are not liable in the character of representative of Edward Bingley. Besides, neither of these defendants were parties to the former bill. Leslie's name is indeed introduced as having purchased the property of Bingley, but no process is prayed against him. 2 Madd. Cha. 174. But even if he was a party he was only nominally so, and the bill having abated as to Bingley, the very

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substratum of the \*proceedings against Leslie failed. It has already been shewn that the only foundation for the first bill was, the allegation that the defendant Edward Bingley was about to transfer or remove the property. But such an allegation against him furnished no ground for an injunction against either of these defendants. To enable the complainant to sustain a bill against the present defendants, some such charge should have been made against them, or some other ground of equity jurisdiction exhibited. But I can discover none, unless calling upon the defendants to disclose the names of the issue be one. And as they deny that there is any issue that ground fails. The grounds on which the Chancellor has sustained the jurisdiction of the Court are:—

First. That the case is complicated and the remedy at law difficult.

Second. That as the defendant Leslie availed himself of the authority of the Court of Equity to get possession of the property, he ought not to be permitted to deny the complainant the aid of the Court to restore him the possession if he is entitled to it.

With regard to the first ground, the case does not appear to me complicated, nor the remedy at law difficult. The complainant claims the property under a deed of gift from Lewis Box. The defendant Leslie claims it under a bill of sale from Edward Bingley, the executor and legatee of Lewis Box. Nothing could be more simple than the title on each side, unless it was the remedy which might have been by a plain action of detinue or trover.

The principle assumed in the second ground

may, to a certain extent, be correct. **But it must be taken with some limitation. A Court must deal out equal handed justice to all the parties before it. It cannot at the same time have jurisdiction for one man and not for another standing in the same situation. If a Court should direct a man to be impris-**

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oned without any justifiable cause, or \*even where it has no jurisdiction, it may order him to be released again. Perhaps the case now under consideration may furnish as good an illustration of the rule as any that can be adduced. If the complainant had inveigled the property from the defendant during the pendency of the former suit, and while it was at his own request put into the keeping of the Court of Equity, I have no doubt but that he might have been attached for a contempt of the Court, and held in custody until he restored the property. But as soon as those proceedings ceased to exist the authority of the Court over the property ceased with them. The taking of the negroes by Robertson was a simple trespass, and was no more a contempt of the process of the Court of Equity than if his bill had never been filed. Ordering the attachment against Robertson upon the affidavit of Leslie, where no bill was pending, appears to me therefore as rather a summary proceeding, which even the Court of Equity, in the plenitude of its power, ought not to have allowed. But suppose the Court in that case, for some reasons which we do not now see, to have acted within the true sphere of its authority, it would not give jurisdiction in this case. Suppose the Court of Equity should, by means of an attachment or any other process, direct the sheriff to turn a man out of his house, and put another into possession—that would not authorize the party ejected to bring an action of ejectment in the Court of Equity to regain the possession. And an action of trover can no more be maintained in a Court of Equity than an action of ejectment. To be sure, this anomalous proceeding has placed the complainant in a situation in which he would not otherwise have been placed. But a similar order by a Judge of the Common Pleas, or a common magistrate, or even by an individual acting without any authority, would have placed him precisely in the same situation. Assuming a jurisdiction in one case

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which a \*Court does not possess cannot extend its authority to another case over which it had not jurisdiction before. And this Court can not violate all the rules of law to give relief to a person who may even be remediless without such relief.

But it appears to me that the decree of Chancellor De Saussure is bottomed on a misconception of the facts connected with the former bill. He says, "Robertson filed a bill in equity, and an order was made by

Chancellor Waties for a special injunction, by the terms of which the possession of the slaves was directed to be placed in the hands of the defendant Henry Leslie, on his giving security to abide the event of the suit at law. Under that decree Leslie got possession of the slaves and even caused Robertson to be imprisoned for violating that order." Now by a reference to the order made by Chancellor Waties, it will be seen that Leslie's name is not mentioned in it. The order directed that Edward Bingley, who already had the negroes in possession, should give the security. It was not under that decree, as the Chancellor supposes, that Leslie got possession of the slaves. But they were delivered to him by Bingley as a counter security for uniting with him in the bond given for the forthcoming of the slaves at the termination of the suit at law. So that the conclusion of the Chancellor is drawn from a state of facts which does not exist.

After giving the complainant therefore the benefit of the most latitudinary construction of all those proceedings in his favour, I cannot discover any jurisdiction in the Court of Equity to afford relief. Nor can the conduct of Leslie, however justly it may subject him to the censure which has been lavished upon him, vary the rights of the parties in that respect. The bill must therefore be dismissed for want of jurisdiction.

With regard to the preliminary question,

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whether an appeal ought to have been sustained in this case, I feel no difficulty in saying, that if that question had been submitted in the first instance, the case ought not to have been heard. I think there is no rule which ought more rigidly to be adhered to than that an appeal ought not to be allowed from an interlocutory order. There is some difficulty in defining in terms so precise as is desirable what shall be considered such interlocutory order as to preclude an appeal. But I think it may be laid down as a general rule, that an order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed. In this case the defendant was ordered to answer more fully. But that did not deprive him of the benefit of the answer which he had already put in. For if a further answer had been unnecessary it did the party no harm, and therefore he ought to have complied with the order, and reserved his appeal until a final hearing, when perhaps it might have been unnecessary. The delay occasioned by allowing an appeal in every such case would be intolerable. It is difficult, however, for the Court, in most cases, to ascertain the real merits of a mo-

tion, until one half the delay is occasioned which it is the object of the rule to avoid. The Court must therefore appeal to the good sense of the enlightened members of the bar, to assist in carrying their views into effect, when the principles are understood upon which appeals are to be brought up. It is the great interest of the community that business should be promptly dispatched, and it not less the interest of the profession. There is nothing more true than the old maxim, that delay is the denial of justice. And although in this instance it is a question of but little importance, it has

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\*afforded an opportunity of laying down a rule to which the Court must hereafter pertinaciously adhere.

With regard to pleading in the Court of Equity, there is no rule better established, than that a person cannot demur and answer to the same matter. He may demur to one part and answer to another; but an answer to the same part of the bill to which he has demurred overrules the demurrer. It is another general rule, that where a defendant answers he must answer fully. That is to say, he must answer all the material allegations in the bill. What shall be a sufficient answer, however, must always be a matter addressed to the judgment of the Court. An answer to so much of the bill as puts the whole merits of the case in issue is sufficient. For instance, where the bill is for a discovery and relief, and the relief depends upon the discovery, he may deny the discovery and demur to the relief. It is not necessary however to dwell upon this part of the case, as the bill has already been disposed of. The decree of the Chancellor must therefore be reversed, and the bill dismissed.

Decree reversed.

#### I McCord, Eq. 352

PERCIVAL E. VAUX, Executor of Mrs. Elizabeth Nesbit v. ROBERT NESBIT and JOSEPH P. LA BRUCE, Executors of Dr. R. Nesbit.

(Charleston. April Term, 1826.)

[*Aliens* ⇨6.]

An alien devisee may take hold (in exclusion of the next heir, a citizen) until office found.

[Ed. Note.—Cited in *Lawrence v. Beaubien*, 2 Bailey, 647, 24 Am. Dec. 155; *Jenney v. Laurens*, 1 Speers, 365; *Wightman v. Laborde*, Id., 534; *McClenaghan v. McClenaghan*, 1 Strob. Eq. 322, 47 Am. Dec. 532.

For other cases, see *Aliens*, Cent. Dig. § 6; Dec. Dig. ⇨6.]

[*Adverse Possession* ⇨62.]

A person coming into possession under a will cannot obtain a right by possession adversely from others claiming under the same will: possession as to them is fiduciary.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 324-327, 329-332; Dec. Dig. ⇨62.]



[*Aliens* ⚭12.]

Denizenship has no retrospective operation.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 12, 33-46; Dec. Dig. ⚭12.]

[*Aliens* ⚭68.]

The Court has the right, on a question of title, to inquire into the regularity of the proceedings taken by an alien to obtain a certificate of citizenship. The certificate is prima facie conclusive (per De Saussure, Chanc.)

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 145; Dec. Dig. ⚭68.]

[*Aliens* ⚭9.]

An alien can neither take nor hold by descent, and if he is not naturalized at the time of the descent cast, he cannot stand in the way of the next heir's taking.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 21; Dec. Dig. ⚭9.]

[*Aliens* ⚭70.]

Naturalization is not retrospective.

[Ed. Note.—Cited in *Keenan v. Keenan*, 7 Rich. 350; *Tucker v. Atlantic Coast Lumber Co.*, 78 S. C. 138, 59 S. E. 859.

For other cases, see *Aliens*, Cent. Dig. § 155; Dec. Dig. ⚭70.]

[*Aliens* ⚭6.]

An alien may take by purchase and hold against all the world till office found.

[Ed. Note.—Cited in *Lawrence v. Beaubien*, 2 Bailey, 647, 24 Am. Dec. 155; *Jenney v. Laurens*, 1 Speers, 365; *Wightman v. Laborde*, Id., 534; *McClenaghan v. McClenaghan*, 1 Strob. Eq. 322, 47 Am. Dec. 532.

For other cases, see *Aliens*, Cent. Dig. § 6; Dec. Dig. ⚭6.]

[*Aliens* ⚭7.]

An alien at law takes by purchase under a devise from his ancestor, if he takes differently from the law of descents.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 11-17; Dec. Dig. ⚭7.]

[This case is also cited in *Lawrence v. Beaubien*, 2 Bailey, 649, 24 Am. Dec. 155, without specific application.]

The bill stated that Dr. Robert Nesbit died in July 1821, leaving a large, real and personal estate. That before his death, on the

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15th day of March 1818, he duly \*executed his last will and testament, by which he disposed of part of his estate. But that no valid disposition was made of his large and valuable plantation called Medway; nor did he bequeath in any way two bonds of John A. Alston for \$32,000, due to him (the testator) for the plantation called Rice Hope, which he had sold to Mr. Alston. That among other provisions of his will, the testator directed that all his estate should be kept together till his just debts should be paid. That the defendants were executors, and had proved the will, and qualified thereon. That on the death of the testator without children, his widow, Elizabeth Nesbit, was the only person, according to the laws of South Carolina, entitled to his real estate; and that she also was entitled, under those laws, to a moiety of his personal estate undisposed of by his will. That a suit was pending in this Court to settle her

rights, but before she could obtain a decision she departed this life, in 1823. That she left in full force at her death a last will and testament duly executed, by which she devised a moiety of the Medway plantation to Joseph P. La Bruce, and the rest of the real estate, to which she might be entitled, to the complainant; and these devisees were appointed her executors, and had proved, and qualified on her will. That the estate of Dr. Nesbit was much more than sufficient to pay his debts; and that his executors entered, under his will, into the possession of his estates real and personal and had received the rents and profits thereof. The bill prayed for an account of the rents and profits, and of the personal estate; and for a partition of the Medway estate between the complainant and Joseph P. La Bruce.

To this bill Robert Nesbit, executor and devisee of Dr. Robert Nesbit deceased, and Thomas How, nephew and devisee likewise of Dr. Nesbit, filed joint and several pleas to part of the bill, and joint and several answers to other parts thereof.

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\*To so much of the bill as sought a division of the plantation called Medway, or an account of the rents and profits thereof, the defendants pleaded in bar that the said Robert Nesbit, deceased, in and by his last will and testament, duly executed to pass real estate devised. That upon the death of his wife, Elizabeth Nesbit, his Medway plantation should be divided into two equal parts, one of which he gave to his nephew Robert Nesbit How, and the other half to his nephew Thomas How, and their heirs. "And the defendants Robert Nesbit How and Thomas How alleged that they were competent to take and did take the Medway plantation under the said devise—for they aver that R. N. How is a citizen of the United States, and that Thomas How is a denizen of the state of South Carolina; and they are well qualified under those characters to hold and enjoy the said plantations; and the defendants, repeating their plea in bar to part of the said bill, prayed the judgment of the Court, whether they should make any other or further answer to the said bill.

And for further plea to so much of the bill of complainant as sought a division of the Medway plantation, or an account of the rents and profits thereof, the defendants pleaded in bar, that they had held and enjoyed that plantation long before the filing of the bill, and did still hold the same as their own estate in fee, adversely to the claims of the complainants, and all other persons. And that if the complainants or any other persons had any right, title or claim to the said plantation called Medway, (which the defendants denied) the same ought to be tried and litigated in a Court of Common Law, where they had plain and adequate remedy. And they pleaded the same

in bar, and prayed judgment whether they should make any further or other answer.

As to so much of the bill as the defendants had not before respectively pleaded unto,

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the defendants (Robert \*Nesbit How and Thomas How) not waiving the benefit of their said pleas, or either of them, answered that the bonds of Col. J. A. Alston for \$30,000, given to the late Dr. Robert Nesbit, were the individual property of one of the defendants. That these bonds arose from the sale of a plantation called Rice Hope to Col. Alston, to which plantation titles were made, by Thomas Carr and wife, to Dr. Robert Nesbit, in trust for the defendant Robert Nesbit How, who had joined in the conveyances to Col. Alston, and the said bonds were always considered by the testator as the property of and an advancement to the defendants, as appeared also by his last will. That the defendant Robert N. How was willing to account as far as he was accountable; and he exhibited copies of his accounts with the estate. That some debts of the estate were still due, which must be paid out of residuary estate, and not charged on the negroes, specifically left by the testator to the two defendants. They denied that they were accountable for the profits of the Medway plantation, which was exclusively their property, they being competent to take and hold that plantation as citizen and denizen of the state. They denied their accountability since the death of Mrs. Nesbit for the profits arising from the slaves specifically bequeathed to them.

At the hearing of the cause the following facts were agreed upon by the counsel.

That Dr. Robert Nesbit died in July 1821; having previously made and duly executed his last will and testament, to wit, on the 15th of March 1818, which had been proved and recorded. It contained the following provisions.

That, until his debts were paid, the slaves of his wife, under the settlement, should be kept together with his own, and worked jointly as one estate; and his own after her death should be kept together. That out of the income his wife and nephew, Robert Nes-

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bit How, should \*be liberally supported, and the surplus of the crops should be applied to pay his debts. That from and after the payment of his debts the proceeds of the crops should be equally divided between his wife and his two nephews Robert and Thomas How. That on the satisfaction of his debts he devised to his nephew Robert N. How and his heirs his plantation called Rice Hope, formerly purchased by him of Robert Elliot and lately conveyed to the testator as trustee, for his nephew Robert, upon the foregoing contingency. And as soon as his debts were paid he devised to his said nephew a tract of land containing twenty-three acres,

adjoining Rice Hope. That his wife should have the right to live at his Medway plantation and at his Sea shore place. He gave to his wife his household furniture; and what he gave her by his will was to be in lieu and bar of dower and of all other demands. That on the death of his wife his Medway plantation should be divided into two equal parts, one of which he devised in fee to his nephew Robert, and the other moiety to his nephew Thomas. And that on the happening of the last contingency he devised and bequeathed all the residue of his real estate and all his negroes to his two nephews, to be equally divided between them. He bequeathed all his stock of hogs, cattle, &c. to his nephew Robert on the death of his wife. He devised all his estate in Berwick upon Tweed to his nephew Robert Nesbit How, and his heirs. He requested his nephew Robert Nesbit How to become a citizen of the United States as soon as he could, and to change his name to Robert Nesbit. He authorized his executors to cultivate Rice Hope as well as Medway to pay his debts. He named C. Kershaw, Joseph P. La Bruce, and Robert N. How his executors, and he revoked all other wills.

After making his will he sold Rice Hope to Mr J. A. Alston.

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\*It was further agreed that Mrs. Nesbit, the widow, resided on the plantation called Medway till her death in July 1823. That the accounts of the estate, and of the sales of the crops, had been kept and were then kept in the names of the executors, and that the debts were not all paid. The defendants had resided on the plantation. That at the death of Dr. Nesbit his two nephews were aliens; and Robert Nesbit How, had changed his name to Robert Nesbit, in pursuance of the will of his uncle, and that he obtained a certificate of citizenship from the federal Circuit Court in Charleston on the 8th day of December 1821, the regularity and legality of which were reserved for discussion. And Thomas How obtained letters of denizenship on the 11th of October 1822.

Mr. Smith was called by complainant to testify to certain conversations with Dr. Nesbit. This was objected to; but it not being stated with precision what facts Mr. Smith would state, he was admitted to be sworn, with the reservation of hereafter separating admissible from inadmissible testimony. He stated that Dr. Nesbit was anxious that his nephew Robert should become a citizen, and inquired what was to be the course pursued, which was explained to him. That after Mr. Robert N. How's departure for Europe (May 1821) Dr. Nesbit was ill, and requested the witness to go to Colonel J. A. Alston and take his bond and mortgage for the price at which he had sold him the Rice Hope plantation. Witness on looking at the titles remarked, that the conveyance had been made



(when Dr. Nesbit purchased the plantation) jointly to Dr. Nesbit and Mr. Robert Nesbit How; and the witness asked to whom the bonds of Mr. Alston should be made payable; to which Dr. Nesbit answered, they should be made payable to himself; for if his nephew was an alien, it was uncertain if he would return, "and he was a poor creature any how." He said his nephew was a minor,

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which had prevented his becoming a citizen. Robert, the nephew, came to this country to his uncle when he was a small boy, prior to the late war, and resided and was educated here; and it was always understood he was to be Dr. Nesbit's heir. The impression left on the witness's mind was, that Dr. Nesbit intended the bonds for his nephew, but being an irascible man, he liked to keep the power in his own hands. He died in July 1821, before his nephew's return from Europe.

Mr. John L. Wilson (as a witness) stated that after the death of Dr. Nesbit he was called upon to give an opinion on his last will. That to do so it was necessary to make an inquiry into the claim of citizenship set up by Robert Nesbit How. He searched the office of the Clerk of the Court of Common Pleas at Georgetown, and saw the original paper stated to be the notice given by Mr. How of his intention to become a citizen of the United States. That the paper was headed with words of this import: "I, Robert N. How, now or late a subject of Great Britain," then there was a very considerable blank and then his signature on the next page. The blank was probably left to be filled up with a petition. The witness has since searched for the paper but it could not be found. And the Clerk, Mr. Heriot, stated that it was probably lost or destroyed with other papers of his office in the great storm of 1822.

Mr. Heriot, the Clerk, testified, that in the spring of the year 1821, before Mr. How went to Europe, he gave notice of his intention to become a citizen. It was in May, when the Court was not sitting, and he deposited a paper with the witness as Clerk. Mr. How asked if he could be made a citizen the next Court. The witness told him he believed that it would take five years. Mr. How went up to the Court house to give the notice. The witness was about to sail for the north, and had not time to fill up the petition. Mr.

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How signed a paper in the way \*stated by Mr. Wilson. The witness had since given Mr. How, at his request, a certificate that he had given the notice, but he did not remember the terms. He did not remember whether Mr. How took any oath. His office was injured by the storm in 1822, and some papers lost. This paper could never be found. He thought the paper was signed (in blank) by

Mr. How according to the directions of the witness, who was to draw the petition and fill up the blank. He gave witness five dollars and no more, as his official fee. There were no other documents in his office on this subject but the paper above mentioned.

A certified copy of the proceedings in the federal Court, as to the admission of Mr. How to the rights of citizenship, was produced in evidence. It consisted of a petition from Robert Nesbit How, stating, that he had resided in South Carolina from the year 1807, and that it was always his intention to become a citizen, and on or about the first day of May 1818 he filed his petition for that purpose, with the Clerk of the Court of Common Pleas of Georgetown district, as appeared by the certificate of the Clerk, and he prayed to be admitted a citizen, renouncing all foreign allegiance, &c. The petition was accompanied by a certificate of good character, and of his residence for more than ten years in South Carolina. This certificate was signed and sworn to by four persons of character on the 7th of November 1821.

The certificate of Mr. Heriot the Clerk at Georgetown stated, that Robert Nesbit How had filed his petition for citizenship with him on the 1st of May 1818, "and the oath will be administered to him when he appears personally. Given under my hand and seal the day and year of our Lord, 1821. (Signed) Thomas Heriot."

The certificate of citizenship was given by Mr. James Jervey Clerk of the federal Court, stating that Robert Nesbit How had applied

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to that Court for citizenship, \*and had complied with the requisites prescribed, and taken the oaths before Judge Drayton, and was therefore enrolled as a citizen.

A letter was produced in evidence from Robert Nesbit How to his aunt, Mrs. E. Nesbit, dated the — of July 1821, at Berwick upon Tweed, stating, that he had arrived safe there, and had been made free (of the town) the day after his arrival from America, which he left on the 25th of May 1821.

On the part of Thomas How a certificate was produced, bearing date the 11th of October 1822, admitting in due form the said Thomas How to the rights and privileges of a denizen of South Carolina. This certificate issued from the Court of Common Pleas, and was duly recorded.

De Saussure, Chancellor. The first points for our consideration are those made by the pleas in bar.

First, That the defendants, the nephews and devisees of Dr. Robert Nesbit, hold the land in question, adversely, against the complainant, and all the world; and that if the complainant has any right, he has a plain and adequate remedy at law; to which alone he ought to have recourse; and they pray judgment, whether they are bound to answer.

Secondly, That the defendants are, the one a citizen, and the other a denizen, and entitled to hold the land; and also devisees under the will of Dr. Robert Nesbit; and whether aliens or not, are entitled to take and hold the lands devised to them: and they pray judgment, &c.

It appears to me that the possession of the defendant Robert Nesbit How is not, and cannot be, adverse. It was fiduciary at first, acquired under the will, with authority to reside on, and cultivate the place, together with his aunt; and the estate to be kept, together with the negroes, even after her death,

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in order to pay his debts; which is not yet done. He was then a trustee under the will for the creditors, as well as for his aunt and her representatives. The defendant cannot change this fiduciary character, and make this possession an adverse one. No suit could have been brought against him to deprive him of the possession, as he held under the will for the purposes of the will. The widow, and those claiming under her, are interested in the proceeds of the estate, and are entitled to an account of the rents and profits to which the will gave her a right, if she claimed under it; and if not, then she was entitled to an account for the use, hire, and labour of her own slaves employed on the plantation by the executors. For these, and other rights and claims in the estate, real and personal, thus blended together, including the widow's separate estate worked on the land in question, neither she nor her representatives have plain and adequate remedy at law. The joint possession of Thomas How, the denizen, with his brother Robert, the qualified executor, is permissive before the debts are paid (supposing him to have a right after that event), and cannot be allowed to be set up as adverse by the connivance of his brother, the executor and trustee. In the case of *Scott v. Scott*, the rights of the parties were tried and decided in equity, in relation to real estate, on the question of alienage. Another branch of the same case, *Scott v. Cohen*, was tried in the Court of Law, and is reported in 2 Nott & McCord's Reports, 293. The decision, in which six of the Judges of that Court concurred, approved the decision in the Court of Equity. Upon the whole, I am of opinion that the plea in bar, on the ground that the defendants held adversely, and that the complainant has plain and adequate remedy at law, cannot be supported, and the plea is overruled.

We come now to the second plea in bar; to wit, whether the defendant, Robert Nes-

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bit How, was a citizen of the United States, and Thomas How a denizen, so as to entitle them to hold the land in those characters; and also, whether as devisees they may not hold the land against the complainant, even if they should be aliens.

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We must take them up in their order.

Was Robert Nesbit How made a citizen, and Thomas How a denizen, regularly, according to the laws of congress, so as to enable them to take and to hold the lands in question either as heirs or devisees?

The manner and the time of the one being made a citizen, and the other a denizen, has been heretofore stated. As the question relating to the denizenship of Thomas is the simplest and easiest, we will dispose of that first. No objection has been made to the regularity of the course pursued, or the certificate of denizenship which was dated the 11th of October 1822. That was fifteen months after the death of his uncle Dr. Robert Nesbit. He was then clearly an alien at the death of his uncle. Has his denizenship a retroactive operation, so as to entitle him to take and to hold land anterior to his denizenship? By the common law it is quite certain that denizenship has no retrospective operation. All the decisions are to that effect. And our statute of the 18th of December 1799, granting the rights of denizens to alien friends, does not alter the common law. It is entirely prospective. Resident aliens, on taking the oath prescribed shall be deemed denizens, so as to be enabled to purchase and hold real property within the state. Mr. Thomas How cannot then claim the land in question as denizen. There are two acts of our state legislature, of December 1806 and December 1807, which were supposed to have some bearing on this question. But on examining them, the first provides for certain aliens named in the act, and no further. The latter act provides that titles derived by con-

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tract, grants or deed of conveyance, from or through aliens, shall be legalized under certain provisos, one of which is, that the act should not affect in any measure descents already cast. And authority is given to all persons holding, or who shall hold, real property in the state, under the said provisions, to convey or devise the land to their children or grand children, though born before the grantor or denizen had acquired titles under the terms of the act. None of these provisions applies to the case we are considering.

The question of the citizenship of Robert Nesbit How requires a fuller examination. That right depends on the acts of congress, and his compliance with the conditions required. The principal act is that which bears date the 14th of April 1802. By that statute it is provided, that "any alien being a free white person may be admitted to become a citizen on the following conditions, and not otherwise.

First, That he shall have declared on oath or affirmation before the Supreme, Superior, Circuit, or District Court of some one of the states, or of the territorial districts of the United States, or the Circuit or District



Court of the United States, three years at least before his admission, that it was bona fide his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatsoever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may at the time be a citizen or subject.

Secondly, That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the Courts aforesaid, that he will support the constitution of the United States, and that he doth renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state,

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or sovereignty whatever, \*and particularly, by name, the prince, potentate, &c. whereof he was before a citizen or subject; which proceeding shall be recorded by the Clerk of the Court.

That the Court shall be satisfied on admitting such alien that he has resided within the United States five years, and within the state or territory where such Court is held, one year at least. His own oath not to be received to prove his residence. And it shall appear to the Court that he has behaved as a man of good character, attached to the principles of the constitution.

By the 6th section it is enacted, that all free white persons being aliens, who may arrive in the United States after the passing of the act (14th of April 1802), shall, in order to become citizens of the United States, make registry and obtain certificates in the following manner, to wit, every person desirous of being naturalized shall, if he has attained twenty-one years of age, make report of himself (or if under twenty-one years, by his guardian, &c.) to the Clerk of the District Court, &c. where such alien may arrive; stating his name, birth place, age, nation, and allegiance, together with the country whence he or she migrated, and the place of his or her intended settlement; and it shall be the duty of such Clerk on receiving such report to record the same in his office, and to grant to such person making such report, when required, a certificate under his hand and seal of office of such report and registry: which certificate shall be exhibited to the Court by every alien who may arrive in the United States after the passing of the act, on his application to be naturalized, as evidence of the time of his arrival in the United States.

The subsequent acts of Congress on the subject of alienage do not, I apprehend, contain any regulations applicable to this case, except one clause of the act of the 22d of March 1816, which will be used hereafter as illustrative of another point.

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\*We perceive, by the acts of congress referred to and quoted, what is required of an

alien that he may become a citizen. Now it does not appear that Mr. How reported himself to the Clerk of any Court in the United States, according to the provisions of the 1st section of the act of the 22d of March, 1816: though his arrival within the United States, which was prior to the 18th of June, 1813, may protect him from that neglect. It does appear that the application, or rather notice, to Mr. Heriot the Clerk of the Court of Common Pleas at Georgetown, on the 1st of May, 1818, was not a compliance with the provisions of the act of the 14th of April, 1802. The paper presented by Mr. R. N. How to the Clerk was a mere blank, and might have been filled up with any other matter as well as with a notification of an intention to become a citizen. It was not presented in term time, or in open court, and can not now be produced. It is said to be lost. Mr. How did not take any oath as prescribed by the statute, nor did the Clerk then give any certificate. In no one particular then was the act complied with. So that the basis, on which the final application to be admitted a citizen, on which the last act was to be founded and consummated, was not laid; and the subsequent proceedings had nothing to sustain them. It does also appear, that Mr. Robert Nesbit How did not seem disposed to follow up his imperfect notification of his intention to become a citizen; for he subsequently writes from Scotland, that he got himself made free of Berwick on Tweed as soon as he arrived there, some time after such notification. Yet it seems at a subsequent day, to wit, on the —— day of November, 1821, an application was made to the Circuit Court of the United States sitting in Charleston, by Robert Nesbit How for admission to the full rights of citizenship. The petition alleged that Robert Nesbit How was a native of Berwick on Tweed in Great Britain, and

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was about the age of \*twenty-two years, had arrived in South Carolina in November, 1807, and from that time to the present continued to reside here, that it was always his intention of becoming a citizen of the United States, that on or about the 1st of May, 1818 he filed his petition for that purpose with the Clerk of the Court of Common Pleas for the district of Georgetown, as appeared by the certificate of the Clerk ready to be produced, and that he, the said Robert Nesbit How, would support the constitution of the United States, and renounce his allegiance to the British and all other foreign governments. A certificate of good character was produced from four respectable citizens, and the certificate of the Clerk from Georgetown, that Robert Nesbit How did file his petition for citizenship with the Clerk of that Court, on the first day of May, 1818, and that the oath would be administered at the sitting of the Court, when he appears personally:

which certificate is dated "this ——— day of ——— in the year of our Lord 1821;" on these papers Judge John Drayton signed his fiat: and Mr. Jervey issued his certificate in due form on the 8th of December, 1821. The statutes of Congress do not provide explicitly, that the final act of application for citizenship should be made in the same Court where the notice was given. But I should apprehend that it is implied, for the proceedings altogether make up a judgment; and it seems to be an anomaly to have the separate parts of the judgment in two different Courts, and one in the state Court and the other in the federal Court. In this way impositions may be practiced, and the Court last applied to may be misled into a belief that the proceedings in the other Court, where notice was given, were regular, and formed a proper basis for the superstructure of the last application. Thus the acts of Congress may be eluded, and the highest right and privilege in the world, that of an American citizen,

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may be illegally conferred. All this \*may occur even where the officers are men of character, as in the present case; how much more dangerous should the clerks not be trustworthy, as may happen, though there is no reason to think so in the case we are considering. I have doubts, however, as the statutes are not explicit on this point. It does, however, appear to me that the requisitions of the acts of congress were not complied with, and that Mr. Robert Nesbit How was not entitled to be made a citizen, nor to a certificate that he was a citizen.

Another question, however, arises whether the proceedings can be looked into, and the grant and certificate of citizenship be annulled, on account of the irregularities stated in obtaining them. I am certainly not disposed to increase the difficulties of aliens, or to diminish the security derived from a certificate of citizenship, but the law must guide wherever it speaks distinctly. On this subject the law prescribes a certain and clear course to aliens to enable them to acquire the proud distinction of an American citizen. That course has not been pursued. Is the alien in question entitled to the benefit of the citizenship, of which he has acquired the evidence of right, not in accordance with, but in despite of, the law? Would it not be a fraud on the laws, not perhaps a moral fraud in this case, but a legal fraud; that is, the acquisition of a benefit under a law without complying with the prerequisites? Now it is a maxim that fraud vitiates every thing which it contaminates. In insurances, even marriages, fraudulent misrepresentations vitiate the contract. Even judgments at law, obtained by fraud, are set aside; sometimes by the Court of Law, more frequently in Equity, as has been settled and acted upon ever since the famous controversy between Lord

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Coke and the Chancellor Ellesmere.<sup>1</sup> \*Now I apprehend that the proceedings directed by the statutes to be pursued by aliens to entitle themselves to citizenship, of which the certificate is only the evidence, cannot be placed on a higher or better ground than a judgment of a competent tribunal, which we have seen may be examined, opened and set aside for fraud. Even foreign judgments, to which more reverence has been attached by the comity of nations, may be examined, and their effects prevented in many cases. There has been great diversity of opinion certainly—but I think the better opinion seems to be that they may be so examined—at any rate in those cases in which the papers, proceedings and judgments of the foreign Courts themselves furnish proof against their legality and validity. Judge Cooper, in his well reasoned opinion in *Dempsey, Assignee of Brown v. The Insurance Company of Philadelphia*, goes further, and holds that the sentence of a foreign Court of Admiralty (to which this reverence has been chiefly attached) is examinable in all its parts, and is evidence of nothing but that the property captured was condemned. In the case before us, the proceedings and certificate of citizenship produced for Mr. R. N. How, to establish his right to that character, distinctly shew that he had not regularly pursued the steps required by law to be taken to entitle himself to the judgment of the Court in his favour. In the case of *Mabury v. Madison*, 1 Cranch, 137 [2 L. Ed. 60], it was held, that a commission is merely the evidence of a right and not the right itself. In *Campbell v. Gordon*, 6 Cranch, 176 [3 L. Ed. 190], parol evidence was gone into as to the proceedings pursued by an alien in order to obtain the character and right of a citizen under the then existing laws; and it was decided, that where the oath was taken, and nothing appeared to the con-

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trary, it must be \*presumed that the Court was satisfied as to the character of the applicant, and it amounted to a judgment of the Court. But by the words used by Judge Washington, who delivered the opinion of the Court, it is evident that if any evidence had appeared to the contrary the presumption would not have arisen. Now in the case before us, the very evidence produced to shew the right of the party proved that the acts prescribed to be done by the alien were not performed. And the statute of 1802 expressly declares, that the acts required to be done by the alien are conditions without a compliance with which the alien cannot become

<sup>1</sup> In 3 Dallas, 357, 363 [1 L. Ed. 634], *Fene-*  
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more v. The United States, the Supreme \*Court decided, that imposing on a public officer and getting certificates was fraudulent and void; but the United States might affirm or disaffirm the act.



a citizen. And congress, finding perhaps some doubts had been expressed, has explicitly declared in the statute of the 22d of March, 1816, that any "pretended admission of an alien" to be a citizen, after the promulgation of the act, without such recital of each certificate at full length (as prescribed), "shall be of no validity or effect under the act aforesaid." It is true that this act speaks of aliens who have arrived in the United States since the 18th of June 1812, but I considered it as only declaratory of a pre-existing principle, that if aliens were admitted by the carelessness of officers and Courts to become citizens without complying with the conditions required of them, such admissions were mere pretensions and of no validity or effect when questioned. It is difficult to find decided cases on this question. In our own Courts a few cases have arisen which have been reported. That of *Richards v. M'Daniel*, 2 [Mill] Const. Rep. 18, was decided on our statutes of 1806 and 1807, the provisions of which do not apply to this case. In the case of *Richards v. James M'Daniel and A. Richards*, 2 Nott & M'Cord's Rep. 351, which seems to have been substantially the same case as the preceding brought up in another shape, Judges Richardson, Nott, and Colcock, looked into the proceedings of the

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alien who sought to be made a citizen, \*and finding that he had not complied with the required conditions of the statute of 1802, decide that the certificate was not conclusive, and pronounced against the claim of citizenship shewn to have been erroneously obtained. The irregular conduct of the clerk too, in granting the certificate of his own mere authority, was considered as affecting the right of the alien to the benefit of the right of citizenship claimed under the certificate. In the case before us the same or greater irregularity occurred. The clerk of his mere authority, out of Court, and out of the time of the sitting of the Court, received a petition or notice, or rather a blank paper, now alleged to have been intended as a legal notice, on which a certificate was grounded, and became the basis of an actual admission in a regular Court three years afterwards, although not one of the conditions prescribed by the act of 1802 had been complied with. It is true that in the same case, subsequently brought up in another shape, 1 M'Cord's Rep. 187, it was decided by a majority of the Court, against the charge of Judge Nott to the jury, and against the opinion of Judge Colcock, in the constitutional Court, that the records of admission to naturalization, not mentioning that the alien previously declared his intention of becoming a citizen, are not sufficient to defeat the alien of his right; because the Court will presume that the Court which admitted the alien must have received evidence of that fact at the time, and admit-

ted the party as the law directs.<sup>2</sup> This pre-

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sumption might have been rebutted \*by other presumptions, or counteracted by positive proofs, such as have been produced in the case we are considering. In [*Campbell v. Gordon*] 6 Cranch's Rep. 176 and 182 [3 L. Ed. 190], it is expressly said, that the presumption of all being regular will be raised if nothing appears to the contrary. As the proofs produced in this cause to support the right of the alien to citizenship actually shew, that the conditions, required by the act of congress 1802, have not been complied with, and thereby prevent the presumption of regularity, I am of opinion that Mr. Robert Nesbit How is not a citizen of the United States entitled to take or hold land by descent.

With respect to the denizenship claimed by the nephew Thomas How. I do not understand that there is any objection to the regularity of the proceedings in obtaining the certificate which evidences that right. He is therefore entitled to all the advantages which the laws of South Carolina give to denizens. Our state law, enacted on the 13th day of December, 1799, points out the course to be pursued by aliens desirous to become denizens; and declares that, on compliance with the terms of the law, they shall "be deemed denizens, so as to enable such persons to purchase and hold real estate within this state," and to be entitled to the protection of the laws of the state as citizens are entitled. Mr. Thomas How became a denizen on the 11th of October, 1822, about fifteen months after the death of his uncle, Dr. Robert Nesbit. It was argued that the certificate of denizenship had a retroactive operation and enabled Thomas How to take under the devise of his uncle's will as a purchaser: for a devisee is in the language of the law a purchaser, and does not take by descent. On this point, however, the law is quite clear. Denizenship has no such operation. It acts wholly prospectively. Mr. Cruise in his Digest of the Law of Real Property states, that an alien made a deni-

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zen becomes capable of holding land \*purchased after his denization. See 4 Cruise, 21, 24. Co. Litt. 8 a. 129 a. 2 Bla. Com. 249, 250. The language of our statute is clearly prospective. If we had considered the citi-

<sup>2</sup>In the argument of the case of *M'Call v. Oliver*, at Columbia, June 1827, the Reporter understood from what fell from the Court, that the latter opinion in the case of *Richards v. M'Daniel*, 1 M'Cord's Rep. 187, would be supported by the present Court of Appeals, and that they would not look beyond the certificate (not alluding to a case of fraud in obtaining it). In *M'Call v. Oliver*, the Court said they would not look into the formalities of a certificate granted by the Courts of another state which had the same power to construe the act of Congress which they had.

zenship of Robert Nesbit How as duly established the same question would arise whether the certificate of citizenship (thus supposed to have been correctly given) had any retroactive operation. For in his case the certificate is in 1821, (December) which was five months after the death of his uncle, Dr. Nesbit, who devised the land in question to him. The parties and the Court of Appeals are entitled to the judgment of this Court on this point, as the judgment of the Court of Appeals may not go with this Court on the point on which this case is ultimately decided. Mr. Justice Blackstone does say that "naturalization cancels all defects, and is allowed to have retrospective energy which simple denization has not." 2 Bla. Com. 249, 250. For which he quoted Co. Litt. 129 a. The very words used by Blackstone are also used by Cruise in his Digest, vol. 3, p. 225, 343, and there we find the illustration which shews that these writers are speaking of descents and not of purchases; for they put the case of a father who had a son born before denization or citizenship (naturalization) and a son born after. By denization the eldest son cannot inherit. By naturalization he may. It is certainly the settled law, that where the next heir of a person dying, seised of lands, intestate, is an alien, he is considered as not in legal existence; and not being capable of inheriting real estate himself, he does not stand in the way of a remoter heir who is a citizen. The latter will inherit. Now can it be admitted that an act of naturalization, which may be obtained by the nearer alien relations after the death of the ancestor, should have a retrospective operation, and divest the estate already devolved on the remoter heir, who is a citizen? I apprehend that this would be too full of inconvenience; for many years

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\*might elapse between the death of the ancestor and the naturalization of the nearest relation. There are not many decisions on this question. There are a few, however, which deserve to be noticed. In *Fish v. Klein*, 2 Meriv. 431, it was decided that an alien, who was a devisee in trust to sell, and who joined in the sale and conveyance, did not give a good title; and that his subsequent naturalization by act of parliament did not operate to confirm the title of the purchaser; even though the words of the act of parliament have the appearance of an intention to give a retroactive effect; for they say that he (the alien) shall from henceforth be reported and taken as if he had been born a natural subject, and shall be enabled to inherit, and to be inherited from and to ask, take, and enjoy all lands which he may or shall have by purchase or gift. That able and excellent person, Sir Samuel Romilly, who was counsel in the cause, contended that these words of the statute might well have a retrospective operation. But the

Master of the Rolls decided against him, and said that the estate of the trustee being out of him at the time when the act passed, his alienee was in no better situation, as to titles, than the defendant the grantor. In the note of this case by Mr. Merivale, he states that the vendor had been desirous of having retrospective words introduced into the naturalization act, which was refused, because parliament would not depart from the common form. And the words of our statutes for naturalizing aliens are evidently prospective, and do not furnish so strong a ground for retrospective operation as the words of the British act which we have just cited, and which were denied to have a retrospective force. Upon the whole I am satisfied that an alien, becoming a citizen in the most regular manner, does not acquire a right to inherit, or to take and hold land which belonged to an ancestor who died before he became a citizen, so as to divest the

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right of a \*remoter heir who was a citizen at the time of the death of the ancestor.

Another ground has been taken for the defendants which requires particular examination. It is contended that an alien, though not entitled to take by descent, is entitled to take by purchase, and to hold the land against all the world except the sovereign, and even against him till office found. On examining the books we find the following rules laid down. Lord Coke lays it down, that an alien may take land by purchase, but he cannot hold it; for the king shall have it by his prerogative, but not before office found, except in case of the alien's death, when the king may take it without office found. Coke Litt. 2 b.

Blackstone states this to be the law in his time. 2 Bla. Com. 249. This subject has been often before the Supreme Court of the United States, and its decisions are entitled to the highest authority on questions of alienage, as congress has the exclusive right of legislating on the subject. See the cases of [*Fairfax's Devisee v. Hunter's Lessee*] 7 Cranch, 603, 619 [3 L. Ed. 453]; [*Craig v. Leslie*] 3 Wheat. 563, 589 [4 L. Ed. 460]; [*Craig v. Radford*] 594, 597 [4 L. Ed. 467]. These cases seem to decide the question, unless some other principle should intervene to take the case we are considering out of their range. One was suggested, i. e. that if a citizen dies intestate, and his next relation is an alien, a remote heir, who is a citizen, is entitled to inherit, and the land will not escheat. This is certainly true. But this before us is not a case of intestacy. The ancestor makes a will in due form to dispose of real estate, and he devises his lands to his two nephews, who are aliens. Such a devise constitutes them, according to all the authorities, purchasers, and as purchasers they may take the land under the devise and hold it too, against all the world, except the



state, and against that also till office found. This puts an end to the claim of the other heir, who is a citizen (as the widow of Dr. Nesbit is from whom the estate is devised).

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\*In Fairfax's case, 7 Cranch, 603 [3 L. Ed. 453], it was decided that the devisee, though an alien, was entitled to take the land under the devise, and to hold the same until office found, which had never taken place, and the treaty intervened and protected his rights. In that case the deviser had a nephew who was a citizen. So in *Craig v. Radford*, 3 Wheat. 594 [4 L. Ed. 467]. In *Orr v. Hodgson*, 4 Wheat. 453 [4 L. Ed. 613], the Court supported the distinction between an alien claiming by descent and by devise. It was a case tried in the District Court of Columbia on a bill in equity. The aliens claimed by descent. It was decided that they were not entitled to take or to hold real estate, and that the remoter heirs should take and hold the land, there being no escheat nor ground for one. But if it had been a devise, the aliens might have taken and held till office found, and then not be responsible for rents and profits. In the case of *Scott v. Cohen* and others, 2 Nott & M'Cord, 293, the Court of law decided, that the devise did not take effect as to the land in question, but the land descended to the heir at law, who being an alien could not take the land, which thereupon descended to the nearest relation who was a citizen, there being in such case no escheat to the state. There is an old case, *The Attorney General v. Duplessis*, reported 2 Ves. Sen. 286, which it may be as well to mention. Lord Colerain devised all the rents and profits of his land in such manner that his daughter Rosa should have the principal benefit, and her mother an annuity. An information was filed on behalf of the crown, on suggestion of alienage of the devisees, and upon motion for injunction to stay waste, a demurrer was put in, and it was insisted that the crown had no right or estate till office found. And that if there were a trust, it was not such a one as the Court of Equity exercises jurisdiction over, and there was no proof of alienage. For the bill it was argued, that where the crown has

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a right on the foundation of alienage, this Court will not suffer any one who goes into possession to destroy the estate before the right of the crown be determined. An alien may purchase, but it is for the benefit of the crown, though office must be found. The crown wants the assistance of this Court to obtain evidence to lay the case before the jury. The mother will be bound to answer the question where the child was born, which is not being called upon to answer an illegal act. The demurrer was overruled, and that judgment affirmed by the House of Lords. See 1 Bro. P. C. 415, (Edit. Toml.)

where the facts and grounds are most fully stated.

Another ground suggests itself which, if solid, might change the character of the devise in question. It is a rule, that where a testator devises his real estate to his heir at law, he takes by descent, and not by purchase under the devise. On reflection, however, I am satisfied that this rule of law does not apply to the case we are considering. For the rule, admitting its existence here, has this qualification, that the devise must be of the same estate which the law would have thrown upon the devisee as heir. Now that is not the case here, for the devise gives the enjoyment of the estate for life to the widow, and has other provisions which break the descent, so that the defendants take under the devise, which makes them purchasers, who may take and hold against all the world, except the state, and against that too till office found. I have looked into our two state acts of the 20th of December, 1806, and 19th of December, 1807, as before mentioned, but I do not think they have any application. In my opinion then, Robert Nesbit How and Thomas How are entitled, not in the character of citizens or denizens, but as alien devisees, to take and hold the lands devised to them till office found against them in behalf of the state. Should either party desire an issue at law to try this question, I have no objection

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\*even at this stage to direct an issue; though perhaps, the quickest and least expensive course would be, to carry up the case immediately to the Court of Appeals, where it will, and ought, ultimately to go. The result then of my judgment is, that the plea in bar, as to the land devised to the two nephews, Robert Nesbit How and Thomas How ought to be sustained, and the party complainant referred to his remedy at law, if he chooses to go there, or take an issue under the order of this Court. As the answer was only to such parts of the bill as were not pleaded to, and as there was no evidence gone into upon some of the points, and no argument upon any part of the case made by the bill and answer, it would be improper for me to express, or even to form any opinion, or to order any reference of the accounts; for the accounts must ultimately be made up according to the decision of the Court on certain important questions made by these pleadings.

The Reporter has not been able to procure the grounds of appeal, further than will appear from arguments of counsel.

Dunkin, for appellant. When one takes possession as executor, the law will presume that he holds in that character, and his possession will not be considered as adverse to the rights of the devisee or heir.

The only question in the case is, whether

an alien devisee can take and hold the estate in exclusion of others next of kin, who might take by descent?

Connected with this was the question, whether the subsequent denization of Thomas, and naturalization of Robert, could have such a retrospective operation as to enable them to take?

There is not a dictum to be found in any of the books which goes to shew that it can

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have such operation. The \*naturalization of Robert was irregular, and therefore void. The Court can look into the irregularity of those proceedings. *Richards v. M'Daniel*, 1 McCord's Rep. 187. There is no question about the irregularity of these proceedings. It follows then that he is even now an alien; and the question now occurs, whether he can take by the devise, in exclusion of complainant. The fee cannot be in abeyance. An alien can not take by descent; a cousin, citizen, will take in exclusion of an alien brother. *City Council v. Large*, 1 Const. Rep. 454. By the act the lands cannot escheat while there is any one who can take, 1 Brev. 303. Remote relations, citizens, will take in exclusion of those standing in a nearer relation, rather than the land shall escheat. 7 Johns. 214. But it is contended that the devisee takes by purchase, and in that case he holds, although an alien, till office found.

The question then is, what sort of estate or interest has he in the estate? The Judge remarks in this case, that the law permits the alien to hold until office found, and that the process of escheat is only the mode of ascertaining the rights of the state; it is not that which gives or fixes the interest. The dicta that he can hold must be taken sub modo? It can not be the fee, and that can not be in abeyance. 1 Const. Rep. 454, Mr. Justice Cheves's opinion. An alien purchaser can not convey. He can not maintain an action for the recovery of lands, nor can his wife be endowed. Co. Lit. 42 b. Co. Lit. 129 b. 1 Haywood, 485. An office conveys no right, it is only the mode of proving the alienage. 7 Cranch, 616, in Harper's argument. A devise to an alien or to the heir of an alien, is void, because he can not take. *Gilbert on Devises*, 15.

Powell appears to be opposed to this doctrine, as he lays it down that an alien devisee, until office found, can take; but it is evident that he only means those cases in which there is an entire failure of heirs.

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*Gilbert* \*refers to those cases in which others could take. Powell, 316. The case of *Fairfax v. Hunter* will be relied on in opposition to the motion, but in that case the Court only determined that the state could not grant escheated lands until office found. The Judge (Story) does, it is true, enter into the doctrine; but as the only question before the Court did not embrace it, it can only go for

the reasoning of the Judge, and not the decision of the Court. 7 Cranch, 616. In a case in 2 Hayw. 104, 108, the devisor died without heirs. The devise to an alien was held void—the lands escheated and vested in the trustees. The case of *Scott v. Cohen*, 2 Nott & McCord's Rep. 293, is decisive on this question. It is attempted to distinguish between those cases where the descent is cast on intestacy, and cases by devise; but if there are those who can take by descent, the property can not escheat. If process is commenced, even the devisee in possession may defeat it, by shewing that there are those who can take.

*Petigru*, Att. Gen. contra. The case resolves itself into the question, whether the devise was void: so much so that its effects would be the same as if the devise was struck out. The rule of law is, that an alien cannot take by the operation of law, but he may take by purchase. Com. Dig. tit. Estate, letter I. An estate by devise is an estate by purchase. An alien may take by conveyance, and although he cannot hold, it divests the grantor of title, and it escheats. Lord Coke lays it down, that an alien may take the fee by purchase. 6 Cruise, 7. 2 Woodeson, 347. Co. Lit. 2 b.

The freehold is not in the king until office found. It is an office of intituling. 5 Coke, 52. In the case of *Fairfax v. Hunter*, the point is clearly settled, that an alien enemy

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may take by devise and may maintain \*an action until office found. By a devise, the fee vests, eo instanti, in the devisee, and does not vest in the heir. Co. Lit. 111 a. If one convey to an alien for money, can he say the deed is void and take back his land? The devisee takes as a purchaser, and is in the same situation.

King, on the same side. The only question in the case is, whether an alien can take by purchase?

The authorities cited by Mr. *Petigru* are decisive of this point, and are supported by many other authorities. 2 Atk. 398. *Butler v. Brown*, 2 Johns. Ca. in Er. 401. 1 Const. Rep. 41, (Tread. Edit.) The statute of wills allows one to devise lands to any one whom one pleases, except bodies politic and corporate. All descriptions of persons may therefore take. *Powell on Devises*, 352. An alien can take by devise. Cruise, tit. 38, ch. 22. An alien devisee is not liable to account for mesne profits, before office found. *Craig v. Lester*, 3 Wheat. Rep. 589. 614. The case of *Fox v. Southack*, 12 Mass. Rep. 145, in which the Court held that an alien might take by devise, is in all respects similar to that under consideration, and explains the text of *Gilbert*. In the case of *Scott v. Cohen*, the only question was, whether the decree of the Court was conclusive on the rights of the parties. The decree of the Court of Equity was made on the ground that the lands were



not covered by the residuary claim, and descended to William Scott.

J. L. Wilson, in reply. It is the essence of a will that there should be some one in esse capable of taking. 4 Bacon, tit. Wills, &c. 302. A devise of lands to an alien is void. Swinburne, 359. Collingwood v. Pace, 1 Ventris. 43. On looking into the Year Books, it will be seen that all the cases were cases of sale by livery of seisin, where the Courts

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hold that the alien \*purchaser may hold in exclusion of all others, until office found; and that the king shall seize, and that the tenant shall account for the mesne profits. 4 H. 4. 26. An alien may purchase, but the king may take. Rolle's Ab. 94. The lord of a manor has such a possession of an escheat, that the person in possession is his tenant at will. Runnington, 172. 177. 2 Strange, 838. An alien may purchase, but he can not hold. Co. Inst. 2 b. His purchase enures to the king. Viner, tit. Alien. The rights of aliens are altogether a matter of domestic regulation. Trezevant's case, 1 Const. Rep. 61. (Tread. Edit.) The common law should only be adopted in this country when it is reasonable and just. 1 Const. Rep. 165.

*Curia, per* NOTT, J. The Chancellor concludes his decree by observing—It is then my opinion that Robert N. How and Thomas How are entitled, not in the character of denizen or citizen, but of alien devisees, to take and hold the lands devised to them till office found against them in behalf of the state. The correctness of that opinion is the only question now submitted to the consideration of this Court. And it is the unanimous opinion of the Court that it is well supported by the numerous authorities relied on in the decree. It is contended however that whatever may be the English law upon the subject, it is incompatible with the principles of our government, that an alien devisee should take by purchase, when there is a more remote relation who can take as heir. If that question were now for the first time to be considered in this country, the argument might perhaps have been entitled to great consideration. But in the case of Sheaf v. O'Neal, 1 Mass. Rep. 256, it is held, that an alien can not only take and hold, but that he may convey. In the case of Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 603

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[3 L. Ed. 453], it is held that an alien \*devisee may take and hold until office found, although there was a nephew who might have taken as heir. That is a case of high authority, for it is supported by the unanimous opinion of all the Judges of the Supreme Court of the United States who were then present. Judge Johnson differed in opinion with the Court on another ground. But with regard to that question, he expresses his un-

equivocal approbation of the opinion of his brethren. There are other cases in which the same principle has been recognized. This Court therefore does not feel authorized to introduce the innovation which has been contended for. In the case of Scott v. Cohen alluded to in the decree, the Constitutional Court decided nothing more, than that as the Court of Equity had previously settled the rights of the parties to the land in question, that decision should be conclusive, and the Court of Law would not look into the case. The Judge who delivered the opinion of the Court does take occasion to say, that lands cannot descend to an alien. But no opinion is given as to the right of an alien devisee. The decree of the Chancellor is affirmed.

Decree affirmed.\*

<sup>3</sup>In this country where there is a failure of inheritable blood by reason of alienage, the lands do not escheat but go to the next of kin. Escheator of Charleston District v. Orsborn. January 1812. MS. The same v. White. See also 7 Johns. Rep. 214. For the English rule on the subject, see Coke Littleton, Craig on the Law of Feuds, and Charles Yorke's Treatise on the Law of Forfeitures.

#### I McCord, Eq. \*383

\*WILLIAM M'CANTS, Jun., and Elizabeth, His Wife, v. JOSEPH F. BEE and the Executors of SARAH FRASER.

(Charleston. April Term, 1826.)

[Reported and annotated in 16 Am. Dec. 610.]

[Trusts ⇨356.]

A legatee taking an estate coupled with a trust, takes subject to the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 532; Dec. Dig. ⇨356.]

[Trusts ⇨283.]

A trustee cannot purchase or deal with his cestui que trust in relation to the trust estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 403; Dec. Dig. ⇨283.]

[Trusts ⇨198.]

Exception, where there is no fraud, concealment or advantage taken of superior information of the matter.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 218; Way v. Union Central Life Ins. Co., 61 S. C. 506, 39 S. E. 742; Ex parte Gadsden, 89 S. C. 364, 71 S. E. 952.

For other cases, see Trusts, Cent. Dig. §§ 258-265; Dec. Dig. ⇨198.]

[Equity ⇨13.]

Many cases of hard and unconscionable contracts not amounting to actual fraud, particularly where there is a trust, will be relieved from in equity.

[Ed. Note.—Cited in Coley v. Coley, 94 S. C. 387, 77 S. E. 49.

For other cases, see Equity, Cent. Dig. § 26; Dec. Dig. ⇨13.]

[Equity ⇨11.]

Equity will relieve against presumptive fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. ⇨11.]

## [Trusts ⇨283.]

To take advantage of one's necessities is as bad as to take advantage of his weakness.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 403; Dec. Dig. ⇨283.]

## [Contracts ⇨97.]

A person may confirm a contract before liable to impeachment, but it must be after the party comes to a knowledge of all the circumstances, and does it with a view to a confirmation, and after the influence of the original transaction has ceased.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442-446; Dec. Dig. ⇨97.]

## [Powers ⇨20.]

A power in a will to sell such property of the testator as is useless to the estate will not authorize the executor to sell any property he may choose.

[Ed. Note.—Cited in *Jennings v. Teague*, 14 S. C. 240.

For other cases, see Powers, Cent. Dig. § 50; Dec. Dig. ⇨20.]

## [Executors and Administrators ⇨307.]

[After one of two executors has delivered over the property of the testator to the residuary legatee, they cannot sell any portion of the property.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1254; Dec. Dig. ⇨307.]

## [Wills ⇨736.]

[A residuary legatee, to whom the estate of the testator had been delivered, leaving a legacy unpaid, delivered to the legatee, in satisfaction of the legacy, a chattel in which such residuary legatee held but a life estate under the will. Held, that the residuary legatee was a trustee, and that the transaction was not binding upon the legatee receiving the chattel.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1875; Dec. Dig. ⇨736.]

The bill stated that Sarah Fraser, by will dated the 31st of January 1814, inter alia, bequeathed as follows. "I give, &c. to my great niece, Sarah E. Campbell, £150, without interest; but when convenient my executors to put out the same at interest, or purchase public stock therewith, which sum of £150, with the interest which may accumulate thereon, is to be paid or be delivered to her on her attaining the age of eighteen years, or day of marriage."

Testatrix then bequeathed the residue of her estate to executors in trust for her grand son, Joseph F. Bee, on attaining twenty-one years for his life, and after his death to such of his children as attained twenty-one years, and appointed Simon Magwood, C. B. Ladson and Thomas Lee, executors. The two former qualified, but Magwood alone acted. That before Sarah E. Campbell married complainant, and after she attained the age of eighteen years, to wit, in 1822, Joseph F. Bee represented to her that she was not entitled to interest on the legacy, and offered her a negro woman and \$100 in satisfaction of her legacy. That complainant, ignorant of her rights, assented thereto, and accepted the said negro; but received no title for her, nor was she paid the \$100. That Joseph F. Bee had but a life estate in the negro, under

the will of Sarah Fraser, and could not convey the negro absolutely. That complainant had received no adequate satisfaction for the legacy of £150, and the price of the negro was far above her value. That Joseph F. Bee, on receiving possession of the estate, stood towards complainants in the relation

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of trustee, and could \*not thus deal with his cestui que trust. That complainants were entitled to interest from the death of the testatrix, as the funds of the estate were put to interest immediately after the death of testatrix, and the complainants now tendered back the wench because she was aged and unsound, and an inordinate price fixed on her; and that Joseph F. Bee had no more than a life estate in her to convey, and complainants were willing to account for her wages while in their possession. The bill prayed for the payment of the legacy with interest.

Defendants admitted the will of Sarah Fraser, the legacy, and qualification of the executors. The defendant, Joseph F. Bee, denied that any thing was said about interest on the legacy by complainant, or himself, at the time stated in the bill when the negro was taken by her in payment of the legacy, and that the proposition to take the negro came from complainant. The negro was a faithful family servant of testatrix by whom complainant was brought up. That he did not intend to speculate on complainant, and would not sell the negro till he consulted her. The negro consented, and defendant then agreed to gratify complainant. That about March following this transaction complainant told him he ought to give her more, and named \$100, and he agreed. The wench had been in complainant's possession ever since and before her marriage. She never was dissatisfied with the transaction. The defendant never objected to give complainant a bill of sale for the negro, or to get the executors to do so; and he said he would give her one executed to her when he finally settled with her and paid her the \$100. He did not conceive the price given for the wench high—she was sound and attached to complainant. That though he had but a life estate in the negro, yet as the debts and legacies of testatrix must be paid, and as the executors were authorized to sell

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such \*parts of the estate as they deemed proper, he submitted whether the executors' bill of sale to complainant would not now be sufficient. He had never seen Mrs M'Cants since her marriage, but after it William M'Cants told defendant he would take the negro at \$500 on defendant's paying the difference and interest to the time; and if defendant had not the money, he (M'Cants) would take one of the wench's children at a valuation, and pay the surplus, if any. To



this defendant objected, considering the matter closed between him and complainant. Defendant then offered him a bill of sale of the negro, which he consented to receive on Colonel Magwood's joining in it, but only for the amount he (complainant) conceived to be her value. That when Miss Campbell consented to take the negro nothing was said about interest, and defendant did not know the legacy carried interest. The defendants had offered to pay complainants the additional \$100, and to execute a bill of sale for the negro in full satisfaction of the legacy, and were now willing to do so. They submitted that it was a solemn contract which ought to be carried into effect, and particularly after being acquiesced in so long.

Thompson, Chancellor. The bill stated that Sarah Fraser, by will dated 31st of January 1814, inter alia, bequeathed as follows: [Here his honour repeated the clause.]

The executors did not find it convenient to put the money at interest, or to invest it in stock; and Mrs. M'Cants made frequent and unsuccessful applications to them for the legacy, or a part thereof. Small sums only were occasionally paid to her. In this situation complainant, Mrs. M'Cants, applied to the defendant, and proposed to accept a negro woman named in the bill in lieu, and as a full consideration for the legacy aforesaid, which, after some consultation,

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was acceded to, and the negro woman delivered to the complainant. Several years afterwards the complainant observed to the defendant, that she thought he ought to give her \$100 more, which he agreed to do without any hesitation, although he did not consider himself bound so to do. Things remained in this situation for several years, and her value proportionably decreased. The complainants then filed this bill to set aside the contract. The principal ground on which the counsel for complainants relied was, the fiduciary relationship existing between complainants and defendant. This case differs from most of the cases which have been decided upon this branch of the doctrine of trusts, as also the reasoning deducible therefrom. The cases, decided in favour of cestui que trusts against their trustees, have been generally founded on the idea that the trustee has had greater opportunities of being informed of all the circumstances of the case, and the value of the property contracted for, than it was possible that the cestui que trust could have had. There are various other reasons upon this branch of trusts which, from the peculiar circumstances of this case, it is deemed unnecessary to touch upon. In the first place it is in evidence from the complainant's own shewing that she knew more of the negro woman, the subject of this litigation, than the defendant. And it further appears,

from the showing of defendant, that the proposition for the contract came from the complainant. That subsequent to the fiduciary relationship having ceased, the complainant proposed an alteration in the contract, which was acceded to by the defendant, whereby he gave to her \$100 more than she was entitled to—and Mrs. M'Cants's remaining satisfied for a number of years afterwards is confirmation too strong to permit this Court to set aside the complainant's contract, made by parties who are able and willing to contract, and too sacred to be touched unless founded in fraud, deception and

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circumvention. \*The conduct of the defendant appears to the Court to be not only fair but honourable.

The Court views this to be an ungracious claim, and orders the bill to be dismissed with costs.

The complainants appealed.

H. F. De Saussure, for appellants. The property of the estate was chargeable with the legacies, and was in possession of the defendant, Joseph F. Bee; he therefore was in the relation of trustee, and was not at liberty to contract with the complainant. Besides, the price was grossly inadequate. The legacy with the interest amounted to near \$800: and the wench, old and diseased. Complainant at least, and probably defendant, were both ignorant that the legacy carried interest, and they acted under a mistake. Joseph F. Bee had no title in the negro except a life estate. The decree has not provided for titles to her, nor for the payment of the \$100 for the interest.

Lance, contra. This contract was moved by complainant. Defendant acted perfectly fair throughout, and with liberality.

*Curia, per* NOTT, J. The testatrix in this case gave the complainant S. E. M'Cants, then S. E. Campbell, a legacy of £150, without interest, until it was convenient to her executors to put it out at interest, or to purchase public stock therewith, and to pay it over to her when she should arrive at the age of eighteen years, with the accumulated interest. After giving certain other legacies she gave all the residue of her estate, consisting of lands and negroes, to her executors, in trust for certain specified purposes until her grand son, J. F. Bee the defendant, should arrive at the age of twenty-

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one years, \*and then she gave the whole to him during life, &c. and upon the happening of certain contingencies, over to the complainant S. E. Campbell. The legacy to the complainant was never paid by the executor. Neither was it put out at interest, or vested in stock, or otherwise employed for her benefit. But the whole of the estate was delivered over to the defendant J. F. Bee, on his arrival at the age of twenty-one years.

When the complainant arrived at twenty-one years she applied for her legacy, which was not paid. For four years she said, she was making incessant, but unsuccessful, applications for it; she was poor and necessitous, and much in want of money. These facts must be taken as true, because they are brought out by the defendant who has examined her by interrogatories, and has thereby made her his own witness; yet neither her solicitations nor her necessity could prevail. She could procure during that period only twenty dollars, although the estate appeared to have been ample. Wearied out with knocking at defendant's door and exposing her wants, she at length proposed to accept this negro woman, whom she supposed she could hire out for a support, as she was much in want of money, and had not even the means of subsistence. She was led to believe that her legacy did not carry interest, and therefore agreed to accept this slave in full satisfaction of her claim. She afterwards discovered that she had been imposed upon, and applied to the defendant to do her justice by allowing her something more. A hundred dollars was promised, but has never been paid. She has since married, and her husband has endeavoured to obtain that justice which she was unable to procure. But his efforts have been equally unsuccessful. After several fruitless attempts, he has been driven by necessity to seek that relief in the Court of Equity which he despaired of obtaining by any other means. The Chancellor being of

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opinion that they were \*not entitled to relief dismissed the bill. And this is a motion to reverse that decree. By the terms of the will, as also by the nature of the trust created by it, the legacy due to the complainants ought to have been paid before the property was delivered up to the residuary legatee. The legatee therefore, received the state coupled with the trust, and therefore took upon himself in relation to complainant the character of a trustee. The rule that a trustee cannot purchase for himself, nor deal with the cestui que trust with regard to the trust estate, is very well settled by the decisions of the English Courts; see 1 Madd. Cha. 111, 112, and the cases there cited, and particularly the case *Ex parte Bennett*, 10 Ves. 385; and the principle has been repeatedly recognized by our Courts. There are indeed cases where purchases made by a trustee of his cestui que trust have been supported; but these are where, after a scrupulous examination of all the circumstances, the Court is satisfied that there is no fraud, no concealment, no advantage taken by the trustee of the information acquired by him in the character of trustee. 1 Madd. Cha. 113. *Coles v. Trecothick*, 9 Ves. 247. *Morse v. Royal*, 12 Ves. 372, 373. The case now under consideration is one of a sale by the

trustee to the cestui que trust, and not of a purchase; but the same principle must apply. 1 Madd. Cha. 115. *Gibson v. Jeyes*, 6 Ves. 266.

It is now contended, that the complainant had the means of knowing the value of the property as well as the defendant: but the evidence on that point is not very clear; and if the fact be admitted, it was when she was very young, and cannot be supposed to have been a very competent judge. Besides, many years had elapsed during which the advantage was altogether on the side of the defendant. And I am not by any means therefore satisfied, that the Court would not

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be authorized on that \*ground alone to set aside the contract. But independent of the abstract principle that the trustee shall not be permitted to contract with the cestui que trust in relation to the trust estate, it is most apparent that the defendant availed himself of the distressed situation of the complainant to force upon her a bargain utterly subversive of her just rights. There are many cases of hard and unconscionable contracts which do not amount to actual fraud, particularly of persons acting in a fiduciary character, which furnish ground for relief in a Court of Equity. It is unnecessary to go into a full examination of the cases on that subject, as they have been lately fully examined and discussed in the case of *Butler v. Haskell*, 4 Desaus. Rep. 652.<sup>1</sup> And although I believe the decision of that particular case did not give general satisfaction, yet I am of opinion that upon an impartial examination it will not be found so reprehensible as has been generally supposed. However that may be, it furnishes numerous cases which go to establish the general principle which I am endeavouring to point out. Lord Hardwicke, in the case of *Lord Chesterfield v. Jansen*, 1 Atk. 339, 352, says, this Court will relieve against presumptive fraud; so that equity goes further than the rule of law, for there fraud must be proved, and not presumed only. "To take advantage of another man's necessities is as bad as to take advantage of his weakness." Indeed the defendant does not deny, and the decree itself seems to admit, the general principle for which the complainants contend. And if any such cases exist, I can hardly conceive of one in which the parties would have stronger claims to relief than the case now under consideration. The complainant was entitled promptly to

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her legacy on her arrival at the age \*of eighteen. The defendant was in possession of the funds out of which it was to be paid, and enjoying the profits of it; yet for four years, notwithstanding he knew her destitute situation, her entreaties were disregarded, until she was obliged to accept of what he

<sup>1</sup>Vide *Miles v. Ervin* [1 McCord, Eq. 524].



was willing to give as the only resource for the means of subsistence. The principal grounds of defence are,

1st. That the proposition came from complainant herself.

2d. That the defendant did not know that she was entitled to interest.

3d. That she afterwards confirmed the bargain.

It is true the proposition came from the complainant, but under circumstances which do not at all weaken her claim to relief. It was not until she despaired of obtaining justice from the defendant, that she yielded to the necessity of making a proposition which at last promised to contribute something to her support; and that is now called a voluntary offer on her part, and urged as a concession on the part of the defendant to gratify her particular desire.

With regard to the interest, if the defendant did not know at that time that she was entitled he has learned it since, and knowing that it was not paid he knew that it was still due.

The last ground of defence is, that the complainant has since confirmed the contract. It is true a person may confirm a contract which was before liable to impeachment, but then it must be after the party has come to a knowledge of all the circumstances, and does it with a view to a confirmation, knowing that it might be impeached, and after the pressure and influence of the original transaction has ceased. 1 Madd. Cha. 16. 2 Scho. & Lefr. 474. But let us examine this confirmation on which the defendant relies. When reproached by the complainant with

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not having done her justice, as \*if reproved by his own conscience, he promises to pay her one hundred dollars more. But it was never paid. And now a mere naked promise, such as he thought proper to make, but which it does not appear she ever agreed to accept, and which has never been performed, is set up as a bar to the just claims of the complainants. So far therefore from being a confirmation of the former contract, it was an admission on the part of the defendant that he had not done her justice. If the demand of the complainant had been of an uncertain or doubtful character, the Court might not perhaps have suffered the transaction to be untravelling. But it was a debt certain which the defendant was bound in law and honour to pay, and for the payment of which the funds had been placed in his hands. Every ground of defence on which the defendant relies furnishes evidence of the merits of the complainant's claim, and of her right to relief. Every thing she did was under the pressure of a necessity which left her neither free to act nor to think. She was solitary, poor and friendless: and the defendant, who had voluntarily assumed the charac-

ter of trustee, and from whom therefore she had a right to expect the most liberal justice, took advantage of her situation to impose upon her a bargain which he admits to be unjust. He admits it, when he offers to pay the additional sum of \$100. He admits it, when he refuses to accept the offer of the husband to take the negro woman at her value if he will pay up the balance. He admits it, when he refuses to accept the complainant's offer to keep the negro woman at the price of \$500 in part payment, for it must certainly be a very high price. And he admits it, when he says he did not know that she was entitled to interest; because he thereby admits that the interest was not paid, and is therefore still due. But as this Court is always reluctant to interfere with contracts under whatever circumstances they may have been made, I shall not rest my opin-

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ion alone on the grounds which \*have been considered. The complainant has still stronger claims on the aid of this Court. It appears from the will of the testatrix, and Mr Bee himself admits, that he had only a life estate in the property which he sold the complainant. It also further appears that upon certain contingencies, which need not necessarily be very remote, the same property will go over to the complainant herself. So that the defendant has not only paid the legacy in property which was not at his disposal, but to which the complainant may become entitled under the will. To this it is answered, that the executor has power under the will to dispose of the property, and that he is willing and has offered to confirm the contract. Without entering into the question, how far an executor has the authority by virtue of his office as executor to dispose of the effects of the estate without permission of the Ordinary, it is sufficient in this case to observe that there are two executors, and one only has agreed to confirm.<sup>2</sup> Besides, that one has executed his trust by delivering over the property to the residuary legatee, and therefore has no further control over it. With regard to the special power under the will to sell, it is to sell any part of the stock of the testatrix, or any other property, which may be useless to her estate. Now that clause cannot be construed into a general power to sell any property which the executor might think proper; for it embraces only such as is useless. It cannot mean her negroes; because they are directed to lay out the surplus funds of the estate in the purchase of negroes. If indeed this negro be of such a description as to be useless to the estate, then it comes within that provi-

<sup>2</sup>By the act of 1824 it is required that no sale should thereafter be made by executors and administrators but by order of the Court of Ordinary or the Court of Equity, and no sale made without such order to be valid in law or equity, except it be directed by the will.

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sion \*of the will. But then it would make the defendant guilty of an actual fraud, which I am not willing to suppose. I will not presume that he intended to impose upon her property which he knew to be worthless. I think therefore the executor derives no such power from the will, and that the contract must be set aside. The decree of the Chancellor therefore must be reversed. But as the complainants have had the use of the slave, it is right that they should account for her services during that period.

It is therefore ordered and decreed, that the decree of the Chancellor be reversed, and the contract set aside. That the complainants do deliver up to the defendant, J. F. Bee, the negro woman in question, and that they do account to him for her services from the time she came into the possession of the complainant Mrs McCants. And that the defendant do pay to the complainants the legacy, with interest thereon from the time it became due, deducting therefrom the amount which shall be found due for the services of the negro woman. And that it be referred to the master to adjust the accounts between the parties and report thereon to the next Court of Equity, and that the defendant do pay the costs.

Decree reversed.

## I McCord, Eq. \*395

\*E. THAYER, Assignee, &c., v. JOHN CRAMER and MARTHA E. GIBBES and C. LOWRY.

(Charleston. April Term, 1826.)

[*Mortgages* ⇨137.]

A mortgage in this state does not convey a fee, even after the time of redemption is past.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 274; Dec. Dig. ⇨137.]

[*Limitation of Actions* ⇨10.]

The legal title is still in the mortgagor, who is a trustee for the mortgagee, and can not hold adversely to the trust; nor can any one who purchases from him with a notice of the mortgage.

[Ed. Note.—Cited in *Drayton v. Marshall*, Rice, Eq. 374; *Secrest v. McKenna*, 6 Rich. Eq. 73; *Norton v. Lewis*, 3 S. C. 32; *Simms v. Kearse*, 42 S. C. 48, 20 S. E. 19.

For other cases, see *Limitation of Actions*, Cent. Dig. § 34; Dec. Dig. ⇨10.]

[*Vendor and Purchaser* ⇨231.]

The mortgage being recorded is notice to a purchaser.

[Ed. Note.—Cited in *Nixon v. Bynum*, 1 Bailey, 150.

For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. ⇨231.]

[*Adverse Possession* ⇨63.]

[Cited in *Thayer v. Davidson*, Bailey, Eq. 412, 413, 416, 426; *Maples v. Maples*, Rice Eq. 313; *Drayton v. Marshall*, Id. 385, 33 Am. Dec. 84; *McQueen v. Fletcher*, 4 Rich. Eq. 164; *Clark v. Smith*, 13 S. C. 600; *Pegues v. Warley*,

14 S. C. 188, to the point that the statute of limitations will not run in favor of a purchaser with notice.]

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 333-357; Dec. Dig. ⇨63.]

[This case is also cited in *Thayer v. Davidson*, Bailey, Eq. 414; *Smith & Cuttino v. Osborne*, 1 Hill, Eq. 341; *Wright v. Eaves*, 5 Rich. Eq. 82; *Harper v. Barsh*, 10 Rich. Eq. 152, on the doctrine of limitation of actions, and cited and disapproved in *Simms v. Kearse*, 42 S. C. 45, 20 S. E. 19.]

The bill stated that John Cramer and Thomas Bass, on the 10th of April 1807, executed their joint and several bond to Jane Creighton, in the penal sum of \$1,400 conditioned for the payment of \$700, with interest from the date, on or before the 1st day of July 1807, together with a mortgage of all that lot of land situate in Parsonage Lane in the city of Charleston, known and distinguished in a plan of the same by No. 8, measuring and containing, &c. as will appear by a reference to the said mortgage, of record in the office of Register of Mesne Conveyances for Charleston district. That the principal and interest was not paid at the time limited, but afterwards Cramer made sundry payments up to the 23d of May 1818, amounting to \$856.39. That the said Jane Creighton after executing the bond, and before the time appointed for payment, assigned to complainant all the right, title and interest which she had therein, by virtue whereof complainant commenced a suit at law in the Court of Common Pleas and obtained judgment thereon, and having taken out an execution was about to levy it upon and sell the said property, when for the first time he was apprised that the said John Cramer, after the execution of the mortgage and before the rendition of judgment, had executed a conveyance in fee simple of all his right and interest in the premises to Charles Lowry, who afterwards conveyed it to Martha E. Gibbs, by reason whereof complainant could proceed no further as the legal estate had passed out of Cramer. The bill prayed for an account and payment of his debt or a foreclosure

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\*of his mortgage. The defendant relied on the statute of limitations.

Thompson, Chancellor. By the act of the legislature of 1791, the mortgagor is considered as the owner of the land, and the mortgagee could not support an action of trespass to try titles until a foreclosure, and no lapse of time under twenty years will operate as a bar. The plea must therefore be overruled. This is a hard case on Mrs. Gibbs, but the Court is not aware of any way to extricate her from it, except by throwing the responsibility on the shoulders of Lowry. His contract with Cramer was to take up the bond, and his not having done so was a moral fraud, whereby all this liti-



gation and expense has occurred. It is nothing but justice, therefore, that he should bear the burthen arising from his own improper conduct. It is therefore ordered and decreed, that Charles Lowry do account for and pay to the complainant the whole of his demand with interest and costs; and in the event of his being unable to do so, that John Cramer shall pay and satisfy the demand with interest and costs; and provided he should not be of ability to do it, that then Mrs. Martha E. Gibbes shall pay and satisfy the claim of complainant with interest and costs, or that the equity of redemption be forever barred and foreclosed.

Mrs. Gibbes appealed, on the ground that her possession, and that of the person under whom she claimed, gave her a title by possession.

Dunkin for the appellant. In the cases he cited the Court held that possession would bar a judgment creditor, although the defendant might have known of the judgment. *Smith v. McRaa*, 2 Bay, 339. *Cholett v. Hart*, 2 Bay, 160.

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\*If instead of a mortgage there had been an actual conveyance, the possession of Mrs. Gibbes would have been protected by the statute, and that although the purchaser had notice of the conveyance. 2 Bay, 429. Now if in those cases the statute would be a bar, what reason can be given why a mortgage should operate differently?

Grimke, contra. The sale of the fee by the mortgagor, before the judgment at law, put it out of the jurisdiction of the law Court, and the case is one of pure equity jurisdiction.

In England the fee passes by the mortgage, and the mortgagee has his remedy by action of ejectment. But the act of 1791 has changed the law in this respect, and places the mortgagor in possession in the situation of trustee for the mortgagee, and in such case the trustee can not protect himself under the statute.<sup>1</sup> The recording of the mortgage was notice to Mrs. Gibbes, and she must be regarded as the assignee of the trust, and is bound by the rules which apply to trustees. The cases of mortgages differ from judgments in this: First. In the latter there is an entire absence of the character of trustee. Second. The mortgage has a specific and the judgment a general lien.

*Curia, per NOTT, J.* In this case it is the opinion of the Court that the decree of the Chancellor ought to be affirmed. Mrs. Gibbes is the only appellant, and the ground on

which she relies is, that having been five years in possession she is protected by the statute of limitations. A mortgage of land in this state does not convey a fee, even after the time of redemption is past. The legal title still remains in the mortgagor, and the

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\*land is only considered as a pledge to secure the payment of the money. The mortgagor must therefore be considered as a trustee for the mortgagee, and cannot be considered as holding adversely. And a purchaser having a knowledge of the trust places himself in the same situation, making himself thereby a trustee. *Murray v. Ballou*, 1 Johns. Cha. Rep. 575. 3 Vern. 271. 2 Fonbl. 152. The act requiring mortgages to be recorded was intended for the purpose of giving notice to creditors and subsequent purchasers. And as the mortgage in this case was recorded, we must consider the defendant as a purchaser with notice, and as holding subject to that incumbrance. She purchased only what we usually call the equity of redemption, though under our act it is a legal not an equitable right. And although she has the legal title, still it is subject to that lien with the right to redeem. Upon any other construction a person selling on a long credit might lose his security before the right to foreclose would accrue, for the purchaser might be in possession five years before the debt had become due.

This case is supposed to come within the principle laid down in the cases of *Smith v. McRaa*, 2 Bay, 339, and *Cholett v. Hart*, 2 Bay, 160, where it was held that the statute of limitations would protect a purchaser against a judgment or execution creditor. It must be confessed that there is some analogy in the cases, though not so striking as would at first appear. Judgments and executions are liens on all a man's property, but not specific liens on any particular part. It would not be permitted that a creditor with a judgment or execution, for a thousand dollars for instance, should hold it as a net thrown over an estate of perhaps twenty thousand dollars, ready to draw in such part as he might think proper at any indefinite period of time. The Court did wisely therefore in those cases, to quiet the purchaser in

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\*his possession. Their error was, perhaps, in suffering personal property, in the hands of a bona fide purchaser, to remain subject to a dormant execution for such a length of time. But the rule does not apply to this case where there was a lien on the specific property of which the purchaser had notice. The motion therefore must be refused.

Decree affirmed.

<sup>1</sup>See *Chofmondeley v. Clinton*, 2 Mer. 173.

## I McCord, Eq. 399

The Administrators of HUGH RUTLEDGE v.  
Executors of SARAH SMITH, and L. KING  
et ux. and E. PHILON, Trustee.

(Charleston. April Term, 1826.)

[Vendor and Purchaser ⇨172.]

A purchaser who takes possession and remains in the uninterrupted enjoyment of it, or who receives the rents and profits, must pay interest.

[Ed. Note.—Cited in *Bowen v. True*, 74 S. C. 490, 54 S. E. 1018.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 351; Dec. Dig. ⇨172.]

[Vendor and Purchaser ⇨172.]

But where it is discovered that the titles are defective and the purchaser offers to rescind on receiving his money; or deposits the purchase money, with notice to the vendor, till titles are made; he is not bound to pay interest.

[Ed. Note.—Cited in *Hampton v. Egleberger's Ex'rs*, 2 Bailey, 522.

For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 349-351; Dec. Dig. ⇨172.]

[Vendor and Purchaser ⇨172.]

Taking possession is generally a waiver of title, and is an implied agreement to pay interest.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 349-351; Dec. Dig. ⇨172.]

[Vendor and Purchaser ⇨172.]

Notice inferred from circumstances.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 349-351; Dec. Dig. ⇨172.]

The only question in this case was, the liability of the defendants to pay interest on the balance of the purchase money of a house and lot purchased by Elizabeth Bride, now Mrs. King, of J. S. Bee, at auction, belonging to Mrs. Sarah Smith and sold by Peter Smith, her executor. The purchase money amounted to \$3,000, which she placed in the hands of William Payne, Esq. her agent, to be paid when good and legal titles should be executed. Mr. Payne paid to Mr. J. S. Bee, the auctioneer, \$2,100, but finding the property was under many legal incumbrances, retained the balance in his hands until 1816, when he paid it back to Mrs. Bride. There was no evidence that Peter Smith knew that Payne retained in his possession the balance of the purchase money. Mrs. Bride, at the time, applied to James Nicholson, Esq. a gentleman then at the bar of skill and ability in the

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management of such cases, to inquire into the real state of facts, and procure for her good and sufficient titles for the lot. Mr. Nicholson testified, that for years he was unremitting in making applications to that effect; but that they all proved unavailing, nor were titles made to this day.

Thompson, Chancellor. The law laid down by the counsel for the complainants, that where a man purchases land and is put into possession, and receives the rents, issues and

profits, he shall pay interest on the amount of the purchase money, notwithstanding any intervening circumstances may have prevented the execution of the titles, I admit to be the general doctrine where the transactions have been fair and bona fide, but it is not applicable to the present case. Mrs. Bride knew nothing of these incumbrances, but it has been proved that Peter Smith did, and his concealment of the facts from her which caused her to purchase amounted (to say the least of it) to a legal fraud. There is another general principle of law equally well established as the one relied on by complainants' counsel, which is that no man shall be permitted to take advantage of his own wrong. Mr. Smith could have exempted the property from the incumbrances, or should have warned purchasers of the existence of them. This not having been done he would be taking advantage of his own wrong could he prevail in making defendants pay interest when it is obvious to the Court that the defendant was always willing, ready and anxious to pay the money when she should obtain the titles. It would be hard indeed to make Mrs. Bride pay the interest when she was always ready to pay the principal. Smith had already received \$2,100, of the purchase money of which he had the use—the balance remained in the hands of Mr. Payne for about five years, the use or interest whereof the defendant was wholly deprived of, and if she was now compelled to pay

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interest on it it would be equivalent to fourteen per cent.—seven for the loss of the use, and seven on the balance of the debt: besides the interest on the balance of the \$2,100 was equivalent to the rents of the lot under any circumstances, and it would be ruinous to the defendant to lose the interest on that sum, and pay the interest on the balance, inasmuch as not long after the purchase of the premises they were consumed by fire—whereas if Peter Smith had executed titles, as he should have done, she could have insured them and guarded herself against any loss whatever. For these and many other reasons I am of opinion that interest cannot be allowed. It is therefore ordered and decreed that upon good and sufficient titles being executed, defendant do pay to the complainants the balance of the purchase money. I feel a great disposition to give costs to the defendants, but have concluded it will be as well to let each party pay their own.

The complainant appealed on these points.

First. That taking possession was a waiver of objection to the defect of title.

Second. That to exempt defendant from payment of interest it was necessary not only to prove that the money was not invested by defendant but that the vendors were notified of that fact.

Third. Because the enjoyment of the prem-



ises was an equivalent for the interest which should have been decreed to the vendors.

Dunkin, for the appellants. There is no evidence that notice was given to Peter Smith that the money was in the hands of Payne, nor was there any evidence that she was disturbed in the possession. While the title is in dispute the vendor is bound to pay interest, although the money is deposited, unless the vendor has notice. It is a general rule that if the purchaser has been let into

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the \*perceptions of rents and profits he shall pay interest. There are exceptions. *Powell v. Matyr*, 8 Ves. 146. The possession of land, and the rents and profits, are equivalent to the interest on the purchase. *Hood v. Huff*, 2 Const. Rep. 163. The purchase money, in the hands of the purchaser to pay incumbrances, must pay interest. 1 Sch. & Lef. 134. Taking possession under a purchase without a conveyance is a waiver of the objection to title, and the purchaser is bound to pay interest. 12 Ves. 25. 3 Desaus. Rep. 555. 2 Desaus. Rep. 592. Mrs Bride is either the debtor to the amount of the purchase, or, being in possession, she is tenant. She is either liable, therefore, for the interest or the rents.

Hunt, contra. There cannot be any fixed rule on this subject—every case must depend on its own peculiar circumstances. The rule in England—if one can be said to be established there—is not applicable to the general state of things in this country. There most of the real estate is improved to the extent of its capabilities, and the rents and the profits are well ascertained, and purchases are made with a view to enjoyments. But in this country purchases are made with a view to improvements. The rents are not well ascertained, and it may safely be affirmed that real estate in this country rarely, if ever, produces an income equal to the interest of the purchase money; and in this case the premises were partially burnt. While these incumbrances were hanging over the title, complainant could not have recovered the purchase money, and while he could not have recovered the principal it is unreasonable that he should have interest. Interest is not allowed on a bond for the purchase money, when there was an agreement to have a re-survey, until the re-survey was made. 1 Desaus. Rep. 586. In awarding interest the Court never regards the time of the purchase, but the time at which the titles were

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to be execu\*ted. *Blount v. Blount*, 3 Atk. 636. 638. A party is never bound to pay interest when the time to pay the money is to be determined by some subsequent event, as to be paid on demand, or on the execution of titles, &c. In this case, in law, defendant was not bound to pay until titles were executed, consequently she was not bound to

pay interest. It was in the power of Peter Smith to have removed the incumbrances, and he neglected to do so, and it is unreasonable that his neglect should operate as an injury to the defendant.

Dunkin, in reply. A possession of five years was a bar to all incumbrances and there was no reason why she should not then have paid the money.

*Curia, per COLCOCK, J.* As a general rule, it is clear that a purchaser who takes possession, and remains in the uninterrupted enjoyment of it, or who receives the rents and profits, is liable to the payment of interest,—and it is a rule founded on the purest principles of equity and justice. It does not always happen that men make judicious bargains, but generally speaking a Court may well presume that the use of property is worth the interest of the money. At all events it is a fair presumption, when nothing to the contrary appears. And in cases where it becomes necessary to allow compensation for the use of property, in the absence of evidence, the value which the purchaser has put on the property must be considered the most correct guide for the Court. But although, as a general rule, the purchaser be liable for interest, yet there may be cases in which I should hold he was not liable, as where a purchaser immediately, on finding that there is a difficulty about the title, offers to rescind the contract, to redeliver the possession and receive back the money advanced—and this is refused by the vendor: I say redeliver the possession on receiving

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\*the money advanced, for I would not be understood to mean that the purchaser should give up the possession without the repayment of the money advanced: on the contrary he should hold it as an indemnity. Or where the purchaser deposits the money in bank or with an agent to await the completion of the title, and gives notice to the vendor that he has done so, and does not intend to be answerable for interest. The case of *Powell v. Matyr*, 8 Ves. 146, is very analogous, both as to the facts and the principles, to this case. A part of the money was paid and deposit made of the balance. The Master of the Rolls decreed the payment of interest: after laying down the general rule, he admits there may be exceptions, and adds "it must be a strong case and clearly made out." In this instance he says, it is proved only that the party, having money in his attorney's hands, makes up the amount of the purchase money, and during the whole time elapsed in clearing the title it remains in his hands—perhaps he loses the interest—that is during that time the interest was not made. It does not appear whether interest was made or not, or if made what has become of it. It does not follow that the mere circumstance that the vendor was not ready to complete

the title at the day will vary the rule. The purchaser must state something more than mere delay, viz. that he has not had the benefit of his money; and I think it is reasonable to add the other term that has been mentioned, that in some way it shall be intimated to the vendor that the purchaser has placed himself in that situation, his money unproductive and to wait the event, otherwise there is no equality. The one knows that the estate produces rent, the other does not know that the money does not produce interest. Whenever, therefore, the purchaser is delayed as to the title and means to insist upon this, he ought to apprise the other party that he is making no interest. In the case

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of *Fludyer v. Cocker*, \*12 Ves. 25, the defendant took possession on paying a part, and afterwards refused to pay interest, on the ground that titles were not made at the day. The Master of the Rolls treats it as a case admitting of no doubt. He says, what are the legal rights is totally immaterial; that here the purchaser could not have a right to the estate, nor the vendor to the money, until the conveyance was executed. But that has nothing to do with the mode in which this Court executes the agreement. The purchaser might have said he would not have any thing to do with the estate until he got a conveyance. But that is not the course he took here. He enters into possession—an act that generally amounts even to a waiver of objections to the titles. He proceeds on the supposition that the contract will be executed. The act of taking possession is an implied agreement to pay interest. For so absurd an agreement, as that the purchaser is to receive the rents and profits, to which she has no legal title, and the vendor is to have no interest, as he has no legal title to the money, can never be implied. And the principle has been acted on invariably in our own Courts, both of Law and Equity. See the case of *Ramsay and others v. Brailsford*, 2 Desaus. Rep. 592 [2 Am. Dec. 698], and the case of *Boyle v. Rowand*, 3 Desaus. Rep. 555, and the case of *Hood v. Huff*, 2 [Mill] Const. Rep. 163.

Now, to apply the principles to the case before us. The purchaser took possession; has never discovered any disposition, nor made any offer, to give up the contract, but remained in the quiet and undisturbed possession to the present moment, always shewing an anxiety to obtain titles. She did deposit the money to pay for the land with her agent, who paid a part, a large part of it, and retained the balance, on account of the titles not being made, until 1816, when he invested it in negroes for the defendant. Now, it may be inferred that this was communi-

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cated to the vendor, and therefore the purchaser is entitled to the benefit of that fact,

She however withdrew the fund in 1816, and was not after that subjected to any inconvenience not originally known to her. The Chancellor in the decree considers that an insurance could not be effected on the property. But this is a mistake; for if she had been so disposed, an insurance might have been effected. A. may insure the property of B. The right of property is a matter of no importance to the insurers. So long then as the defendant's money remained in the possession of her agent unproductive, she is not liable to pay interest. But from the time it was invested for her benefit, that is from 1816, it is ordered and decreed that she pay interest, and that the decree of the Chancellor be so modified as to meet this view of the case.

Decree modified.

### I McCord, Eq. 406

Ex parte THE UNITED STATES in the case of The Creditors of SHUBRICK v. The Executor of SHUBRICK.

(Charleston. April Term, 1826.)

[*Executors and Administrators* ⇐225.]

Where a suit is brought against an executor, and all the creditors are advertized to come in by a day given, though a party come after the day, he will be let in, while the fund yet remains in the power of the Court, upon his paying the expenses incident to any delay thereby.

[Ed. Note.—Cited in *Shannon v. Dinkins*, 2 Strob. 201; *Ex parte Hanks*, Dud. Eq. 233; *Hall v. Faust*, 9 Rich. Eq. 390; *Ex parte Naylor*, 11 Rich. Eq. 262, 78 Am. Dec. 457; *Beall v. Lowndes*, 4 S. C. 287; *State v. Spartanburg & U. R. Co.*, 8 S. C. 172.

For other cases, see *Executors and Administrators*, Cent. Dig. § 789; Dec. Dig. ⇐225.]

In this case the creditors claimed by bill the assets in the executor's hands, who set up that the United States had a claim against them for large advances, under a contract between the United States and the testator. A notice was published for creditors to file their claims by the sitting of the next Court. Instructions from the Secretary of the Navy

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with the documents were forwarded \*to the District Attorney, and arrived during the sitting of the Court; but the Secretary had before given notice to the executor of the demand of the United States. Chancellor Thompson refused to extend the time. From which the United States appealed on these points:

First. That their claim was set forth in the executor's answer.

Second. That it was made to the executor in time.

Third. That at any time before a fund is distributed, the practice of the Court is to allow creditors to come in.

Gadsden, U. S. Att., for the appellants. The Court will at any time, before the final



disposition of the funds, suffer a creditor to come in and prove his demands on terms. 4 Johns. 643. 647. 11 Ves. 602. 1 Madd. Rep. 529. It is a matter within the discretion of the Court; and as the object would have been to do justice, and as no delay would have supervened, the complainants ought to have been let in. Besides, the answer of the defendant set forth this claim; and all the parties had notice of it, although it was not proved in form.

*Curia, per COLCOCK, J.* The point submitted in this case admits of no doubt. The fund, it is admitted, is yet in the hands of the officer of the Court, and no final decree as to the rights of the parties has been made. No inconvenience or injustice then will be done to others by admitting the claim of the United States for proof. And to exclude it, merely because the day appointed for rendering the accounts had passed before it was delivered, would be rigorous and unjust. It appears to have been the usual course pursued, and if any expense be incurred by the applicant, he shall pay so much for his laches, but not excluded from his demand. In *Lashley v. Hogg*, 11 Ves. 602, the Chancellor said he could not dismiss the bill after

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a decree, except on a \*rehearing or appeal. But the object, as to the disposition of the funds, might be obtained by consent upon further directions; and though the time had elapsed, yet the Court will let in creditors at any time, while the fund is in Court. And in the case of *Angell v. Haddon*, 1 Madd. Rep. 529, a creditor was let in though the money was apportioned among the creditors, and transferred to the accountant general, on his paying the costs incurred by his delay. The decree of the Chancellor is therefore reversed.

Decree reversed.

### I McCord, Eq. 408

The Executors of L. C. RADCLIFFE v.  
WILLIAM WIGHTMAN.

(Charleston. April Term, 1826.)

[*Arbitration and Award* ⇨82.]

Where a testatrix in her life time submitted accounts to arbitration and was satisfied with the award and performed it, her representatives cannot open the settlement on account of usury in the accounts.

[Ed. Note.—Cited in *Murrell v. Murrell*, 2 Stro. Eq. 154.

For other cases, see *Arbitration and Award*, Cent. Dig. § 443; Dec. Dig. ⇨82.]

[*Arbitration and Award* ⇨82.]

When parties submit a case they do not expect it to be decided according to technical law.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 440-450; Dec. Dig. ⇨82.]

[*Arbitration and Award* ⇨82.]

The determination of arbitrators should always be supported, unless founded in partiality or fraud, or such injustice from which misconception or mistake in law calculations are inferable.

[Ed. Note.—Cited in *Bollman v. Bollman*, 6 S. C. 43.

For other cases, see *Arbitration and Award*, Cent. Dig. §§ 441, 444; Dec. Dig. ⇨82.]

This was the case of an injunction to stay proceedings at law in a case wherein William Wightman was plaintiff, and the executors of Mrs. Radcliffe defendants, on a note of hand. It appeared that Mrs. Radcliffe in her life time, being pressed with numerous and heavy judgments against her, and having no means of extricating herself from her embarrassment, applied to the defendant for assistance which he consented to give on the following terms: to wit, that he would provide the funds necessary to her relief, and that he should be allowed a commission of ten per cent on whatever amount he might pay; and also a compensation for all losses, damages and expenses that he might be put to or sustain in such settlement

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of \*her debts. But afterwards it was agreed that a sum of five thousand dollars should be allowed him in lieu of the commissions of ten per cent. and for all trouble, inconvenience, damages, loss and expense whatever, incident to the payment of the debts. In pursuance of this arrangement Thomas Parker, Esq. in behalf of Mrs. Radcliffe, did accordingly give a note to the defendant for the sum of five thousand dollars, which was afterwards settled with Colonel Simon Magwood. The testator Mrs. Radcliffe, being dissatisfied with some of the items in the account of Wightman, particularly as to the commissions, they agreed to refer it to their mutual friends, and whatever result they came to was to be final and conclusive. The agents of Mrs. Radcliffe, Mr. Parker and Colonel Magwood, attended the settlement and were perfectly satisfied therewith, as was Mrs. Radcliffe, as appeared by repeated declarations of hers to that effect. In consequence whereof Mrs. Radcliffe was to give Wightman her note with a good endorser for the amount due him; but being unable to procure an endorser for so large an amount, Wightman himself endorsed for her at a premium of one per cent; and in order to enable her to draw the money he was compelled to pledge, besides his endorsement, three hundred shares of United States bank stock in the bank of the state of South Carolina as a security, whereby he lost altogether the control and use of that stock during all the time that the note remained unpaid. The note of \$24,127.05 was discounted in the bank of the state of South Carolina, and the proceeds thereof having been passed to Wightman's credit were received by him, and

the note, after having been renewed from time to time, was at last taken up by Wightman's endorsing a new note for her to the bank of the United States, the proceeds whereof were passed to Mrs. Radcliffe's credit. The present suit was brought with a view to enjoin the defendant from pro-

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ceeding at law on the note given by Mrs. Radcliffe to Wightman upon their final settlement, on the ground that the original transaction was tainted with usury in taking usurious interest on the money paid, and also a compensation for services. It was also objected that the charge for losses on bank stock was usurious.

Thompson, Chancellor. It is objected that the charge for losses on the pledge of the bank stock was enormous, and it really had that appearance; but, inasmuch as it was allowed in their final settlement, agreed to by Mrs. Radcliffe's confidential agent, and ratified and confirmed by herself, her legal representatives shall not now be allowed to call it again into question. With respect to the \$5,000 note, given to cover all losses, trouble, inconveniences, damages and expenses incident to the paying of the said debts, Wightman acted in the double capacity of an agent and furnisher of the necessary funds. He was entitled by law to three per cent for the moneys advanced, and no person I presume would consider three per cent too large a premium for the trouble and risk of taking up and settling such large and numerous demands as subsisted against Mrs. Radcliffe. Colonel Magwood declares he would not have done it for twice that amount, and he was her agent and well acquainted with all her business. Besides the \$5,000 note is the only usurious part of the transaction insisted on by complainants' counsel; and as that was paid out of moneys which Wightman received on account of Mrs. Radcliffe, and she assented to it, her legal representatives, admitting it had been usurious, cannot recover it back; it being an established principle in equity, that a borrower on an usurious contract cannot recover money paid thereon. It is further contended, that the premium of one per cent should not be allowed for endorsing the note of Mrs. Radcliffe. A premium for endorsing is no

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\*usury; it is not the loan of money, but a loan of credit and risk. Upon the whole I am clearly of opinion, that there exists no ground of equity would justify the interposition of this Court. It is therefore ordered and decreed, that the injunction be dissolved and the bill dismissed with costs.

The complainants appealed on the ground that the transaction was usurious.

Dunkin, for the appellants. If the original transaction was usurious, no subsequent confirmation can give validity to the contract. *Lord Chesterfield v. Jansen*, 1 Atk.

301. In *Tate v. Welling*, 3 Term Rep. 537, Lord Kenyon said, "It has been argued by plaintiff's counsel that we are precluded from considering whether, or not, the first contract was usurious; because, admitting it to be so, it was merged in the second bond; but as the former bond was the consideration of this on which the present action is founded, if that were void, as being given for an usurious consideration, most undoubtedly this second bond would be also void."

In 1810 Wightman, by his own statement, agreed to take up the judgments against Mrs. Radcliffe (part being his own) amounting to \$23,798 at 10 per cent for his trouble. His commissions would then be \$2,379 by his own statement. But in 1813 he sends by the sheriff a statement to Mrs. Radcliffe, in which he acknowledges he holds her note for \$5,000 to cover commissions, &c. states a pretended loss on bank shares, and after submitting a calculation directs the sheriff to proceed, unless a settlement is made on this basis. Under these circumstances the acknowledgment is given, which was the basis of the settlement made in 1818.

The first objection is to the duress.

The second, to misrepresentation as to loss on stock.

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\*The third, to the calculation as usurious.

The first payments were deducted from Mrs. Radcliffe's note of \$5,000. For taking up \$23,798 Wightman received \$5,000, above 20 per cent on the principal. There was no hazard as her whole property was bound, and part by his own judgments. The greater part was actually paid with her money. It is evident, however, from the whole transaction that defendant was to raise the money either from his own funds or on loan, and that in addition to all interest and incidents he was to have \$5,000. Nay, more, almost all the judgments to be satisfied were at the suit of defendant; so that he was to get this premium for paying his own judgments out of her money.

A charge for trouble in getting a loan is usurious, and vitiates the contract. It would open a door to avoid the statute. 1 Johns. Cha. Rep. 6. The calculation of Mr. Bentham made a difference of \$11,520 on the 26th of January 1818. Even if the 10 per cent was allowed, the excess would be very great. As to premiums upon endorsements, he cited *Fanning v. Dunham*, 5 Johns. Cha. Rep. 134. There was no risk, as the endorsements were still open.

Hunt, contra. In the life time of Mrs. Radcliffe, a settlement, with the advice of eminent counsel, assisted by an honest and intelligent merchant, was made of all these matters; and she, up to the time of her death, remained perfectly satisfied with it; and this Court will not now be disposed to open it.

By the terms of the contract the defendant



was to raise a fund to meet judgments to the amount of \$23,000. He was to become her agent, both as respected her own affairs, and the estate of her husband. The result has shewn that he had a great deal of trouble; and the compensation was, in the opinion

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of Col. Magwood, by one \*half less than it was worth. There is no pretence for the charge, that the per centage for endorsing the last note, was usurious.

The accounts between the parties were settled, and a note given. This note was discounted at the bank of the state, which falling due, Mrs. Radcliffe, in order to pay it, procured a new note to be discounted at the United States Bank, adding what sum she wanted; and with the proceeds paid the note in the bank of the state.

Her note to the United States bank being unpaid, Wightman had to take it up, and she was sued upon it; on which the executors of Radcliffe filed a bill to open the account. The original transaction was closed to the satisfaction of the deceased, who was represented by a competent agent. It therefore amounted to accord and satisfaction: and usury is no ground to set aside accord and satisfaction, as it is optional in the party to pay; and usury being only *malum prohibitum*, the law will, after payment, apply the maxim *melior est conditio possidentis*.

The evidence establishes that Wightman's advances saved the estate of Mrs. Radcliffe from ruin: and had he been disposed to make an unconscionable bargain, he could have forced her estate to sale by the sheriff, and purchased it at half its value. Of this she was conscious, and for it grateful, and accordingly settled with him. The note now sued upon is a distinct contract; and the fact, that the money raised by it was applied to pay the amount due to Wightman, on a final settlement, does not vary the effect of that settlement. The effort is to open it and vary the balance, by deducting what is alleged to be illegal charges; and this too by the executors. The example would render all adjustments of account uncertain; and destroy faith in settled accounts. It would lead to infinite perjury and fraud, to open accounts after the death of parties who were

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in their life \*time satisfied with their adjustment. It would prove a precedent, which would delude parties to destroy their vouchers, relying on such settlements; and then subject them to losses, for so placing their trust. I conclude that the mutual accounts having been satisfactorily settled in the life time of Mrs. Radcliffe, this Court will not now open them; and the decree of the Circuit Judge should stand.

Grimke, same side. It is not pretended, that there is any thing in the case from which usury is pretended to be inferable, but the note of \$5000. The true mode of determining whether the contract was usuri-

ous or not was, to ascertain whether the contract was or was not intended to avoid the statute? Now, there is no foundation for the pretence that any such consideration entered into that note. The witness proves that the trouble and risk were worth it. The whole matters were, however, referred to O'Gier and Magwood, and they settled it; and Mrs. Radcliffe was perfectly satisfied.

Lance, in reply. It was the duty of the complainants to carry on this suit; for if there was any well founded suspicion of usury, it would have been a devastavit even in them if they paid it. Toll. 283. 486. A note given for the balance of a note founded on an usurious consideration is void. When the original consideration is usurious, no subsequent modification or affirmation of it can purge it. 2 Desaus. Rep. 333. 1 Const. Rep. (Tread. Edit.) 144.

By the terms of the contract, the defendant was to retain the lien which the judgments to be paid had on the estate of Mrs. Radcliffe; which rendered the debt abundantly secure. All that defendant was to do was to raise money and pay them off; or, in other words, he was to advance the amount,

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and over above the legal \*interest. The arrangement secures to him \$5,000, which is clearly usury. 2 Johns. Cha. Rep. 191.

*Curia, per COLCOCK, J.* The Court are unanimously of opinion that the decree of the Chancellor be affirmed; but they put the case distinctly on the ground, that the parties referred all their accounts and disputes to arbitrators of their own choosing, who fully investigated them, and made an award, which was approved of by the testatrix in the strongest terms, and acquiesced in during her life. The claim of the complainant is res judicata, and therefore cannot now be investigated. It is admitted to be of great interest to the community that the laws regulating contracts should be enforced; but *maius interest reipublice ut sit finis litium*. The determination of these domestic tribunals ought always to be regarded as conclusive on the rights of the parties, unless there be partiality or fraud, or such injustice as would authorize the presumption of some degree of misconception, or some palpable mistake in the law, or their calculations. Now when we consider who were the arbitrators in this case, we are authorized to say, that a more able tribunal could not well have been found. The one a gentleman of the bar, preeminent for his learning, his ability and his zeal; the other equally distinguished for his knowledge in mercantile affairs: and both of unquestionable integrity. Who better understood the law of arbitrations than Mr Parker? He well knew that when a reference is made to such a tribunal, the parties do not intend, they do not wish nor expect, that their differences are to be adjudicated with technical nicety, or accord-

ing to any prescribed form. And upon a reference to decided cases this will be found to be the correct view of the subject. In *Tittenson v. Peat*, 3 Ark. 529, the defendant pleaded an award; and the Lord Chancellor

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said the only ground for impeaching an award is collusion or gross misbehaviour in arbitrators; for, otherwise, being made by the judges of the parties' own choosing, it is final and binding on all the parties. And speaking of the account between the parties he says, the award is conclusive as to the account; unless an error can be shewn in taking the account,—meaning in some part of their calculation. So in the case of *Morgan v. Mather*, 2 Ves. Jun. 21, where compound interest was allowed, as this depended upon the view which the arbitrators took of the evidence, it was held that the award could not be set aside. And Lord Rosslyn says, "I have no authority to review the proceedings of the arbitrators. All the matters before them were within the compass of their submission. You have not stated corruption, misbehaviour or excess of power, which are the only three grounds I know for setting aside awards." In the case before us the conclusion of law depended on the view taken of the evidence. We cannot then say that the award is against the law; and it is not pretended that it is against the facts of the case. I conclude with a reference to later authorities, which will be found to support the same views of the subject. In *Herrick v. Blair*, 1 Johns. Cha. Rep. 101, Chancellor Kent observes, "to interfere and set aside an award upon a slight and immaterial irregularity would be contrary to the general doctrine of the Court in this respect. The uniform language of the law is that an award cannot be impeached but for corruption, partiality, or gross misbehaviour in the arbitrators, or for some palpable mistake of the law or fact. The arbitrators are judges of the parties' own choosing. Their proceedings and award are treated with great liberality; and even a mistake on a doubtful point of law will not open an award." And he refers to a number of authorities in support of his opinion; to which I will only

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\*add those of our own Courts, [*Aylwin v. Perkins*] 3 Desaus. Rep. 305; and [*Mulder v. Cravat*] 2 Bay. 370; [*Sumpter v. Murrell*] Id. 450. The motion is dismissed.

Decree affirmed.

#### I McCord, Eq. 417

Mrs. CAROLINE M. TRESCOT v. Mrs. CAROLINE C. TRESCOT, Administratrix of JOHN S. TRESCOT, and Others.

(Charleston, April Term, 1826.)

[*Executors and Administrators* ⇨275.]

A receipt in full upon a bond and mortgage, entered by the request of an executor and the

legatees, for the benefit of the legatees, under a promise of giving a different security, set aside, and the bond and mortgage set up again, the promised security not having been given and the defendant not paid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1083; Dec. Dig. ⇨275.]

Creditors of the legatees not being parties, their rights reserved.

[*Executors and Administrators* ⇨315.]

An order for distribution before the debts are paid will not be made unless the executors are secured.

[Ed. Note.—Cited in *Shannon v. Dinkins*, 2 Strob. 201.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298–1314; Dec. Dig. ⇨315.]

[*Executors and Administrators* ⇨128.]

The representatives of an executor or administrator are liable for a devastavit committed by the former; and that even as to an executor de son tort.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 531; Dec. Dig. ⇨128.]

[*Executors and Administrators* ⇨308.]

Where legatees have received their portions before the debts have been paid, the creditor may file his bill against the executor and legatees both for an account.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1263; Dec. Dig. ⇨308.]

[*Executors and Administrators* ⇨423.]

The general principle is that the executor must first account, but there are many exceptions.

[Ed. Note.—Cited in *Vernon & Co. v. Ehrich's Exrs*, 2 Hill. Eq. 261; *Fogle v. St. Michael Church*, 48 S. C. 93, 26 S. E. 99.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⇨423.]

The bill stated that at the sale of the estate of the late William Trescot, made under the decree of the Court of Chancery, Edward Trescot became the purchaser of a house and lot of land in the city of Charleston, and for part of the purchase money gave his bond dated 11th March 1818, in the penalty of \$25,600, conditioned for the payment of \$12,800, in two, four, and six years, with interest from the date—the whole of the interest to be paid annually. And to secure the payment of the bond Edward Trescot executed a mortgage of the house and lot. The bill further stated, that in the division of the estate of the said William Trescot the bond and mortgage were allotted to her, the complainant, as part of her proportion of her husband's estate; and that Henry Trescot, the administrator of the said William Trescot, on the 14th of February 1821, assigned the bond and mortgage to complainant; that several payments had been made on the bond, but there was still a large balance due. The bill further stated that Edward Trescot died in November 1818, having first executed his will and appointed John S. Trescot his executor, and leaving his



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\*executor and also George Trescot, Henry Trescot, and Edward and Elizabeth Trescot (minor children of William Trescot deceased), his heirs at law, who were made defendants to this bill. That John S. Trescot proved the will and took possession of the estate of said testator. That afterwards a division and partition of the estate among the heirs at law was ordered by the Court of Equity, and the Commissioner allotted to each heir a considerable estate in lands, negroes and bank stock, amounting to upwards of \$30,000 to each respectively. That in the partition no provision was made for the payment of the claim of complainant, but the estate was divided without any reference thereto. Complainant charged that each heir received a dividend subject and liable to her demand. The bill further stated, that John S. Trescot departed this life in 1820, intestate; and that Mrs Caroline C. Trescot administered on his estate, consisting, among other things, of the lands, negroes, and bank stock, or their proceeds, which the said John received from his father's estate. The bill further stated that Henry Trescot had taken out letters of administration de bonis non on the estate of Edward Trescot, but that the estate in his hands was not sufficient to pay complainant's demand. That in 1821 Henry Trescot applied to complainant, and represented to her, that it was not equitable and right that the house and lot, which he had received as a part of his proportion of his father's estate, should be incumbered by her bond and mortgage, while the other heirs, who were equally bound to pay the same, had their property unincumbered, and proposed to complainant to have her lien released on the house by entering satisfaction on the mortgage, and to receive his bond as administrator of the said Edward Trescot for the balance due her. That complainant, induced by the representations of the said Henry Trescot, and knowing the estate was amply sufficient, and firm-

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ly believing that she \*would not injure her claim thereon except as to the lien on the particular property mortgaged, consented to the proposal. And Henry Trescot, as administrator of Edward Trescot, gave a bond dated 24th of February 1821, in the penal sum of \$14,162.04, conditioned for the payment of \$7,081.02, with interest from the date on the 24th of February 1822; and complainant signed a receipt in full on the bond of Edward Trescot and entered satisfaction on the mortgage. That the receipt was dated the 30th of July 1821, and was as follows: "Received of Henry Trescot the amount of the within bond, as administrator of the estate of Edward Trescot. (Signed) C. M. Trescot." Complainant charged that in making this arrangement she had no intention of releasing the heirs from their liability to her, she believing that the new bond was

equally binding on the estate as the old one, and that the only effect produced by it would be to put the proportion of the said Henry Trescot on a footing with the other heirs. That complainant consulted no person whatever, nor took any legal advice, but relied implicitly on the close connection which existed between her and the defendant; and averred that if she had supposed her rights against the estate of Edward Trescot would have been affected, she would have refused to agree to the proposal. That Henry Trescot could not have considered the said bond as settled, as he had never introduced it in his account as administrator of his father's estate—on the contrary, he had only charged the estate with three payments which he had made on his bond as administrator. That if this amount should be debited in his administration accounts the estate will be considerably indebted to him. That there was no prospect of complainant's receiving the amount of her demand from Henry Trescot, as he had not funds from his testator's estate, and his own situation was considerably embarrassed. That there was a considerable

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balance \*now due complainant, which the heirs were bound in equity to pay, as the exchange of bonds was made under erroneous impressions. That it could make no difference with the heirs with whom they settled, as it must be admitted that if Henry Trescot settled with complainant his right to call upon the heirs would be clear, and his claim paid out of their several portions in preference to their private creditors. Complainant again charged, that she consulted no one as to this transaction, but acted at the suggestion of Henry Trescot, supposing as she then and now believed that it was his wish and intention not to injure her just claims on the estate of his testator. That complainant had made repeated applications to the defendants to cancel the receipt in full on the bond of Edward Trescot, and to pay her the balance due thereon, with which reasonable request she hoped defendants would have complied. The bill propounded interrogatories as to the facts above stated—prayed that the heirs might set forth the property received from the estate of Edward Trescot, and that it might be ordered and decreed that the receipt be cancelled, and the original bond of Edward Trescot be revived, and that complainant's claim be considered a lien on the estate of Edward Trescot in the lands in possession of his heirs or representatives, and be decreed to be paid out of the same in preference to their private creditors. That the said Edward and Elizabeth Trescot, might have a guardian appointed to defend their rights, and that complainant might have further relief, &c.

The separate answer of Henry Trescot admitted the death of his father and his will; and that Dr John S. Trescot was sole

executor thereof, who qualified and took possession of the estate. The defendant received from the said Dr Trescot to the amount of \$3,466; that he applied to Dr. John S. Trescot as executor of his father for a settlement of his legacy and a division

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of the \*residuary estate, which he refused, on the ground that the estate of Edward Trescot still owed outstanding debts, and particularly a bond of his testator to the administrator of the estate of William Trescot, given for a part of the purchase money of the house and lot mentioned in the will, secured by a mortgage of the house and lot; that George Trescot and himself, being anxious for a division of the estate of Edward Trescot, proposed to the executor, John S. Trescot, that he should retain the bonds and other choses in action of the estate to meet small demands against it,—and that the residuary devisees and legatees should and would respectively assume their portion of the bond of Edward Trescot to the estate of William Trescot deceased, which having been divided between his widow and children, the bond and mortgage became the property of the widow,—and upon application to her she readily acceded to the proposal, being herself anxious to facilitate a division of the estate of Edward Trescot, in which her children were interested; that John S. Trescot agreed to the proposal of the defendant and George Trescot, that the bond of each of the residuary legatees and devisees should be substituted for one fourth of the said bond debt—the bond of John S. Trescot for one fourth—the bond of George Trescot for one fourth—the bond of defendant for one fourth—and that the children of William Trescot should be responsible to their mother and guardian for their own one fourth.—and that the estate of Edward Trescot should be divided as soon as practicable; but that John S. Trescot still refused to carry this agreement into effect, and divide the residuary estate, without the intervention of the Court of Equity, and compelled the other residuary legatees and devisees to institute proceedings for a partition, thereby causing great and unnecessary expense to them. The pecuniary legacies to George Trescot and this defendant were then dis-

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charged by delivery of property to them respectively; so this defendant was allotted the house and lot mentioned in the bill at its full value, as a part of his pecuniary legacy, although still incumbered by the mortgage aforesaid, yet under the agreement that the incumbrance should be removed by the substitution of the bonds of the heirs, as before stated; the incumbrance however was not removed; and the defendant, finding it necessary at a subsequent period to raise money by a mortgage of the house and lot, applied to Mrs C. M. Trescot to remove the incum-

brance, and proposed to her to take his bond as administrator of the estate of Edward Trescot as a memorandum, until the bond of the other heirs could be obtained, in compliance with their agreement; to which proposal she assented, and discharged the incumbrance, expressly stipulating that she did so in confidence that the agreement should be carried into effect, never imagining that any ungenerous advantage would be taken of her confidence in the parties. Defendant admitted that shortly after the division of the estate Dr John S. Trescot died, leaving his papers in great confusion, and not having made regular returns to the ordinary; and that his widow, Mrs. C. C. Trescot, administered on his estate; and this defendant took out letters of administration de bonis non, with the will annexed, of Edward Trescot, deceased; and with the funds of the estate paid off some small debts and a part of the bond debt due to Mrs. C. M. Trescot, and made regular returns to the ordinary; that the funds of the estate were wholly exhausted, and there was still a considerable balance due Mrs. C. M. Trescot; that the defendant was willing to settle his proportion of the bond debt in the manner agreed upon; and was informed, and believed, that George Trescot was also willing to do so; but that the widow and administratrix of Dr John S. Trescot objected and refused to per-

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form the agreement, on the ground \*that the discharge of the incumbrance on the house and lot by C. M. Trescot was a relinquishment of her claim upon the residuary legatees, and devisees of Edward Trescot. Defendant denied the fact to be so, and again repeated that the arrangement was only temporary until the bonds could be obtained, and that C. M. Trescot expressly declared that she did not consider the bond of defendant, as administrator, as a payment, but looked to the agreement previously made. Defendant was willing to settle any balance due by him to complainant, but he was advised, and submitted to the Court, that complainant was not entitled to any preference over the other creditors of defendant.

The answer of George Trescot admitted the facts, as far he knew them, to be as Henry had stated them; that he had been applied to to cancel the receipt on the bond of Edward Trescot, which he had refused to do, on the ground that the rights and interests of third persons would be affected thereby, and he could not properly interfere. Defendant submitted to the decision of the Court, whether the complainant had superior equitable claims over his private creditors upon the estate derived by him from his father.

The answer of Mrs Caroline C. Trescot, administratrix of Dr John S. Trescot, admitted the execution of the bond and mortgage mentioned in the bill; and that they were allotted to complainant; and that a consid-



erable sum was still due to complainant. She admitted the death of Edward Trescot, the execution of his will, the appointment of his son as executor, and the division of the estate among the heirs by the Court; in which division defendant believed no notice was taken of complainant's bond; nor was any notice taken of the just and equitable claim of Dr Trescot against the estate for commissions on various legacies, though by the terms of the will it was the evident inten-

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tion of the testator that he \*should have the benefit of them. She admitted the death of Dr John S. Trescot; that she had administered on his estate and taken possession thereof; and that Henry Trescot had administered on the estate of his father, Edward Trescot; that Henry Trescot gave complainant his bond, as stated in the bill; and that complainant satisfied the mortgage, and gave a receipt in full on the original bond; but what were the motives of Henry Trescot and complainant defendant knew not; and could therefore neither deny nor admit the statement of the same in complainant's bill. She had been applied to to cancel the receipt on the bond of Edward Trescot, which she had refused, on the ground that the rights and interests of third persons were concerned, over which she had no control, nor with which could she interfere. She neither admitted nor denied that complainant had superior equitable claims over his private creditors on the estate of her late husband, Dr John S. Trescot; but submitted the same to the decision of the Court; to which she also submitted, "whether the estate was not entitled to commissions on the legacies he settled by a transfer of property; and whether she ought to be compelled to pay any of the creditors of Edward Trescot (who were obliged to seek the aid of the Court) more than an equal proportion with the other heirs, after an allowance of defendant's equitable demand for commissions against the estate of Edward Trescot.

The joint and separate answers of Edward Henry Trescot and Elizabeth Trescot, infants, under the age of twenty-one years, by Benjamin A. Markley, their guardian ad litem, submitted their rights to the judgment of the Court.

Thompson, Chancellor. The facts in this case were, that at the sale of the late William Trescot's estate his father, Edward

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Trescot, became the purchaser of a \*house and lot, situated at the corner of Broad street and State House square; and for a part of the consideration he gave his bond, dated the 12th of March 1818, in the penalty of \$25,600, conditioned for the payment of \$12,800, secured by a mortgage of the property. On a division of the estate of William Trescot the above bond and mortgage were allotted to the complainant, his widow, as a

part of her proportion of the estate. It further appeared that Edward Trescot died about November 1818, having first made his will and appointed his son John S. Trescot executor thereof, who duly qualified on the same. In the course of his administration Dr J. S. Trescot had advanced various sums of money to his brothers George and Henry Trescot, and to the minor children of his brother William Trescot. To his brother George he had advanced, at different times, the sum of \$2,221, to his brother Henry the sum of \$3,466, and to the minor children of his brother William the sum of \$350. These were advances over and above what the parties were entitled to from the estate. On the death of Dr. Trescot the defendant, Henry Trescot, administered on the estate of his father Edward Trescot, and possessed himself of the funds of the estate to an inconsiderable amount. He afterwards induced the complainant, in consequence of a previous arrangement made with Dr Trescot in his life time, and the other heirs, to accept his bond as administrator for the amount due to her on the bond of Edward Trescot, and to give a receipt in full on the latter bond, and to enter a satisfaction on the mortgage of the house and lot in Broad street. At the time this arrangement was made the complainant was without advisers, and did not intend that the lien on the general estate of the original obligor, Edward Trescot, should be relinquished, and so expressly declared. The arrangement was a matter of accommodation

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to one of the heirs, who had received \*this house and lot, incumbered as it was, as part of the proportion of the estate, and placed him in an equal situation with the other heirs, who had received their portions free and unincumbered, as had been previously agreed on between the executor in his life time and the other heirs.

The administrator de bonis non of Edward Trescot never considered this bond as fully discharged; but on the contrary, declared in his answer that he considered his bond given as administrator only as a memorandum of the amount due complainant. He never introduced the amount in his accounts of administration. If he had done so the estate would have been indebted to him upwards of \$6,000. The parties all acknowledged a considerable balance to be due to complainant.

In the administration of the estate the executor Dr J. S. Trescot erred. He was bound to pay off all the debts in the first instance, or to have provided for their payment. Under all the circumstances of the case it is ordered and decreed, that the receipt on the original bond of Edward Trescot be expunged, and the said bond fully reinstated,—the same to be paid out of any part of the estate of the said Edward Trescot which may now remain in the hands or possession of

any of his heirs or representatives; the same to have a preference to any of their private creditors as far as the specific property received by the heirs respectively from the estate of Edward Trescot is involved. It is further ordered and decreed, that the estate of Dr J. S. Trescot be liable for the amount which may be found to be due by him as executor of his father Edward Trescot, deceased, to the estate of his testator, with interest on the same from the 3d of October 1820. Also that the estate of the said John S. Trescot be liable for the amount overpaid by him to George Trescot, Henry Trescot, and the minor children of William Trescot

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respectively, with interest \*on the same from the respective times the amounts were advanced. It is further ordered and decreed, that it be referred to the Commissioner of this Court to report the amount due to complainant, and to report on the accounts of the executor and administrator be bonis non of Edward Trescot, and the amounts due by them respectively with interest. The costs of this suit to be paid out of the estate of Edward Trescot.

The defendants appealed from this decree.

Pepoon, for the appellants. The Chancellor erred in decreeing that the bond in this case should be set up against the estate of Edward Trescot, and have a preference over the private creditors of the heirs of Edward Trescot, who had taken their property by a regular partition out of the Court of Equity. The complainant herself having regularly satisfied the mortgage and cancelled the bond, and having by her own act held out that there was no such incumbrance on the estate of the heirs, and the creditors not being parties. He was also wrong in decreeing that the estate of the executors of Edward Trescot should pay the sums advanced to his brothers, with interest on the same; inasmuch as the balances were created by the act of the Court itself, in forcing a partition of the estate before the debts were paid, or the estate settled. The decree should have directed, that the heirs who had received the amounts, and who were all parties, should have been decreed to refund their respective sums, with interest; and not the executor who paid them. Besides, the Chancellor had decreed upon matters not included in the suit, and which were the subject of another bill, in which a reference had been ordered, and which was then pending. The Court was also wrong, in allowing the answer of one defendant to be evidence

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against the \*others, contrary to their denial on oath. The rule obtained as well in equity as at law, that the Court will not decree on matters not put in issue by the bill and answer. The whole object of complainant's bill was, to cancel the receipt on the bond and mortgage, and that they should again be set

up. And there was nothing in any of the answers, which put the matters of account between the parties in issue, except the mere admission in Henry Trescot's answer, that he had received an advance from the executors. But admitting that the questions of accounts were before the Court, yet the Court erred in decreeing that the executors of Edward Trescot should pay the sums advanced to his brothers with interest, as the balances were created by the act of the Court, in forcing a partition, for it was in effect a decree.

*Curia, per COLCOCK, J.* In the argument, the general power of the Court to grant relief in such cases as the present is not denied. But it is contended that, in this particular case, the bond should not have been set up and charged on the estate of Edward Trescot; because the complainant, being of full age and of perfect mind, disposed of her rights, and received what she thought a sufficient consideration; and that, at all events, a preference should not have been given to the complainant's demand over those of the creditors of the legatees.

The first inquiry presented is, whether the demand of the complainant is a just one and unpaid? And as to this we are relieved from any difficulty, for the answers of the defendants admit all that is stated by the complainant on that point. That she held the bond of Edward Trescot, and that there is still due to her a large balance on that debt. It is also apparent, that the debt being chargeable on the estate of Edward Trescot each of the defendants were liable for a part of it. For if the house which had been

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allotted to Henry \*Trescot, as his portion, had been sold, he would have had an undoubted right to call on his co-legatees for contribution; as the payment of the debt would have diminished his portion by so much as the debt amounted to. The removal of the debt then operated as a benefit not only to Henry but to all the heirs. And it was given up by the complainant under the belief, that each of the legatees would become bound to her for his respective share. This impression was certainly made on her mind; and all the circumstances of the case warranted her in believing that it would be carried into effect. It is not important, that the conduct of Henry should be considered as fraudulent; for if he acted under an honest mistake the complainant is equally entitled to relief. If he alone had been benefited by the act, perhaps the complainant would have been bound to look to him alone for compensation. But it would never be permitted that those, who are benefited by the fraud or mistake of another, should be allowed to retain the benefit because they did not participate in the fraud or mistake. It has been urged that there is no proof against the rest. It is true the answer of



one defendant is not evidence against his co-defendant; but his answer is evidence of what he thought, and that he made the representation to the complainant; and I think that all the circumstances of the case, taken in connection with the testimony of Mr. Bentham, would well warrant a belief that such an arrangement had been agreed on. For he says he was employed by all the parties to settle the accounts. They were perused by George, Henry, and Mrs. Caroline C. the administratrix of John, and Charles Carrier, her brother, and that the object was to bring about an amicable adjustment, and to settle the bond of Edward Trescot. The Court are, therefore, unanimously of opinion, that the decree of the Chancellor be so far affirmed, as that the receipt on the bond be

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\*cancelled, and the bond again established as a claim against the estate of Edward Trescot.

But the Court are not prepared to say that the complainant's demand shall have a preference over the claims of the creditors of the legatees; nor is it necessary that the point should be determined; for there is no evidence before the Court, at present, which shews that there will be any deficiency of fund to pay the debt; nor are the creditors before the Court. The decree of the Chancellor on that point is therefore overruled.

Before I proceed to the consideration of the other grounds and arguments made in the case, I must premise that so much of the second ground as states "that the balances against the executor John S. Trescot were created by the act of the Court itself, in forcing a partition of the estate before the debts were paid or the estate settled," is, to say the least of it, altogether gratuitous; for there is no evidence to support the charge of so much inconsistency in the Court; and it cannot be supposed that an order for a distribution would ever have been made by any Court, had the executor stated that there were still outstanding debts. At all events such an order never would have been made without securing the executor from all future liabilities. Under this head it was contended, that in no event could the estate of John S. Trescot be made accountable for any mal-administration on the estate of Edward Trescot; because if he had committed a devastavit, it was a personal wrong and died with him, and his executor or administrator could not be made answerable, and 1 Salk. 314, was referred to in support of the position. It could not have been expected that such a doctrine would have been advanced at this day. That this was the old doctrine is well known, but it was one so fraught with mischief, that the statute of 30

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Charles II. c. 7, and that of 4 and \*5 of William & Mary, c. 24, sec. 12, (both of which are made of force in this state) were passed

for the express purpose of remedying the mischief; and by those statutes the executor of an executor or administrator, and the administrator of an executor, are made liable to an action for a devastavit committed by the first executor or administrator. But even before these statutes were passed the Court of Equity made the estate of an executor (and that too of an executor de son tort) liable. In 2 Modern Reports, page 293. (case 171, Anonymous) a case tried in the Exchequer Chamber, the Lord Chancellor said, the executor of an executor de son tort is not liable at law, though he would help the plaintiff here. And in the case of Price v. Morgan and Evans, 2 Chancery Cases, 217, tried in 1637, the Lord Chancellor declared he would grant relief; and with a prophetic spirit he added, that the common law would come to it at last. His words are—"although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last. Therefore whatever estate of Gyles is come to Elizabeth, or to the hands of William, which William her testator wasted, the personal estate of William in the hands of his executrix shall answer."

The second ground concludes with submitting, that the Chancellor ought to have decreed that the heirs who had received the amounts (and who were all parties) should refund their respective sums with interest, and not the executor who paid them. It was certainly not necessary, nor had the Chancellor sufficient evidence before him to enable him, to make any specific decree against any one of the defendants, and therefore this part of the decree is considered as reversed. Such may possibly be the result when all the accounts shall be made out between the

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parties, as in *Stiddolph v. Leigh*, \*2 Vern. 76, and in [*Smith v. Smith's Ex'rs*] 1 De-saus. Rep. 304. But this Court will do no more at present than order that the accounts of all the defendants, with the estate of Edward Trescot, as well as the claim of the complainant, be referred to the Commissioner to be examined and adjusted, and that he report the amount of complainant's demand, and how much, if any, remains of the estate of Edward Trescot unadministered, in the hands of either Henry Trescot the administrator de bonis non, or in the hands of Caroline C. Trescot the administratrix of John S. Trescot, who was the executor of Edward Trescot.

But it was further urged on the part of the defendant, that a creditor of an estate could not maintain a bill against the legatees or distributees of an estate until the executor or administrator had first accounted; and the reason assigned is, because if one creditor is permitted to do so, all the rest may likewise sue. This reasoning is

by no means conclusive or satisfactory, because it may be answered, that if a legatee or distributee will take his share before the debts are paid, he knows that on a deficiency of assets the estate in his hands may be pursued, and he does an act by which he subjects himself to be sued, and therefore has no right to complain; and further, because it seems unjust to counsel an honest creditor to expend his money in calling on an insolvent executor, as may be the case, to account and make good his administration, when ultimately the legatees or distributees must pay his debt. A better reason, however, is that there may be funds in the hands of the executor not administered, which ought first to be applied, and the insolvency of the executor ought to appear before the representatives are made to pay. It must be admitted, that the position of the defendants' counsel is generally correct, yet there may be cases in which it would be departed from; as where there was collusion between the executors and legatees, as is ex-

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pressly said by \*the Lord Chancellor in the case of *Doran v. Simpson*, 4 Ves. 664; or, as in a case like the present, where the complainant does not rely alone on a special agreement, or promise to pay.

But the bill is not against the legatees alone; it is against the representatives of the estate of Edward Trescot, as well as against the legatees: and the circumstance, that the representative of the estate of Edward Trescot is one of the legatees does not alter the case; as he is called on, in both capacities, to answer. And it is perhaps the most convenient way of proceeding to file the bill against both executor and legatees; as indeed appears to be more frequently done.

The principle that the executor must first account has been long and well established here; but it will appear by a reference to the cases, that a suit against both has been frequently permitted: as in the case of *The Surviving Executors of B. Elliott v. John Drayton, Trustee, T. Drayton Administrator of Glen Drayton, and Edward Lynah Administrator of B. Elliott*, 3 Desaus. Rep. 29. 2 Fonbl. 372, note (h), book iv. part 1. c. 2, § 5. [*Milligan v. Milledge*] 3 Cranch, 220, 228 [2 L. Ed. 417]. [*Riddle v. Mandeville*] 5 Cranch, 322, 330 [3 L. Ed. 114].

It is therefore ordered and decreed that the receipt on the bond given by the deceased Edward Trescot be erased; and that the bond be re-established as an existing debt against the estate of Edward Trescot deceased; and that the same be paid out of the unadministered estate of Edward Trescot (if any such there be), either in the hands of the administrator de bonis non, or in the hands of the administratrix of John S. Tres-

cot. But if there be no such funds, then by contribution by the legatees of the said Edward Trescot; each paying his proportion of the debt; and that all the accounts of

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\*the defendants be referred to the Commissioner for examination and adjustment; and that he do report if there be any part of the estate of Edward Trescot unadministered; and also that he do ascertain and report the amount of the claim of the complainant; and that the costs of suit be paid in the same manner as the debt is to be paid.

Decree modified.

## I McCord, Eq. 434

JAMES MOFFAT, THOMAS COCHIRAN and Others v. M'DOWALL and BLACK, Assignees of James M'Dowall.

(Charleston, April Term, 1826.)

[Witnesses ⇨94.]

In a suit between creditors, the debtor is a competent witness to prove usury; and under the statute to prove usury, unless the lender will deny the usury on oath.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 249-257; Dec. Dig. ⇨94.]

[Equity ⇨345.]

Where the defendant denies positively a fact stated in the bill it is conclusive unless contradicted by two witnesses, or by one witness and circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⇨345.]

[Equity ⇨325.]

Every allegation must be proved that is not admitted by the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 642; Dec. Dig. ⇨325.]

[Usury ⇨126.]

It seems the Court of Equity may set aside an usurious contract for the benefit of creditors where the usury is so excessive as to furnish a strong presumption that the object was fraudulent. Unsafe to lay down a general rule on the subject.

[Ed. Note.—Cited in *Pickett v. Pickett*, 2 Hill, Eq. 479.

For other cases, see Usury, Cent. Dig. § 364; Dec. Dig. ⇨126.]

[Fraudulent Conveyances ⇨115.]

A debtor may make an assignment of his property to particular creditors in preference to others: though it may be dishonest in the debtor it is not void among the creditors.

[Ed. Note.—Cited in *Niolon v. Douglas*, 2 Hill, Eq. 446, 30 Am. Dec. 368.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375-377; Dec. Dig. ⇨115; Insolvency, Cent. Dig. § 84.]

[Fraudulent Conveyances ⇨115.]

So any other lien may be given preferring a creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375-377; Dec. Dig. ⇨115.]


[Usury ⇨117.]

[Evidence that a person was accustomed to deliver his notes, indorsed by a third person, to his broker to be negotiated, and that the broker, usually at a subsequent time on the same day,

<sup>1</sup>See ante, p. 318, the case of *Gregory's Ex. v. Forrester*.



accounted for the proceeds at a usurious rate, is not sufficient evidence that the negotiation was usurious.]

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 329; Dec. Dig.  117.]

This was a bill of interpleader filed by M'Dowall and Black, assignees of James M'Dowall, against James Moffat, Thomas Cochran and others, creditors of the said James M'Dowall, to obtain the direction of the Court as to the distribution of the funds in their hands. By the assignment James Moffat was postponed to the other creditors made defendants to the suit, and being dissatisfied instituted an inquiry into the dealings of the said James M'Dowall; and suspecting that most of the money transactions of the said James in the latter part of his life were usurious, gave notice to the assignees not to pay any notes which were not clearly bona fide transactions. In consequence of this notice, the assignees, having been advised by counsel that they ought not to assume upon themselves the determination of what notes were good or bad, filed a bill of interpleader against the said James

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Moffat and the creditors holding the \*suspected notes, and who were expressly provided for in the said assignment in preference to the said James Moffat. To this bill the defendants severally put in their answers; and in answer to the charges of the bill replied, that they had given valuable considerations for the said notes; and Adam Tunno and Rapeyle, Bennett & Co. denied the usury, while Timothy Street and Co. Jacob R. Valk and Thomas Cochran alleged the same, and did not admit the charge of usury.

James M'Dowall, the original maker of the notes and assignor of the fund in dispute, was examined as a witness before the Commissioner respecting the notes held by Adam Tunno, Jacob R. Valk, Timothy Street & Co. Thomas Cochran, and Napier Rapeyle, and Bennett. With regard to these he proved that his habit of doing business was the following. He drew the note, and obtained the endorsement of M'Dowall and Black, for the purpose of raising money. He then delivered them to a broker with authority to raise money upon them, and generally received from the broker on the same day, but not at the time of giving him the note, a sum considerably less than the face of the note, with the legal interest discounted from them. Sometimes only double bank discount was taken off, and at other times twice as much. He could not say whether any brokerage was also deducted, nor could he say whether the amount withheld from him, or any part thereof, was retained as brokerage, or usurious interest. He was always paid in cash and not by a check. He did not know what became of the notes after they were delivered to the broker, nor did he know how much the brok-

ers received upon the transfers of the notes. He knew no persons in the transactions but the brokers.

James Moffat, at whose instance the bill was filed, and who was also made a defendant, put in his answer, insisting upon his

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claim as a bona fide creditor, and calling upon the Court to place his debt on a footing with the other defendants, although his claim was in the second class and theirs in the first class, according to the terms of the assignment.

The parties went to trial upon the bill, answers and testimony of James M'Dowall.

Thompson, Chancellor. One very important question in the case is, whether these notes are to be considered usurious? Without referring to authorities I lay it down as a general rule of law, that notes of this description, created and thrown into the market for the express purpose of raising money, have generally been considered usurious, provided the discount exceeds the legal interest. These notes therefore, at law, would be null and void, but in equity not so. This Court will compel the borrower to pay the principal with the legal interest, and only lop off the excess. It is contended, however, that James Moffat, being a third person, had not a right to insist on the statute against usury. As well might it be said, that a man, having a rightful claim against another, cannot insist on setting aside a fraudulent conveyance for the purpose of letting him in to recover a just and legal demand. It is further urged, that Mr M'Dowall had a right to select whomsoever of his creditors he pleased, and give them a preference. Generally speaking the law is so; but not when there is fraud or collusion. In this case the defendants by exacting exorbitant interest from Mr M'Dowall contributed to his failure and ruin. Moffat on the contrary, by furnishing him with goods, set him up in trade, and enabled him to rank with the merchants of the place. And it was a moral, as well as legal, fraud, not to have placed him at least upon a footing with his other creditors; and what was just and right for him to have done, which has not been done, the Court will do for him. It is

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therefore ordered and decreed, \*that James Moffat be placed on the schedule containing a list of preferred creditors, that it be referred to the Commissioner to ascertain the excess of the discount over and above the lawful interest, and that such excess be deducted from each note according to the rates of the discounts; and the aggregate of the estate of the said James M'Dowall be divided in average and proportion between the said preferred creditors. And should there remain any surplus the same is to be divided in the same manner amongst the creditors named in schedule No. 2. each party to pay his own costs.

An appeal was taken up on these points.

First. That James M'Dowall ought not to have been admitted as a witness.

Second. Because there was no proof of usury to affect the defendants Cochran, Tunno or Street, or Napier Rapeyle and Bennett and Valk.

Third. That Moffat, though a creditor of James M'Dowall, could not avail himself of the objection of usury, admitting its existence.

Fourth. That admitting that the Court had power to reduce the claims of the defendants who were creditors in class No. 1 under the deed of assignment, yet the Court had no power to place the defendant Moffat in class No. 1, or to give him a right to an equal and rateable payment with the other defendants.

Dawson, for the appellants, cited 2 Brev. tit. Usury. 2 Powell on Contracts, 2. The assignment to M'Dowall and Black is not an undertaking to pay money; but is, in effect, the payment to his creditors. Comyn on Usury, 55. It is essential to the loan, that the money is to be returned. Comyn on Usury, 55. Not so of this assignment. A Court of Law will not set aside a judgment founded on an usurious consideration, without compelling defendant to pay the sum

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actually loaned. Comyn \*on Usury, 95, 96, 208, 209. Whatever might have been the character of the loan, nothing corrupt entered into the assignment. The plea of usury can not be sustained in an action on a bond for indemnity. Cro. Eliz. 197. 588.

A bond given on a corrupt contract between two obligors can not be affected by it in the hands of the obligee, who was no party to the usury. Cro. Jac. 33. 1 Saund. 295. If A. gives B. his note for usury, who transfers it to C. without notice to whom A. gives his bond for the amount, it is good. 8 Term Rep. 390. 2 Caines' Ca. 150. A substituted security is not void, although plaintiff knew that the original was usurious. Feron v. Hulm, 4 Esp. N. P. 11. An assignment to pay an usurious contract cannot be set aside. 1 Johns. Ca. 161. The defence of usury is not favoured. Amendments will not be allowed. Cro. Eliz. 104. Comyn, 209. If parties to an illegal contract think proper to waive the objection, third person cannot make it. 4 Johns. Cha. Rep. 332.

Conveyances cannot be said to be voluntary, when there is any consideration; even when it is only conscientious. Roberts on Frauds, 15. 66. 432. The statute was made to protect creditors, and it is anxious to protect those also who have a moral obligation. 1 Fonbl. 271. The payment of an usurious debt is a moral obligation. 3 Day's Rep. 363. Coop. 290. 294.

King, contra. First, as to the competency of the witness M'Dowall, it was decided at the last Court that the party to an usurious con-

tract might be a witness. Packhard v. Night. M'Dowall stands indifferent between the parties; if liable at all, he is liable to all. Executors of Thomas v. Brown, 1 M'Cord, 557. Flemming v. Mulligan, 2 M'Cord, 173.

The Court will not interfere to release against an usurious contract, without the payment of the sum really due. 1 Fonbl. 25. 5

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Johns. Rep. 136. He also cited \*Duncan v. Vaux, decided four or five years since, in the Appeal Court of Equity.

Grimke, in reply. The complainants have no interest in the question. The only question in the case arises out of the allegation of Moffat, that the notes were usurious; quo ad hoc, he is the complainant, and when he comes into equity he must do equity by paying the sum loaned and interest. Smith v. Fisher, 2 Desaus. Rep. 275. The Court dismissed a bill preferred by one creditor against another, to set aside an usurious contract to let him in. The defendants have not admitted the usury, and it was incumbent on Moffat to prove it. M'Dowall's evidence was necessary to establish it between them; but he might have been imposed on by the brokers. 1 Gilm. Rep. 42.

*Curia, per JOHNSON, J.* The first ground of this motion has not been insisted on and is clearly untenable. However the partialities of James M'Dowall might have been enlisted, in a legal point of view his interest was equally balanced between the contending parties. The result would be the same to him whether the one or the other prevailed. He was a competent witness, therefore, on the principles of the common law. And being called to testify as to the fact of an usury to which he was a party he was rendered competent by the statute, unless the lender would have contradicted on oath what he offered to swear and that although he had been a party to the suit. Executors of Thomas v. Brown, 1 M'Cord, 557. Flemming v. Mulligan, 2 M'Cord, 173 [13 Am. Dec. 707].

The second ground denies the fact of usury, with respect to which the defendants form three distinct classes.

1. Moffat, who makes the allegation. 2. Tunno and Napier, Rapeyle and Bennett, whose answers expressly deny it. And 3.

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Street & Co. and Valk and Cochran, \*who although they do not, in express terms, deny it, yet do not admit it. James M'Dowall was the only witness who testified as to this fact. He states in substance that he was in want of money, and as the means of raising it put his notes, endorsed by the present complainants, into the hands of brokers, who accounted with him for the amount by deducting generally double bank discount, and sometimes more; but by whom the notes were discounted, or on what terms, he was wholly ignorant. This evidence is unsup-



ported by any other witness, nor do the circumstances necessarily tend to that conclusion, especially as the broker, Immanuel, who was then living, might have been called in aid of the other proof, if the fact existed. Admitting, therefore, that the conclusion of usury might possibly have been deduced from the evidence of James M'Dowall, yet the defendants designated as the second class would have been protected under the rule which obtains in this Court, that where a defendant denies positively a fact stated in the bill it is conclusive unless contradicted by two witnesses, or by one witness and circumstances. The evidence of James M'Dowall does not, however, establish the fact of usury. He does not pretend to know on what terms the notes were originally negotiated—all that he professes to know about it is, that the brokers employed by him accounted with him for the proceeds at an usurious rate, and whether honestly or not he was equally ignorant. They were his agents, and if no usury entered into the original negotiation of the notes the contract was obligatory on him, and whatever fraud or cozenage they may have practised on him cannot be set down to the account of those who discounted the notes. The fact of usury cannot therefore be fairly deduced from this evidence, and whatever suspicions may arise out of the evasive answers of the defendants constituting the third class, they are protected by the rule that requires proof of every allegation that is not admitted by the answer.

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\*Third. The disposition made of the preceding ground renders the consideration of the third ground unnecessary. That cases might exist, in which the Court would be justifiable in setting aside a contract tinged with usury in favour of third persons (creditors), may be readily conceived; as where the excess was so great as to furnish strong presumptions that the object was fraudulent. But it would be difficult, if not impossible, to lay down any rule upon the subject: it is indeed the language of Courts of Equity, that it would be unsafe lest it should give a covering to the artifices of avarice.

The only remaining question necessary to be considered in this case is, whether the Court had the power to place the defendant, Moffat, on a footing with the creditors who are preferred in the deed of assignment. The foundation of so much of the decree as relates to this subject is the supposed usury and fraud which entered into it. The opinion already expressed has removed this foundation, and if the superstructure rested solely on it, it would as a necessary consequence fall with it. But laying these considerations

out of the question, it has been urged with much earnestness, that supposing all the transactions perfectly fair and legal, yet the fact of appropriating the whole of his funds to the payment of debts due to favourite creditors to the exclusion of others equally meritorious, is, in an equitable point of view, a fraud against which the Court ought to relieve. If we were left to reason on this subject, without the aid of the lights with which experience has furnished us, it would be difficult to resist this conclusion. Reasoning a priori we should, I think, generally conclude, that where the estate of a debtor was insufficient to satisfy all his creditors it ought to be distributed amongst them in equal proportions, without regard to the nature of the demands or legal priorities. But beautiful and fascinating as a system built upon

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the basis of natural justice may be, \*and wide as the Courts of Equity, in this and every other country where they exist, have opened their doors to admit the idol, a necessity growing out of public expedience has compelled them to preserve a few landmarks by which their powers are circumscribed. Amongst these may be safely reckoned the principle, that they are bound by the positive rules of law. That a debtor may pay one creditor, that he may give him a lien on his property, or make an assignment for his benefit, are conclusions that admit of no controversy. It is the practice of every day, and universal consent has stamped it with its sanction. Fraud, it is said, however, will vitiate any contract, and on this ground Moffat claims to set aside the deed of assignment made by James M'Dowall, and to come in on a footing with the preferred creditors. Let us suppose that it was dishonest and unfair in James M'Dowall to make this difference among his creditors, how, let it be asked, does that circumstance affect the favoured creditors? There is nothing in the most rigid code of morals which prohibits a creditor from using legitimate means to secure a doubtful debt, or to protect himself in the enjoyment of the fruits of his exertions. And however we may be disposed to censure the conduct of James M'Dowall, there is no reason why we should visit his sins on the heads of his creditors, who have done nothing illegal or morally dishonest.

The decree of the Circuit Court is reversed, and it is ordered and decreed that the complainants do apply the funds assigned to them in the manner provided for in the deed of assignment—that the defendant, Moffat, pay his own costs, and that all other costs be paid out of the funds in the hands of the complainants.

Decree reversed.

## I McCord, Eq. \*443

\*Mrs. CHARLOTTE W. SMITH, Executrix of W. L. Smith v. ADAM TUNNO, and the Survivor of SIMPSON and DAVIDSON.

(Charleston. April Term, 1826.)

[Evidence ⇨423.]

Parol evidence is admissible to shew that a party to a bond signed as surety in all cases involving the rights of principal and surety.

[Ed. Note.—Cited in *Wayne v. Kirby*, 2 Bailey, 553; *Sloan v. Gibbs*, 56 S. C. 487, 35 S. E. 408, 76 Am. St. Rep. 559.

For other cases, see Evidence, Cent. Dig. § 1964; Dec. Dig. ⇨423.]

[Principal and Surety ⇨45.]

Whether a party signed as surety or not may be inferred from the circumstances of the transaction.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 22; Dec. Dig. ⇨45.]

[Principal and Surety ⇨115.]

The surety will be discharged if the creditor releases any of the securities he may otherwise have for the payment of the debt. But when by the terms of a public sale a mortgage and personal security were required, the surety is not discharged if the vendor chose not to require the mortgage, at the consummation of the contract.

[Ed. Note.—Cited in *Land v. Brevard*, 3 Strob. Eq. 63; *Exchange Bank v. McMillan*, 76 S. C. 568, 57 S. E. 630.

For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. ⇨115.]

[Principal and Surety ⇨104, 105.]

A new contract varying or altering the original contract, without the consent of the security, discharges the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186, 201; Dec. Dig. ⇨104, 105.]

[Principal and Surety ⇨97.]

This rule applies to a bond in the hands of an assignee as well as against the original obligee.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-154; Dec. Dig. ⇨97.]

[Principal and Surety ⇨104.]

Mere forbearance will not discharge the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. ⇨104.]

[Principal and Surety ⇨105.]

A contract to give time, to exempt the surety, must be such as is binding on the creditor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. ⇨105.]

[Principal and Surety ⇨105.]

A deed can not be avoided by parol; but such agreements may discharge the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. ⇨105.]

Campbell was the purchaser at the Master's sale of certain lands and mills at Edisto, and the bonds set forth in the bill were signed by him and the complainant, and given to Gibbs, the Master, for the purchase. Campbell was the principal in

the bonds, and on the face of them Smith was a principal also, but it appeared that Campbell was the purchaser, that personal security was one of the conditions of the sale—that the titles of the property were made to him only, and that he had the exclusive benefit of it. Smith never pretended to any interest in the purchase, but the bill stated that he signed merely as a surety. Standing in that relation he sought to be released from his contract, stating that he was applied to by Campbell to become his surety to the Master in these bonds, who represented that his signing them as surety was merely matter of form; as the whole of the property purchased, which was very valuable, was, pursuant to the conditions of the sale, to be mortgaged to the Master in Equity, to secure the payment of the bonds. Smith stated further, that he declined joining in the bonds until fully satisfied that the terms and conditions of the sale were, that the whole of the property so purchased was to be mortgaged to secure the payment of the bonds, and that titles could not, pursuant to such conditions, be given until the mortgage was executed. The bill was filed against Adam Tunno and Crawford Davidson, survivor of Simpson and Davidson, who held the bonds by assignment. Smith and Campbell were both dead. Smith's state-

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ment, in a material part, was supported by the fact, that the property purchased was to be mortgaged. The Master, in the conditions of the sale of the 12th of April 1792, stated, "good personal security, or other adequate securities, with mortgages of the property purchased, will be required."

Gaillard, Chancellor. Smith, who never pretended to any interest in the purchase, must be considered merely as a surety. Standing in this relation he seeks to be released from his contract. The mortgage of the property was not given by Campbell; probably it was not required; certainly it was not insisted on; for, according to the conditions, unless the terms were complied with in one month from the day of sale, the lands were to be resold, and the former purchaser made liable for any deficiency in the second sale. Smith, being the surety in the bond, was interested that the mortgage should be taken, and so far as he was concerned Gibbs could not dispense with this security, for on his part the conditions of the sale must be considered in the nature of a stipulation. A co-obligor in a bond, who becomes so confiding in the express assurance of the other obligor, the real debtor, confirmed by the conditions of the sale imposed by the obligee, must be considered as a surety when called upon to perform his obligation; and if the obligor, who is the real debtor, and the obligee afterwards dispense with a mortgage, which was to have



been taken by the terms of sale, without the surety's knowledge, he may say, *non hæc in fœdera veni*, this is not the contract I entered into.

Another objection is to be taken to these bonds. It is, that James Smith, who held them as assignee in 1794, then made a new contract with Campbell, without the privity of Smith the surety, consolidating the principal and interest, and extending the time of payment beyond the period at which they were payable by the original contract. Two

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of the bonds—there were five in all—\*came afterwards into the hands of Blacklock, who is dead; but in a statement of them rendered by him it appears, that the principal and interest were consolidated on the 2d of August 1794, and he adds, “as by written agreement between D. Campbell and James Smith from whom I received it.” The answer admits that “an agreement was entered into between Messrs. Campbell and James Smith, in substance such as is set forth in the bill; but whether it was executed with or without the knowledge of the complainant it says the defendant is altogether ignorant.” This admission lets in the application of the principle upon which sureties are relieved. It is by no means necessary that it should be made to appear, as was contended, that the time was extended contrary to the consent of the surety, for the new contracting parties to be bound by it. The agreement between Campbell and James Smith incapacitated Smith from suing Campbell on the bonds till the expiration of the time mentioned in it, which was considerably beyond that when payment was required by the original contract. There is no evidence that Smith, the surety, acceded to this agreement; and without his consent it was not competent to the obligee or his assignee to extend his liability, and alter the definite character of his engagement.

Smith is released from the bonds. And it is ordered and decreed that the defendants be perpetually enjoined from proceeding to recover them, and that the parties do each pay their own costs.

The defendants now appealed. The brief makes these points, viz.

First. That parol testimony ought not to have been received to prove an obligor of a bond in the hands of an innocent purchaser without notice to be a mere surety.

Second. That if such proof was admissible, that which was adduced in this case was insufficient to establish that Smith was merely a surety on these bonds.

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\*Third. That if the proof was sufficient the mere forbearance to sue could not entitle him to his discharge.

Fourth. That there was no proof that the mortgage had been dispensed with after Smith had signed the bond, as the decree as-

serted; nor was the mortgage to have been taken at all events, but only if required by the master, who in this case was not proved to have required it.

Fifth. And that extension of time, to discharge a surety in a bond, must be in writing, and made against the surety's consent.

Dawson, for the appellants. The first ground on which the bill rests for relief is, that Smith was a surety, and that a mortgage was not taken according to the terms of sale. The doctrine of subrogation does not arise from contract, but is derived from the civil law. 1 Poth. 258, 259. 4 Johns. Cha. Rep. 130, and is purely of equity cognizance, and arises out of the doctrine of contribution by co-sureties. 4 Ves. 824. 2 Bos. & Pul. 270. The question then arises, whether, in this case, the complainant is under all the circumstances entitled to this equitable relief? Smith was absent from the country from 1797 to 1804: during the whole of this time Campbell was his sole and absolute agent. Defendant was ignorant that Smith stood in the relation of surety: the circumstances of Campbell were unknown to him: and Smith acquiesced up to 1812. Defendant was a purchaser, without notice of the facts, that a mortgage was required by the terms of the sale, or that Smith was only surety. If equities are equal, law prevails. The doctrine of tacking mortgages is a part of the same jurisdiction. 2 Fonbl. 300. 306. When the loss is the consequence of an act done by the surety, Poth. 360. 821, or when it arises from any other cause than an act done by any other than the creditor, the Court will not relieve. The omission to take

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the mort\*gage was the act of Gibbes; and, in some measure, the neglect of Smith, who might have insisted on it. 1 Johns. Cha. Rep. 414, 430. 4 Johns. Cha. Rep. 128. 1 Poth. 360. 821.

The second and third grounds are, that time was given for payment. Rees v. Berrington, 2 Ves. Jun. 540. It is admitted that the rule in equity is, that if the contract be altered without the privity of the surety, he will be discharged. In that case notes were given, in pursuance of the contract. In this there is no such evidence: at most, it was an agreement merely verbal and not obligatory; and the Court will not be disposed to extend the doctrine. 2 Desaus. Rep. 230.

But again, the surety has a right to call on the creditor to proceed in the collection of his debt. 2 Johns. Rep. 562. Smith did not do so. He was then in fault. 3 Meriv. Rep. 579. If such a demand had been made, there was nothing in the parol contract which would have precluded Tunno from proceeding against him, 1 Phil. 444. 498, as no parol contract can be admitted to vary a written contract. 17 Ves. 364. Admitting the agreement proved, it could not have been available; for the consideration, if

any, was usurious and void. 1 Johns. Cha. Rep. 16. Mere neglect to sue will not discharge the security; there must be something more. 1 Bos. & Pul. 419.

Toomer, contra. Proof of the fact that Smith was only surety consists, 1st. In the terms of sale, which were that the purchaser was to give personal security. 2d. In Campbell's own written acknowledgment and the report of the master that he was the purchaser. 3d. In the sale of the lands to satisfy judgments against Campbell. 4th. In James Smith's treating with Smith alone for further time to pay the bond. The mode of distinguishing between a principal and

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surety is to inquire \*whether he who claims to be the surety did or did not derive benefit from the enterprise. 4 Ves. 833. 14 Ves. 168. 170. If he did not, he can only be regarded as surety. 2 Desaus. Rep. 546. When payments are made by one of several obligors, and all the arrangements are made with him, it is an evidence that he is principal. 7 Johns. 337. 2 Caines' C. C. 29.

Testing this case by all or any of these rules, William Loughton Smith must be regarded as standing in the relation of surety. But the report of Gibbes the Master, who was the obligee, puts the matter beyond doubt. He states the fact expressly in his report. The facts were all known to Gibbes, the obligee; his report and evidence both go to establish the fact; and Tunno, the assignee, cannot stand in a better situation. The assignee of a chose in action, not negotiable under the law merchant, takes it subject to all the equities to which it would have been subject in the hands of the assignor. 2 Johns. Rep. 595. 602. 2 Johns. Ca. 438.

By the terms of the sale the purchaser was to give a mortgage, which Gibbes neglected to take. The surety had a right to look to it as an indemnity. And if the creditor relinquish a security, he must lose the amount. It is a settled principle, that a surety is entitled to stand in the same situation as the creditor, and to be subrogated in his stead. 1 Johns. Cha. Rep. 409. 2 Johns. Cha. Rep. 554. 560. 4 Johns. Cha. Rep. 123. The title to the lands, in the hands of Gibbes, was a security, with which he had no right to part, unless a mortgage had been given as a substitute, according to the terms of the sale. James Smith, who held the bonds, did enter into an agreement with Campbell for further time to pay them; and that for a consideration of £100 then paid; and that interest should also be paid on the interest which had previously accrued. It was objected that this contract was not in writing, and therefore not obliga-

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tory. Admit for the present, that the contract was not in writing: here was a new contract founded upon an adequate consideration, and was to all intents and purposes

obligatory, on which an action might have been sustained. 1 Chit. Plead. 95. The agreement would have been a bar to any action brought on the bonds before the time limited by the agreement had expired. To this contract Smith was no party; and could not be bound by it. "That changing the contract will discharge the surety" will not be denied. It is a rule which runs through all the authorities. But the bill sets out a written agreement. The answer admits it; and further, that he did give the indulgence pursuant to that agreement. Whether the agreement was or was not in writing was immaterial, if the act done was calculated, in any manner, to jeopardize the rights of the surety. 3 Desaus. Rep. 609. It is admitted that mere forbearance would not discharge the surety; but it will not be seriously denied that a new contract will. So that the whole case is resolved into the question, whether there was a new contract or not?

Grimke, same side, stopped by the Court.

Petigru, in reply. 1. Was complainant a surety? It does not appear from the pleadings that he was. Defendant's answer denies it. It is only to be inferred from the fact, that the lands were bid off by Campbell, and the titles were made to him. By the terms of the bond he is put on the footing of a principal; and a presumption so slight as must arise from that circumstance ought not to be admitted to control it. It does not follow that because Campbell only was seen in the transaction, that Smith was not greatly interested in the purchase. The act of the legislature, which makes bonds assignable, reserves to the obligor the right to defend

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\*himself against the holder of the bond on the same grounds that he might have done in the hands of the original obligee: but there is no provision in the act that he shall have the same defence as to any thing that transpired in the hands of an intermediate holder.

It would be inexpedient to extend the rule beyond the letter of the act. For in proportion to the number of hands through which it had passed would be the danger, that something had been done which discharged the obligation. Thus reversing the effect of negotiable paper, where every endorsement is an additional security.

2. Does the contract for time discharge the surety?

The rule is, that any modification or alteration in the original contract, by another settled and binding contract, will discharge the surety. 2 Johns. Cha. Rep. 559. A contract by specialty cannot be extinguished by a parol contract; neither does one contract extinguish another of the same character. Thus a note will not extinguish another note or book account. 12 Mod. 548. 2 Salk. 442. 5 Johns. 58.



The bonds in this case make the interest payable annually, and by the law of the Court the interest carried interest without the aid of the new contract. It was therefore without consideration, and for that reason not binding. The payment of the £100 was pro tanto a payment of the bond, and formed no part of the consideration for the new contract.

3. Did the neglect to take the mortgage discharge the surety?

The allegation is, that Gibbes deceived Smith, holding out that a mortgage was to be taken, seduced him to become surety, and that in consequence an injury has accrued to Smith. The injury proceeded from the act of Gibbes, and he ought to be responsible. The loss ought not to be visited on Tunno, who

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was an innocent purchaser without notice. Again, when the personal surety was so ample it rendered the mortgage unnecessary as a security, and if the security thought it necessary for his own safety he might have required it to be taken. To let off sureties, on the ground that their principal had not been compelled to comply literally with the terms of sale would, especially as applied to sales made by public officers, be extremely mischievous. They have varied, and do vary them, by the consent and for the convenience of parties, and there would be no end to the mischief of setting them aside.

*Curia, per* JOHNSON, J. The grounds of this motion may be resolved into the following propositions:

1. Whether parol evidence is admissible to prove that W. L. Smith was or was not a surety and not the principal debtor?

2. Whether the evidence proved the fact?

3. Whether the neglect on the part of Gibbes to take the mortgage, according to the terms of the sale, did not discharge the surety?

4. Whether the contract entered into between James Smith, the holder of the bond, in 1794, and Campbell, for further time of payment, did not discharge the surety?

It is a matter of common notoriety, that contracts of this nature do not usually distinguish between the principal and the surety; and that it may and must be proved by parol is a conclusion which necessarily arises out of the numerous cases growing out of them, especially those where a recovery over is sought by the surety against the principal, and by the numerous rules of law which regulate their respective rights. And I take the principle to be, that the relationship which subsists between the joint obligors is a matter wholly extrinsic of the written contract, and may therefore be proved by parol, without any violation of the rule which prohibits

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\*the introduction of parol evidence to contradict or vary a written agreement.

The mode of distinguishing between a prin-

cipal and surety is by inquiring, whether he who claims to stand in relation of security did or did not derive a benefit from the contract; and the proof of it may be deduced from the circumstance, that all the payments and all the arrangements relative to it were made by one of several co-obligors. 2 Caines' Ca. 29. [Doughty v. Bacot] 2 Desaus. Rep. 546. 7 John. 337. And testing this case by this rule it is proved to a demonstration, that W. L. Smith stood only in the relation of a surety. The report of the sales made by Gibbes the obligee places him in that situation. He derived no interest from the contract. The holders of the bonds treated with Campbell exclusively on the subject, which puts the matter beyond any rational doubt.

The right of a surety to be subrogated to all the securities which the obligee has, and the rule that the surety will be discharged if he releases them, are abundantly supported by the authorities quoted at the bar, and are not denied by the opposite counsel. But whether the principle can be extended so far as to cover the neglect of Gibbes to take a mortgage, which was contemplated by the terms of the sale, especially under the circumstances of this case, may I think well be doubted. The only circumstance relied on to shew that a mortgage was to enter into the contract is, that it was promulgated as a condition of the sale: and it is obvious that Gibbes did not contemplate it otherwise than a security to himself, and not as an indemnity to the personal security that the purchaser was to give. He might therefore, without any violation of good faith, dispense with it if he was satisfied with the other security, unless the surety thought proper to insist on it. In short, the terms of the sale were mere proposals, which

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the contracting parties were at liberty to vary at their pleasure at any time before the contract was consummated; and in the absence of any proof, and after an acquiescence of about eighteen years on the part of Smith the surety, I think it a reasonable presumption, that it was so understood between all the parties. This is, however, a question of some importance, and as it is not necessary to the decision of the case, the Court have thought proper to reserve it.

It is a well settled rule, that if the creditor or obligee of a bond enters into any new bona fide contract with the principal debtor, whereby the terms of the original contract are varied or altered without the privity or consent of the surety, the surety will be discharged from his liability. The bill states, that in 1794 James Smith, who then held the bonds as assignee of Gibbes the obligee, in consideration that Campbell, the principal debtor, would pay promptly £20 on each of the several bonds, and consolidate the interest then due, and thereby make an increased principal which would carry interest, agreed that he would give time for payment for sev-

eral years beyond the time fixed by the bonds, and that this arrangement was made without the consent of complainant. The answer admits that such a contract was entered into, and one of the defendants' own exhibits shews that it was reduced to writing. The counsel for the defendant do not controvert the rule, but admitting it to its fullest extent they contend,

1. That the defendant is an innocent assignee without notice, and cannot be affected by any act done by an intermediate holder.

2. That to discharge the surety the act done by the creditor must be such as would be obligatory on himself. And that admitting the existence of the contract, it was without consideration, and amounted to no more than a forbearance to sue which would not discharge the surety.

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\*At common law the assignee of a bond could not sue in his own name. He was, therefore, compelled to sue in the name of the original obligee, and as a necessary consequence the defendant could have availed himself of all the equity which he had against the obligee. And the act of 1795, which makes these instruments assignable, expressly reserves that right to the obligor. The transfer of the bond to James Smith by Gibbes constituted him the unlimited agent of Gibbes in relation to them. He would therefore have been bound by any act which he might have done: so that the first of these arguments can not prevail.

The argument founded on a want of consideration to support the agreement assumes, on the authority of the case of *Gibbs v. Chisolm*, 2 Nott & M'Cord, 38 [10 Am. Dec. 560], that without that agreement the interest which had accrued would be consolidated into principal, and carry interest; and that the payment of £20 could only be regarded as a payment pro tanto. In the case of *King v. Baldwin*, 2 Johns. Cha. Rep. 554, all the cases on this subject are collated by the masterly hand of Chancellor Kent, and from them it is clearly deducible, that if a creditor vary the terms of the agreement with the principal without the consent of the surety, the latter will be discharged. They proceed on the principle that the surety is entitled, on the payment of the debts himself, to be substituted to all the rights of the creditor by the terms of the original contract, which becomes impossible when they have been changed. And in the application of this rule numerous cases prove, that mere forbearance to call on the principal debtor for payment will not discharge the surety, for the obvious reason that the contract still remains the same. It follows then as a necessary consequence, that to discharge the surety the agreement to vary the terms of the original contract must be such as to be binding on the creditor.

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Such an agreement must therefore \*possess all the ingredients of a substantive independent original contract. But for the purposes of this case, it will not be necessary to enter upon the nature and extent of the consideration that would be required to support such an agreement. The prompt payment of £20 on each of the bonds, some of which were not then due, the agreement to consolidate the interest with the principal, and the reduction of the agreement to writing, constituted in any view of it a binding contract on James Smith, upon which both himself and defendant acted, and which both kept with good faith.

It has been further insisted, that a contract by specialty can not be extinguished or abrogated by parol, and hence it is concluded that whatever might have been the terms of the new contract, Campbell's liability on the bond was unimpaired, and that the transaction only amounted to a forbearance to sue. This application of the rule appears to me to be too refined for practical purposes. When there are several contracts having the same object in view, that which furnishes the highest evidence of it is to be preferred for the most obvious reasons; and as no contract is obligatory which has not some consideration for its basis, such new contract without it would be void. But that the parties may, upon any new consideration, make any modification of an existing contract, and thereby extinguish it, is a legal conclusion which admits of no doubt. For these reasons the decree of the Circuit Court is affirmed, and the appeal dismissed.

Decree affirmed.<sup>1</sup>

<sup>1</sup>See on this subject many authorities and most of the views, stated in the text and notes to *Chitty on Bills*, 371, last American Edition.

# I McCord, Eq. \*456

\*TAVEAU et ux. v. JOHN BAILL.

(Charleston. April Term, 1826.)

[*Executors and Administrators* ⇨104.]

The general rule is that executors are liable for interest on funds which remain in their hands, whether they derive a profit from them or not.

[Ed. Note.—Cited in *Duncan v. Dent*, 5 Rich. Eq. 11; *Nance v. Nance*, 1 S. C. 220.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 423-432; Dec. Dig. ⇨104.]

[*Executors and Administrators* ⇨104.]

Exception, where the money is retained to meet exigencies of the estate or to look out for proper investments. But it always depends upon the circumstances of the estate.

[Ed. Note.—Cited in *Duncan v. Dent*, 5 Rich. Eq. 11.

For other cases, see *Executors and Administrators*, Cent. Dig. § 428; Dec. Dig. ⇨104.]



[*Executors and Administrators* ⚡104.]

The executor of a planting estate is liable for interest only on the annual balances. And six months are allowed him after making up his annual balances to make investments.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 428; Dec. Dig. ⚡104.]

[*Executors and Administrators* ⚡501.]

An executor besides ten per cent. allowed him for vesting funds at interest, is allowed two and a half for the final disposal or payment of it, under the directions of the will. But not where the fund is still under his own control and the disposition not final.

[Ed. Note.—Cited in *Briggs v. Holcombe*, 3 Rich. Eq. 17; *Jones v. Jones*, 39 S. C. 254, 17 S. E. 587, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2142; Dec. Dig. ⚡501.]

[*Executors and Administrators* ⚡118, 161.]

An executor is bound to manage the estate with the care and diligence of a careful and cautious man; but is not liable if his factor (who was respectable) sold on a few days credit, in the usual way of business, and the purchaser fails.

[Ed. Note.—Cited in *Bryan v. Mulligan*, 2 Hill, Eq. 364; *Boggs v. Adger*, 4 Rich. Eq. 411; *Mikell v. Mikell*, 5 Rich. Eq. 226; *Nance v. Nance*, 1 S. C. 222, 223; *Pope v. Mathews*, 18 S. C. 448; *Parks v. McDaniel, Ex'r*, 75 S. C. 9, 54 S. E. 801, 117 Am. St. Rep. 878.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 472, 638; Dec. Dig. ⚡118, 161.]

The Reporter has no other statement of this case than that made by the Chancellor in his decree.

Thompson, Chancellor. This case comes up upon exception to the Master's report. He reports that the defendant produced his accounts supported by satisfactory vouchers, upon which two points have arisen. The second is, whether the executor should be amerced for all sums in his possession, which were not invested as soon as an amount of sufficient magnitude had accumulated? The Commissioner reported, that it was his duty to have done so as soon as a convenient and favourable occasion occurred. But it was not shewn, that he was benefited by retaining the funds, as he did not use them for his own purpose; and, in his own language, has allowed him the liberal term of one year to make the investment. This is certainly liberality to the executor by no means consistent with the interest of the complainants. There existed no inconvenience in making the investments, and, inasmuch as he has neglected to do what it was his duty to have done, he must be answerable for the consequence. This exception is therefore sustained.

I have reversed the order of the exceptions by considering the second exception in the first instance. The first exception is, that the Commissioner has not allowed against defendant the amount of sales to William Cannon & Co. made by Keating Simons & Sons, as factors of defendants: whereas it is contended, that as the factors sold for cash,

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they ought not to have delivered the \*property until payment; and having done so, the loss must fall on the defendant who sanctioned the acts of the factors. The evidence on this point is, that the factors received no instructions to sell for cash, but were instructed to act according to their best discretion. That they had, at various times, for several years sold to Cannon & Co. on the same terms, and always found them punctual. That the house was of unsuspected credit until the day of failure, and that application was made for payment the fourth day after the sale, and frequently afterwards. From the evidence there appeared to be no established custom, it being the habit of factors frequently to allow more or less time as days of grace. This loss, therefore, appears to the Court more as a misfortune to the estate of the testator than any such on the part of the factors, who are known to be men of great skill in their business, and of unimpeached integrity. This exception is therefore overruled.

The exception taken by the counsel for the defendant I am unwilling to think him serious in. I am equally unwilling to suppose, that he would make an exception that he did not think had at least the appearance of plausibility. The exception is, that the complainant has not allowed the executor two and a half per cent for receiving, and two and a half per cent for paying away, the funds invested. The act of the legislature, allowing two and a half per cent for receiving and paying money, had an illusion altogether to debts and legacies, which is an entirely different thing from the investment of money in the funds; and the large compensation of ten per cent for such investment must have been intended to cover all the charges, as well as to indemnify, the executor's accountability. This exception is therefore overruled.

The defendant appealed from so much of

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this decree \*as allowed interest on sums in the executor's hands, other than annual balances; as well as to that portion of the decree which sustained the report of the Commissioner, denying to the executor two and a half per cent on money invested in the purchase of stock.

The complainants also appealed from so much of the decree as discharged the executor from liability on account of the sale by Keating Simons & Sons to William Cannon & Co.; because factors, acting under general instructions, were liable, if they sold for cash and delivered the property without payment or security for the price, to answer the amount, should the purchaser fail.

Grimke, for complainants. Under the authority of the case of *Barksdale v. Brown*, 1 Nott & M'Cord's Rep. 517, the factors,

Simons & Sons, were liable to defendant for the loss of sales to Cannon & Co. and he is liable to complainant for it. 5 Ves. 141. 839, 840. Admit that the factors had a discretionary power over it, they were bound to sell either for cash or credit. They admit that the sale was as a cash sale, and they are bound by the rules affecting such sales. 3 Ves. 565. He admitted that the general rule is, that the executor is chargeable with interest only on the annual balances: but peculiar circumstances constitute exceptions to it. In this case the estate was not in debt: funds were not necessary to the support of the family, as they had abundant funds besides. The annual accounts are made up in August, and the principal receipts were of large sums by the sales of crops of the winter preceding, and there has been no reason why it should not have been sooner invested.

Holmes, for the defendant, submitted,

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whether the \*defendant was not entitled to be credited with two and a half per cent for investing money, and two and a half per cent for paying it, as of the date of the investment, as well as the questions made by complainants.

*Curia, per JOHNSON, J.* The defendant in this case appeals on two grounds:

First. Because he ought not to be charged with interest, other than on the annual balances on his accounts, from the time of making them up. And

Second. Because he ought to have been allowed a credit of two and a half per cent on the day on which the money was vested in stock, as for money then paid away.

The general rule is, that an executor is liable for interest on funds which remain in his hands, whether he derives a profit from them or not; and it is founded upon the presumption, that he has either made a profit, or that as much is lost to the fund by his neglect. The same good sense, which dictated the rule, has incorporated with it qualifications by which it is accommodated to all the variety of circumstances that could enter into the receipt or disbursement of funds: securing on the one hand the prompt and faithful discharge of the duty of the executor, and on the other allowing him the exercise of a discretion in accommodating his management to the peculiar situation of the fund; promoting in the end the true interest of those entitled to it. Amongst the latter of these may be enumerated, the exception allowed when the exigencies of an estate may render the present command of funds necessary to meet the growing demands upon it, or to preserve good faith in the fulfilment of contracts: and those which allow him a reasonable time to look out for suitable objects in which to invest

them. 3 Bro. C. C. 73. 434. 2 Madd. Cha.

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135. For it is unreasonable to \*require that an executor should sacrifice all his other concerns to this duty; and it would furnish a temptation and an excuse to act with precipitancy, and consequently expose him more to improvident contracts.

From this view of the subject it follows that, in determining the time when the liability of an executor to pay interest shall commence, we must look through all the concerns of the estate, the source from whence the fund is received, the time and manner of its receipt, and the nature and extent of the demands upon it. If, for example, the receipts are considerable and at fixed periods, and the facilities of investment great and the accruing demands inconsiderable, all that would be necessary would be a reasonable time to make the investment. But if, on the contrary, the receipts were inconsiderable, irregular, and uncertain, and the growing demands so considerable as to render it doubtful whether any surplus would remain, time ought to be allowed him to ascertain the result. The peculiar circumstances of every case must therefore so control the rule as to make it answer the purpose for which it was designed. The complainants in this case claim interest from the time the funds came into the hands of the defendant: and the defendant on his part insists that he ought to be allowed a reasonable time after making up his annual accounts to make investments; at any rate, that he ought only to be charged with interest on the annual balances. The estate consists of an extensive planting establishment, incumbered with all the incidents and exposed to all the casualties and expenses of such property, and the fund on which the interest is claimed consists in the proceeds of the crops, received from time to time as the produce could be prepared and sent to market. The defendant's accounts are regularly made up in the month of August in each year, and they exhibit what every one accustomed to the management of such prop-

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\*erty would readily admit would arise in the course of its administration. Expenses arise, and the disbursements are almost daily; and in making up the annual accounts it is found that the balance in favour of the estate is sometimes considerable, at others less, and again it is found that the estate is in debt. The question then arises, when ought the liability of the defendant to account for interest to commence under the circumstances of this case? On this subject I have not been able to ascertain that our own Courts have laid down any fixed rules, and I should be unwilling to derive them from any other source; as almost every country, and even different sec-



tions of the same country, might present circumstances calculated to vary it. The nearest that we can approach any thing like a settled rule is, by resolving it into the exercise of a sound discretion in the application of the general rule to each particular case. A prudent man would never make investments, unless with a view to speculations, until he had ascertained with some degree of precision what sum remained after meeting the demands upon him, and when his receipts are annual and his expenses current throughout the year. This could not be done until his annual accounts were made up. It would therefore be rigid and harsh, and in the main injurious to the estate, to compel an executor either to make investments or to pay interest in any case where the income was derived from planting, until his annual accounts were made up and the balance ascertained. It would be difficult, if not impossible, for him to ascertain by any other means or at any earlier time what sum the exigencies and growing demands on an estate, situated as this was, might require, or what balance should remain. I have therefore no difficulty in coming to the conclusion, and adopting as the rule of this case and others similarly situated that the defendant is not chargeable with

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interest, except on the annual \*balances. It is reasonable too that time should be allowed an executor to look out for proper objects in which to make investments after the balance is ascertained; and taking all the circumstances of this case into consideration, and as a rule applicable to cases thus situated, six months might be allowed after making up the accounts to make the investments. But the present defendant does not come within the benefit of it, as the investments made by him were at a greater distance of time. In stating the accounts between the parties the commissioner is therefore directed to debit the defendant with interest on the annual balances against him from the time the accounts were made up.

The second ground is one of little consequence to the parties, as it only involves the interest on the commissions of two and a half per cent claimed for investing the fund in stock; as under any circumstances the defendant would be entitled to the commissions on the final settlement of the estate. The executors' law (Pub. Laws, 495) allows an executor to retain in his hands, as a compensation, two and a half per cent on all sums which he receives, and the like sum of two and a half per cent on all sums which he shall pay away in credits, debts, legacies, or otherwise; and ten per cent for all sums arising out of moneys let out at interest. The intention of the act cannot I think be misconstrued. The ten per cent was evidently intended as compensation for

the trouble of managing the fund while in the hands of the executor; and the two and a half per cent for paying away refers to the final disposition of it, or, in other words, to that point of time when the executor's power over it ceases, or when he has disposed of it in the manner directed by the will of the testator. It cannot without great injustice be so referred to any other time; for if it was to be allowed to every application or appropriation, the executor might,

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by letting out and calling \*in at short periods, make his commissions exceed any profits which could be expected to arise from it by way of interest. The mode of determining what time he is to be credited with it is, by inquiring whether he has made a final disposition of the fund, or whether his power over it has ceased. The will of the testator recommends, that if there should be any surplus funds they should be vested in bank stock and in pursuance of this recommendation the defendant did invest a part of them. He has therefore made a disposition of them in the manner authorized, and has discharged the duty enjoined upon him, and has earned his two and a half per cent for paying it away; and the Commissioner is directed to credit it as the day on which the fund was invested. A different rule would obtain, when the investment was made by the executor of his own accord and upon his own responsibility; because then the fund would be still under his own management and control, and the disposition of it not final.

The complainants also move to reverse the decree of the Circuit Court, so far as it goes to discharge the defendant from his liability for the loss sustained on the sales of produce by his factors, K. Simons & Sons. The liability of the defendant is not increased nor diminished by the agency of K. Simons & Sons in effecting the sales. On the one hand, he was not bound to require more diligence of his agents than he himself was bound to observe; and it is unreasonable on the other, that he should shelter himself under the negligence of an incompetent or dishonest agent. This question will be simplified by considering it as though the sales had been made by the defendant himself. An executor and trustees are generally greatly favored in the Court of Equity, as an encouragement to engage in the discharge of duties always onerous and frequently complex and difficult; and few would undertake to perform them if

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\*they were to be made responsible for all the casualties and misfortunes to which an estate in the hands of the most circumspect is exposed. When he has honestly and faithfully endeavored to acquit himself of his charge, the Court is slow to visit a loss up-

on him; having however always so much regard to the cestui que trust as to prevent negligence and abuse. *Rowth v. Howell*, 3 Ves. 565. *Powell v. Evans*, 5 Ves. 843. Upon this principle it was held by Lord Hardwicke in the case of *Knight v. The Earl of Plymouth*, (cited in 3 Ves. 565) that a receiver was not liable on account of the failure of a banker in whose hands he had deposited funds with the intention to draw for them, and who was in good credit at the time the deposit was made. The rule to be extracted from the current decisions on this subject is one founded in practical good sense, and requires that an executor should manage the funds committed to his care with the same care and diligence that a prudent and cautious man would bestow on his own concerns. The loss in this case arose out of a sale made in conformity with the general usage of the country, and in the manner and upon the conditions that nineteen-twentieths of the whole produce of this state is disposed of,—and to a house in apparent good credit. It would be a violation of both principle and rule to charge the defendant. The Court therefore concur with the Chancellor on this ground. In the case of *Barksdale v. Brown*, 1 Nott & McCord's Rep. 517 [9 Am. Dec. 720] it was decided that, under instructions to sell for cash, factors were held liable for a loss arising out of a sale made in conformity with the usage, and it has been insisted in support of this ground, that upon the authority of that case *Simons & Sons* were liable to the defendant for the loss, and that therefore he was liable to the complainants. The cases are not however analogous. There the instructions were to sell for cash. True

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they \*were generally to do so. But here it was for the best, leaving the factors to exercise a discretion which it has been before shewn they exercised with prudence. It has been said too, that the defendant is chargeable with negligence in parting with the crop without some security for payment. Generally, I am inclined to think, that rule ought to prevail; but the case of *Knight v. Earl of Plymouth* is an answer to its application to this case. The defendant might, if he honestly thought it to the interest of the estate, have sold it on a credit, and whether that was effected by express stipulation or by a tacit acquiescence in the usage was immaterial; and if the purchaser was apparently solvent the defendant had discharged his duty. The indiscriminate application of such a rule would require persons thus situated to practice the childish incredulity of holding fast on every bale of cotton, or barrel of rice, with one hand, whilst receiving the price with the other; and no one would be willingly exposed to a situation so ridiculous.

Decree modified.

## I McCord, Eq. \*466

\*The Administrators of CHARLES RUTLEDGE v. HAZLEHURST et al.,  
Creditors of Charles Rutledge.

(Charleston. April Term, 1826.)

[*Executors and Administrators* ⚡49; *Marshaling Assets and Securities* ⚡6.]

Outstanding debts are legal assets, and must be applied to the payment of debts in their legal order. Equitable assets are such as can only be reached through equity, and they alone are subject to the rules of equitable distribution. Legal assets are distributable according to the act.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 301; Dec. Dig. ⚡49; *Marshaling Assets and Securities*, Cent. Dig. § 7; Dec. Dig. ⚡6.]

[*Executors and Administrators* ⚡260.]

Legal assets must be distributed under the act after satisfying all liens existing before the death of the debtor.

[Ed. Note.—Cited in *Haynsworth v. Frierson*, 11 Rich. 478; *Kinsler v. Holmes*, 2 S. C. 498; *Edwards v. Sanders*, 6 S. C. 333.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 927, 928, 930-940, 942, 943; Dec. Dig. ⚡260.]

[*States* ⚡110.]

[Cited in *Baxter v. Baxter*, 23 S. C. 118, to the point that a debt due to the public cannot take precedence of a debt secured by the lien of a mortgage, judgment, or execution.]

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. ⚡110.]

The object of the bill was, to obtain from the Court of Equity directions as to the order in which the debts of the intestate should be paid. The act of 1789, 1 Brev. 335, provides that the debts due by a testator or intestate shall be paid in the following order, viz. Funeral and other expenses of the last sickness; charges of probate of the will, or of the letters of administration; next debts due the public; next judgments, mortgages and executions, the oldest first, &c. The assets of the intestate in this case consisted of negroes, household furniture and outstanding debts. The intestate at the time of his death was indebted to the public. He was indebted to Mr. Hazlehurst on an old judgment, on which no execution had been issued, and to other persons on junior judgments, on which executions had been issued and lodged in the sheriff's office (one belonging to Muir) in the life time of the deceased. The question submitted to the Court of Equity was, whether the executions, which had acquired a lien on the personal property in the life time of the intestate, were entitled to a preference to the other creditors to the extent of that lien; or whether the proceeds of the estate should be paid in the order prescribed by the act, without regard to the liens thus acquired. The cause came before Chancellor Thompson, January term, 1826. He made the following decree:

Thompson, Chancellor. This case came up on exceptions to the Master's report. It ap-



pears that the estate of the intestate con-

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sisted solely of negroes and outstand\*ing debts. The negroes were sold for the sum of \$1,376.56½ and the outstanding debts amount to about \$800. The execution creditors contend that they are entitled to the whole of both funds. The judgment creditors contend, that as the execution creditors have two funds to resort to, they must resort to that fund which will be the least injurious to secondary creditors. There can be no doubt but that the executions bound all the personal estate of the intestate, from the moment they were entered the sheriff's office, in preference and in exclusion of the judgments, which had no legal lien except on the real estate. It is equally clear that they had no lien on the choses in action; and that the judgment creditors had an equitable lien on them as equitable assets. The rule of this Court is, in regard to equitable assets, to put all the creditors on a footing. So when the assets are partly equitable and partly legal, although the Court cannot take away the legal preference on legal assets, yet if one creditor be paid out of legal assets, when satisfaction comes to be made of the equitable assets, the Court will postpone him until there is an equality of satisfaction to all the other creditors out of the equitable assets. It is ordered and decreed, that the amount raised by the sale of the personal property be appropriated to the discharge of the legal liens and that the amount of debts received be applied by the administrator in due course of administration. Interest to be allowed on all demands legally entitled to draw interest. Costs to be paid out of the funds.

From this decree an appeal was taken on the following grounds:

First. That the debts and expenses of the estate, preferred in payment under the act of 1789, had an equal claim to be paid and preferred both from the legal and equitable assets, and were in fact principally paid

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from \*the legal assets. The judgment of Hazlehurst ought to be paid from the equitable assets.

Second. That at all events as the preferred debts and expenses had an equal lien on both funds they ought to be charged rateably and proportionably on the legal and equitable assets.

King, for the appellants. The executors' law obviously intended that the debts should be paid in the order in which they were set down, without regard to the nature of the funds or the source from whence they were derived. Pub. Laws, 494, Executors' Law. But admitting that the lodging of an execution gives a specific lien on the visible personal estate, and for that reason would be preferred, yet the preferred debts, such as expenses of the last sickness, administration,

and the judgment and execution of Muir, had equally a lien on them and they ought to have been paid out of that fund; so that a balance of the equitable assets (choses in action) should be left to be applied to the payment of complainants' debt.

The principle is, that when a creditor has a specific lien, he shall first resort to that fund; and until that shall be found insufficient, he can not resort to the general fund. *Greenwood v. Executors of Boquet*, 2 Bay, 86. 1 Harp. Eq. Rep. 164.

Dunkin, contra. At the death of Rutledge, there is no doubt that his execution creditors had a lien on his visible personal property, to the exclusion of the complainants; and it is now intended by the executors' law to take away those liens. Expenses of administration and the last sickness were, from motives of public policy, preferred and made an exception; but none of the reasons which apply thereto affect creditors of equal rank. The last argument of the counsel for the ap-

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pel\*ants departs from the executors' law, and substitutes in its place the rule of equity. If that is taken in extenso, the effect would be to divide the whole fund among the creditors, without regard to date or lien.

King, in reply. It is not intended to forego the provisions of the executors' law, but merely to call in the rule of equity to assist in determining the true meaning of the statute.

*Curia, per NOTT, J.* I do not think this case entirely free from difficulty. I have, therefore, bestowed no inconsiderable attention on it; and I have at length come to the conclusion, that the decree of the Chancellor must be affirmed; although I have not arrived at that conclusion by the same course of reasoning to which the Chancellor has resorted. I am induced to think, that much of the difficulty, which has been thrown in the way of a clear understanding of the case, has resulted from considering the outstanding debts as equitable assets. Outstanding debts, when collected, are as much legal assets as tangible property or money in hand. And I cannot find that they have ever otherwise been considered by any of our Courts. Legal assets are such as constitute the funds for the payment of debts, according to their legal priority. 1 Madd. Cha. 586. Equitable assets are such as can be reached only by the Court of Equity. 1 Madd. Cha. 586. Outstanding debts may be collected by the executor or administrator without the aid of the Court of Equity, and constitute the legitimate fund for the payment of debts, according to legal priority. All the rules of the Court of Equity, therefore, with regard to the distribution of equitable assets, are out of the question in this case. It is intended

to be urged that, by bringing the case into the Court of Equity, the assets must be distributed according to the rules of that Court

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in case of \*equitable assets, without regard to the provisions of the act. It may be an important question, though it does not appear to me to be one of much difficulty. In the case of *Brady v. Sheil*, 1 Campb. Rep. 148, Sir James Mansfield said "he wished it were more generally known (for he believed that the lawyers in the Court of King's Bench were not aware of it) that through the medium of a Court of Equity the creditors of a deceased insolvent debtor may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator to account, after which the Chancellor would enjoin any of the creditors from proceeding at law." But it will be recollected that an executor in England may pay one creditor, or confess judgment to one for the amount of his debt, in exclusion of all the rest, in equal degree. 2 Black. Com. 512. 1 P. Wms, 255. And I presume that all that was meant by Sir James Mansfield was merely that a Court of Equity would prevent such preference from being given, and would marshal the assets among all the creditors in equal degree. But that is nothing more than what is required by our act. So that the executor may do here precisely what a Court of Equity, under similar circumstances, would do in England.

If a Court of Equity in England would do more, I can only say, that I am not prepared to concede to such Court in this state the power of directing a distribution of the legal assets of an estate, different from that required by the act. Courts of Equity are as much bound by positive statutes as Courts of Law. How it would be in case of equitable assets it is unnecessary now to decide.

The case then comes back to the original question, whether the execution creditors still maintain the lien which they had acquired? I am of opinion the lien is still preserved. Suppose the deceased had in his life time given a mortgage of the personal property. I

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apprehend that it will not be contended that the judgment creditors, or other preferred creditors, could have divested the mortgagee of his lien; and as it regards creditors I can see no difference whether the lien be by execution or by mortgage. The act is merely directory to the executor as to the manner of disposing of the assets where there are no pre-existing liens, and this appears to me to be consonant with the English decisions as well as our own. 1 Madd. Cha. 595. 3 Atk. 326. 3 Salk. 83. In the case of *Sharpe v. The Earl of Scarborough*, 4 Ves.

538, it is said assets are not marshalled against judgment creditors. In the case of the *Commissioners of Public Accounts v. Greenwood and others*, 1 Desaus. Rep. 450, it was decided, that the state had no prerogative to be paid out of the effects of the debtor in preference to any of the citizens who have judgments, mortgages, or other liens. That the act of 1789 is only directory to executors and administrators, and does not alter the case in relation to the rights of the state, and other creditors. (See the case more fully reported in an appendix to the same volume.) It was there held that execution creditors should still maintain their liens against the state, to whom the deceased was largely indebted. And in the case of *Brown, Executor of McKearney v. Gilliland*, 3 Desaus. Rep. 539, it was decided that the purchaser of a negro at the sale of an estate, made by permission of the Ordinary, should not be required to pay the purchase money until the executor should secure him against an execution which had been obtained against the testator in his life time, although the execution had been returned nulla bona before his death, and before he became owner of the property in question. It was considered that the execution still operated as a lien upon it, and that it could not be at the disposal of the executor until that lien was removed by satisfaction of the debt. These

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\*decisions appear to be conclusive of the question now under consideration.

It is thought that the decree of the Chancellor is ambiguous, in not directing in what order the debts shall be paid, but when we take it in connection with the report of the Commissioner, and the subsequent confirmation of that report, the ambiguity is removed, and the order in which the debts shall be paid is clearly prescribed. The motion therefore must be refused and the decree affirmed.

Decree affirmed.

## I McCord, Eq. 472

Administrator of ROBERT ROLAIN v. Administratrix of ROBERT A. DARBY.

(Charleston. April Term, 1826.)

[*Executors and Administrators* ⌘263.]

As far as equity is permitted, it distributes the funds of a debtor equally. But at common law a debtor may prefer a creditor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 975-1000; Dec. Dig. ⌘263.]

[*Trusts* ⌘250.]

A breach of trust only constitutes a simple contract debt.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 356, 360; Dec. Dig. ⌘250.]



[*Executors and Administrators* ⚡261.]

So where an executor receives money on a bond or judgment and retains it, it stands against him only as a simple contract debt.

[Ed. Note.—Cited in *Stock v. Parker*, 2 McCord, Eq. 384.

For other cases, see *Executors and Administrators*, Cent. Dig. § 974; Dec. Dig. ⚡261.]

[*Executors and Administrators* ⚡158.]

If a man, undertaking to keep property of another, mixes it with his own, the whole must be taken to be the property of the other, until the former puts the property under such circumstances as will render the distinction as satisfactory as it was before.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 646½; Dec. Dig. ⚡158.]

[*Executors and Administrators* ⚡115.]

Where an executor sold slaves belonging to the estate, together with his own, he was liable for the entire proceeds, in the absence of evidence of the respective values of the slaves.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 467; Dec. Dig. ⚡115.]

In this case Darby was executor of Rolain. Rolain by his will directed that if any of his negroes should be sold the proceeds arising from the sale should be vested in bank stock. From the Commissioner's report it appeared that Darby sold four negroes for \$2,000 to W. M. Gibson, and received in cash \$500, and for the balance took Gibson's bond with Charles O'Hara, William Gresham and Orran Byrd as securities. No mortgage of the property was taken. Gibson's bond was given to R. A. Darby, as executor of R. Rolain. Two of the negroes belonged to Rolain's estate and two to R. A. Darby. It was given in evidence that Rolain's negroes were bricklayers,

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and Darby's field negroes. Eleven \*hundred dollars were collected on the bond, and the bond put in suit for the balance, but it was not recovered. It was contended by Rolain's administrator that \$1500 should be allowed for their negroes. That Darby's estate should be held responsible for the full amount of the bond with interest, although four hundred dollars of the principal was not collected, and that it should be set up as entitled to preference as a bond debt. It further appeared that Darby as executor of Rolain had received the sum of \$350, on a judgment recovered against Dr. Carrendiffer by Rolain in his life time for rent due. This amount, it was contended, should be set up as entitled to preference as a judgment debt.

To this report exceptions were filed on both sides.

The administrator of Rolain excepted, on the grounds,

First. That \$1,500, the full amount of Gibson's bond, should have been allowed as a bond debt due by Darby's estate.

Second. That the amount received on Dr. Carrendiffer's judgment should have been allowed a preference as a judgment debt.

The administratrix of Darby excepted, on the ground that Gibson's bond was not entitled to preference as a bond debt according to the executors' law.

Thompson, Chancellor. This case was brought up on the report of the Commissioner. The first exception must be overruled, except so much thereof as relates to the \$400 lost by the neglect of Darby. The Court considers his estate liable for that amount, not so much on the ground of laches, as that the executor violated the directions of the will, which makes him personally liable. He was directed, if it became necessary, to sell any

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of \*the negroes and invest the proceeds in bank stock. Having sold them on a credit he became personally liable. The second exception must be sustained so far as relates to Carrendiffer's judgment, and overruled as to the rest. The third exception is unnecessary, as the Commissioner has allowed interest on the debt.

From this decree an appeal was taken, on the following grounds.

First. That the Chancellor was incorrect, in giving a preference to Rolain's estate as a bond creditor, on account of the bond taken by Darby for the sale of the negroes belonging to the estate.

Second. That the full amount ought not to have been allowed: as it was not received by Darby or his administrator.

Third. That Carrendiffer's judgment should not have a preference as a judgment debt.

J. E. Holmes, for the defendant, cited *Gadsden v. Lord*, 1 Desaus. Rep. 208. *Executors of Mason v. Executors of Man*, 3 Desaus. Rep. 121.

Eckhard, for complainant, cited *Toller*, 426. If an executor lay out the funds on private security he is liable. 4 John. Cha. Rep. 281. 3 John. Cha. Rep. 552. 1 Desaus. Rep. 304. 515. 559. Executors are liable for not taking sufficient security. 2 Madd. Cha. Rep. 142.

*Curia, per COLCOCK, J.* The important question submitted in this case, is whether, where an executor receives money from the debtors of his testator, he is to be considered as a debtor in the same degree as those from whom he received the money, and this to the prejudice of his other creditors? I take it for granted that it is a well established principle of abstract justice, that every creditor is equally entitled to the payment of his debt

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\*out of the estate of his debtor, and that the Court of Equity, as far as they are permitted to do so, act on that principle. But the common law does allow a debtor voluntarily to give a preference by mortgage or judgment to any particular creditor whom he may be disposed to favour; and it also permits the vigilant creditor to obtain a preference against the wish of his debtor, by obtaining

a judgment and execution, and thus creating a lien on the whole of his estate. The case of *Gadsden v. Lord*, referred to in the argument, and the subsequent cases decided on the authority of that case, do certainly seem to support the position contended for by the complainant's counsel, that the estate of Darby should be considered as indebted by bond for the money received by Gibson, and as indebted on judgment for that received from Carrendiffer. But after an attentive examination of the subject and a reference to authorities, we are constrained to differ from the highly respected and distinguished Chancellors by whom those cases were decided. But for the positive enactments of the law, one creditor would have as just and equitable a right to the payment of this debt as another. And further, it is a rule in equity, that where one of two innocent persons must suffer, he who has reposed the greatest confidence should bear the loss. Now, from this principle it would seem, so far from the representatives of an estate of which one has been an executor being favoured, the general creditors of such person should take his estate in preference to them. For by the testator's reposing such confidence as to put his whole estate at the disposal of one executor, he enables him to impose upon the community. If a man possessed of a large fortune be left executor to another, who was also possessed of a large estate, the executor may keep his own estate unimpaired in the eyes of the community, by using the money of his testator, and obtain credit on the faith of property which is thus secretly (as to the

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\*community) embarrassed. Why is it that property is suffered to be encumbered by the operation of a judgment or recorded mortgage? Because there are public records to which all have access, and of which every attentive and vigilant man may have notice. But what degree of human foresight or penetration could dive into these secret liens created by a violation of trust reposed.

That a breach of trust constitutes a simple contract debt (unless under some peculiar circumstances) seems to have been the well established doctrine of both the Courts of Law and Equity. In 1 Term Rep. 42, the position was maintained, and in *Vernon v. Vaudry*, 2 Atk. 119, and *Cox v. Bateman*, 2 Ves. 19, it is recognized as the doctrine of the Court. Indeed it is not now disputed, except so far as the case of *Gadsden v. Lord* may affect it, and I think that case must be considered as resting on its own peculiar circumstances. And such seems to have been the opinion of the Court of Equity in the case of the Executors of *Mason v. Executor of Man*, 3 Desaus. Rep. 122. Chancellor De Saussure observes, that on an examination of the case of *Gadsden v. Lord*, and *Buist v. Perry*, it did not appear to him that the Court intended to lay it down as a principle,

that in all cases where executors have received and misapplied money of their testator due on judgment or bond, that they should be liable as judgment or bond debtors. The question did not appear to have arisen solely between conflicting creditors. And he adds, "if it had, it seems to me the Court acted under the peculiar circumstances of those cases." Whatever sums, therefore, may have been received by the executor in this case are to be charged on his estate as simple contract debts.

On the second ground, although this Court does not concur with the Chancellor as to the ground on which he rests the liability of the intestate, yet it is clear that his estate must

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be answerable for the full value of the \*two negroes sold. The Chancellor makes him liable on the ground of laches, and for a violation of the directions of the will. Now, from the evidence adduced to the Commissioner, there was no such laches as would make an executor liable. And as to the four hundred dollars due he cannot be said to have violated the directions of his testator, for he could not invest it in bank stock until he had received it; and his neglect to vest one sum, which he had received, would certainly not make him liable for another sum which he had not received. It may be meant, as was suggested in the argument, that the executor should not have sold on a credit. Now, I do not perceive that there is any thing in the will to restrain the executor from the exercise of his discretion in this respect; nor is there any thing in the evidence to shew that the discretion was improperly exercised. But the executor sold two of his own negroes, who were very inferior ones, with the two of the estate, who were very valuable tradesmen; he received five hundred dollars in cash, and the bond of Gibson for fifteen hundred, on which eleven hundred have been paid. Now, it is a great principle, familiar both at law and in equity, that if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part. *Lupin v. White*, 15 Ves. 436. It does not appear what was the value of the negroes belonging to the executor, nor whether the credit given extended to their whole value, though the evidence offered may secure him from the full operation of the rule. For it is in proof that, a short time before this sale, a bricklayer of the estate was sold for \$800. Taking that as the value, the two must have been worth \$1600, which is the sum received by him, and for

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which \*he must be answerable, with interest on the different amounts from the time they



were received, taking it for granted that the cash received was in part for the negroes of the estate, as the contrary has not been shewn. It is ordered and decreed, that the accounts of the parties be adjusted on the principles here laid down, and the decree of the Chancellor so far as the same is repugnant thereto be reversed.

Decree modified.

# **I McCord, Eq. 478**

## **SHINNIE and LOOMAS v. JONATHAN COIL.**

(Charleston. April Term, 1826.)

[*Arbitration and Award* ¶33.]

An award set aside where the arbitrators heard evidence without giving the opposite side an opportunity of being heard or of cross examination.

[Ed. Note.—Cited in *Rounds & Hagler v. Aiken Mfg. Co.*, 58 S. C. 314, 36 S. E. 714.

For other cases, see *Arbitration and Award*, Cent. Dig. § 173; Dec. Dig. ¶33.]

[*Equity* ¶39.]

Equity, after setting aside an award, will not entertain jurisdiction where adequate remedy may be obtained at law.

[Ed. Note.—Cited in *Hunt v. Coachman*, 6 Rich. Eq. 288.

For other cases, see *Equity*, Cent. Dig. §§ 104-114; Dec. Dig. ¶39.]

[*Arbitration and Award* ¶64.]

Partiality upon which to set aside an award need not be a corrupt partiality.

[Ed. Note.—Cited in *Cothran v. Knox*, 13 S. C. 510.

For other cases, see *Arbitration and Award*, Cent. Dig. §§ 321-327; Dec. Dig. ¶64.]

This bill was brought for the purpose of setting aside an award between the parties. It was in evidence, that the arbitrators met, and proceeded in the examination of sundry witnesses, but defendant wishing further time to examine certain witnesses at Cheraw, for the purpose of invalidating the testimony of complainants' witnesses, it was granted him, and no time was set for the second meeting. Defendant procured sundry affidavits of persons residing at Cheraw, and placed them in the hands of the Secretary of the Board of Commerce, who placed them in the hands of the arbitrators the day before the second meeting. The complainants had no notice of the time or place of the examination of the witnesses, nor of their names, nor the subject matter of which they were to be examined; nor had they any notice of the second meeting. The arbitrators met, read the affidavits, and rendered in an award against the complainants.

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\*The counsel for the complainants contended that the award should be set aside, on the ground of error and mistake of the arbitrators in proceeding to investigate the rights of the complainants without their being present or notified thereof, and upon ex parte

evidence taken upon affidavits without giving them an opportunity of a cross examination of the witnesses.

It was contended by the counsel for the defendant, that as the arbitrators were persons of the parties' own choosing, they ought to be bound by their award, and that they were not bound by any legal technical rules.

Thompson, Chancellor. It will be observed in this case, that the arbitrators are not judges of the parties' own choosing, but that they were appointed monthly by the Chamber of Commerce; and admitting that they were, every day's practice proves, that the Court will set aside an award made contrary to law, or founded in error or palpable mistake. As to their not being bound by the rules of evidence, if such an idea has heretofore existed, it is time that it should be corrected and abolished. Every tribunal to decide upon the rights of parties, whether delegated by law or the parties themselves, are bound to decide by the rules of evidence. There is no rule in law which allows an ex parte affidavit to be read in evidence. There is no rule of law which allows a person to be examined out of Court, without giving the adverse party an opportunity of cross examination, nor is there any rule of law which will justify the rendering a judgment against a party without giving him an opportunity of being heard. The testimony should be heard, the documentary evidence read, in the presence of both parties. None of these requisites have been complied with in the present case. The Court is of opinion, that the arbitrators acted erroneously in receiving and acting upon ex parte affidavits, without giving

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ing complainants an \*opportunity of cross examination or rebuttal, and that in their absence, without notifying them either of the contents of the affidavits or of the time when they took the same into consideration.

It is therefore ordered and decreed, that the award be set aside, and the case be set down in this Court for trial upon its merits.

This was an appeal from that decree on the following grounds.

First. Because his honor erred in setting aside the award, inasmuch as there was not sufficient grounds for so doing.

Second. That if the award be exceptionable, and be therefore rightly annulled by the decree, yet it was insisted that the bill should be dismissed, the complainants having full and adequate remedy at law for the recovery of any balance due them.

Hunt, for the appellant. An award will not be set aside except for fraud or partiality, 1 Desaus. Rep. 345, 1 Vern. 157; or for collusion or gross misconduct, Lord Raym. 1076, Str. 908, 1 Atk. 77, 3 Desaus. Rep. 305; or for corruption, partiality or gross misconduct, Amb. 245. If the parties chose those men they were their own agents, and must

be governed by their acts. If they chose to refer their matter to a Committee of Commerce they must be governed by their rules. An award of arbitrators was good though against law. 1 Wils. 4. 1 Swanst. Rep. 56. 2 Madd. Cha. Rep. 6. 1 Price's Rep. 81. The testimony need not be on oath, unless so stipulated. Wellington v. McIntosh, 2 Atk. 569. 1 Dall. 161. A party interested may be examined. 1 Bos. & Pul. 175. 18 Ves. 447. The arbitrators ought to be made parties. 1 Wash. Rep. 11. 14. And they are not bound to give notice of their meeting. 3 Atk. 530.

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Equity will not be anxious to give relief when a party may obtain relief at law. 6 Ves. 10. 9 Ves. 67. He also cited 2 Bay, 374. 450.

Dunkin, contra. The award was invalid. Walker v. Frobisher, 6 Ves. 70. Chaplin v. Kirwan, 1 Dall. 187. Passmore v. Pettit, 4 Dall. 271. Herrick v. Blair, 1 Johns. Cha. Rep. 101. The Court, in this last case, say, in Walker v. Frobisher the arbitrators, after the parties were dismissed, examined three more persons on the part of the defendant when no person was present on the part of the plaintiff. This was unfair, partial, and gross misconduct, contrary to all the principles of a just proceeding. Complainants were not informed what witnesses were to be examined, when or where, nor did they know the questions, &c. They were not present at the meeting, nor did they hear of it until after the award. It was an extraordinary award.

On the second ground he cited 2 Chit. Plead. 478. 8 East, 344. 1 Saund. 327. An issue at law might be ordered.

Grimke, in reply. The complainants knew of the application for further time. Why did they not then object? Why did they not apply to the arbitrators afterwards? The arbitrators are the private agents of the parties, and they must be bound by their acts.

*Curia, per* NOTT, J. It is contended in this case, that as the arbitrators were judges of the parties' own choosing, the Court ought not to set aside their award except for fraud, corruption, partiality, or gross misconduct.

The cases on this subject are certainly very strong; and it cannot be expected, that when the parties have thus withdrawn their cause from the ordinary tribunals of justice, that the same regularity should be observed as

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\*would be required in a Court whose proceedings are governed by fixed and determinate rules.

The parties themselves, by selecting their own judges, are understood to dispense with that degree of formality; and the very object of referring cases to arbitration is, in most cases, to be absolved from those fetters which the technical rules of Court impose

upon their proceedings. But there are nevertheless certain limits, beyond which even arbitrators are not permitted to dispense with the rules of law. There are certain fundamental rules for the trial of causes, the disregard of which by any tribunal, however organized, will render their proceedings null and void. Among these are, the right of the party to have notice of the time and place of trial; to have an opportunity to produce his testimony; to know and to have an opportunity to rebut the testimony offered against him. However, the law is so well settled upon this subject, that I will barely refer to the decided cases, and shall be satisfied to be governed by the conclusion which is to be drawn from them. In the case of Fitzpatrick v. Smith, 1 Desaus. Rep. 345, the Chancellor, who delivered the decree of the Court, observed that as there was no charge of fraud or partiality on the part of the arbitrators, the award was conclusive. In the case of Brown v. Brown, 1 Vern. 157, the Lord Keeper dismissed a bill to set aside an award, because he did not see any fraud or collusion in the matter. Other cases are relied on where similar expressions are used, from whence it is inferred that these are the only grounds on which an award will be set aside. But upon examining those authorities it will be found that there is usually some alternation annexed. Thus in the case of Aylwin v. Perkins, 3 Desaus. Rep. 305, it is said, the award is binding on the defendant, unless he can shew corruption, partiality, or gross misconduct on the part of the arbitrators; or un-

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less the arbitrators were \*mistaken in a plain point of law; or unless there were such gross and palpable mistakes in calculation as produced manifest injustice. So in the case of Brown v. Brown, above quoted, the Lord Keeper added, if their accounts prove a manifest error in the body of an award, relief may be had. In 3 Atk. Rep. 644, an anonymous case, though Lord Hardwicke said, unless there is corruption or partiality in an arbitrator, the party cannot set aside his award; yet he added, if there was any palpable mistake made by the arbitrator, or miscalculation in an account laid before him, the party aggrieved might bring his bill to have it rectified. In the case of Ridout v. Pain, 3 Atk. Rep. 494, the same learned Judge refers to the case of Comforth v. Green, where Lord Cowper lays it down, that if arbitrators go upon a plain mistake, either in law or fact, Equity will relieve against the award; and remarks, "in the case of Medcalfe v. Ives I was of the same opinion." It appears then that there are cases falling very short of fraud or corruption in which an award may be set aside. But the cases go even further.

In the case of Morris v. Reynolds, 2 Lord Raym. 857, a motion was made to set aside an award on the ground, that the arbitrators had refused to hear what the defendant



could say after they had heard the plaintiff. Holt, Chief Justice, opposed this totis viribus, as contrary to all his experience. He said, the integrity of the arbitrators, in such cases, whom the parties by consent had chosen for their judges, should never be arraigned any more than the integrity of any other Judges; but Powell, Powys and Gould, Justices, said "it was abominable to give countenance to any such proceedings;" and they suffered the award to be examined into. The same doctrine is laid down in *Medcalfe v. Ives*, 1 Atk. 64. The Lord Chancellor says, when the arbitrators make their award clau-

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destinely, without hear\*ing each party, the Court ought to interfere to avoid such an award. In the case of *Morgan v. Mather*, 2 Ves. Jun. 16, 17, not hearing a witness, even though there be no corruption, is expressly stated as a ground for setting aside an award. In the case of *Walker v. Frobisher*, 6 Ves. 70, where the arbitrator examined witnesses on one side without the knowledge of the other party, after he had informed the parties that he would hear no other testimony, the Chancellor set aside the award; although the arbitrator swore he had previously made up his mind, and that this testimony had no influence on his judgment in making up his award. The Lord Chancellor said he believed him, because he knew him to be a most excellent man. But he could not, from respect for any man, do that which he could not reconcile to general principles. A Judge must not, said his Lordship, take upon himself to say whether evidence, improperly admitted, had or had not an effect upon his mind. And that although the award might do perfect justice, upon general principles it could not be supported. Now, what are the facts in this case? In the course of the investigation the defendant discovered that he should want more testimony than he had adduced. He requested further time for that purpose, which was granted. He must have expected that the testimony, which he was about to obtain, would have an important influence on the result of the case, otherwise he would have been indifferent about it. And it was equally important to the complainant as to the defendant; for their interests were equally involved in the issue. They ought therefore to have had an opportunity of cross-examining the witnesses whose testimony was to be taken, and notice of the time and place of hearing the case, that they might have had an opportunity of rebutting the testimony. The case comes precisely within the principles of the case of *Walker v. Fro-*

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bisher, and se\*veral of the other cases which have been relied on. For, whether ex parte testimony be received after the arbitrators had agreed to close the examination, or during its progress, the principle is precisely

the same. When it is said, that partiality on the part of the arbitrators is a good ground for setting aside an award, it is not to be understood that it must necessarily be a corrupt partiality. Any ex parte proceeding, the effect of which is to give an advantage to one party over the other, is such a partiality as will avoid an award. Suppose the witnesses had been examined viva voce, ought not the complainants to have had notice of the time and place of meeting, that they might have heard the evidence. And in principle, there is no difference whether the evidence be ore tenus, or in writing. There is no allegation of corruption or fraud against either the defendant or arbitrators. It is admitted that they are all gentlemen of high respectability, whose characters raise them above any suspicion of that sort. But they have mistaken their duty in hearing evidence on one side without giving the other party an opportunity of being heard. Their award therefore cannot be supported. It is the opinion of the Court, that that part of the decree which goes to set aside the award must be affirmed, and that the defendant must pay the costs. But that is as far as the decree ought to have gone. The only relief which the complainants have asked and to which they are entitled is, that the award should be set aside. They then have a plain and adequate remedy at law. At least there is nothing brought to the view of the Court, by which it can be seen that they have not. By their original agreement it was stipulated, that if any difference should arise between them it should be settled by arbitration, and there can be no reason why the Court of Equity should take the case from the tribunal selected by the parties themselves. That part of the decree, therefore,

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\*which directs that the bill should be retained for further hearing is reversed.

It is therefore ordered and decreed, that so much of the decree of the Chancellor as goes to set aside the award in this case be affirmed; but that so much of the decree as directs that the case be set down for trial in that Court on its merits be reversed, and that the cause be struck from the docket, the Court seeing no cause for further relief.

Decree modified.

#### I McCord, Eq. 486

In the case of *GEORGE TRESCOTT, Assignee, v. JOHN SMYTH et al.*

(Charleston. April Term, 1826.)

[*Landlord and Tenant* ¶269.]

The mortgagee of personal property is the legal owner, and such property cannot be distrained on for rent in the hands of the mortgagor.

[Ed. Note.—Cited in *McKnight v. Gordon*, 13 Rich. Eq. 247, 94 Am. Dec. 164; *Reese v.*

Lyon, 20 S. C. 20; Williams v. Dobson, 26 S. C. 112, 1 S. E. 421; Ex parte Knobloch, 26 S. C. 336, 2 S. E. 612; Greene v. Washington, 89 S. E. 651.

For other cases, see Landlord and Tenant, Cent. Dig. § 1093; Dec. Dig. ¶269.]

[Execution ¶40.]

An equitable interest is not the subject of distress.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 50, 88-94; Dec. Dig. ¶40.]

This was a rule on the Master, taken out by consent of parties, to shew cause why he should not pay six months' rent due by the defendant, J. Smyth, to Mrs. Christie, Executrix of Alexander Christie, on the 16th of February 1826, and for which rent she distrained on the 1st of April 1826 on a negro named Molly. It was agreed that the Master should sell the wench and hold the proceeds of the sale to abide the order of the Court. In the decree in the case of Trescott v. Smyth, the property of Smyth was ordered to be sold to pay his debts. Mrs. Christie claimed a preference of payment on the grounds, that the order of sale by this Court could not divest her of the right of distress for rent due by Mr. Smyth,—the negro being on the premises leased, and two quarters' rent due on the 16th of February

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1826; and \*on the further ground, that even the sheriff levying an execution is compelled by law to pay the landlord one year's rent, if so much be due, in preference to the debt of the execution creditor. [McWillie v. Hudson] 1 Const. Rep. Tread. 120. It was submitted, that the Master on selling this wench was compelled to do what the sheriff would have been obliged to do if he sold her under an execution.

On behalf of the Master, the parties claiming the benefit of the decree replied, that this negro was under mortgage; that the mortgage was forfeited; that the legal estate in the slave was in the mortgagee; that it was therefore the slave of a third person on the premises of the tenant within the act of 1799. 1 Brev. 242. 2 Faust, 251. It was also insisted, that the decree of this Court in January, against the specific property including the negro in question, prevented any lien from attaching on the property. It was also insisted that the distress of Christie had no equity, because she had a lien on other property on the premises, viz. furniture, which was exclusively bound by the lien for rent, and which was not bound either by the mortgage or decree. And that the well known equity rule applied, viz. that if one creditor has a lien on two funds and another only on one, the former creditor must first exhaust the fund on which the other had no lien before he could resort to the other fund.

De Saussure, Chancellor. I am of opinion that the slave in question was not liable for the rent, and the rule must be dismissed.

From this decree an appeal was taken up on the grounds following.

First. That the slave distrained on was the bona fide property of Mr. Smyth, and not of the person to whom she was mortgaged,—

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the mortgagee having no other interest in property mortgaged than the right of having it sold and the proceeds applied to his debt, subject to other incumbrances; and that the slave was not sold by the Master until after the second quarter's rent was due; and the property of Mr. Smyth in her divested by the levy under the distress warrant.

Second. That the decree of January, 1826, and the sale under it and the mortgage, could have no stronger efficacy against a landlord than an execution at law in the hands of the sheriff, who would be obliged to pay a year's rent, if so much be due, in preference to the execution, under the statute of Anne.

Third. That a rule for marshalling securities referred to by the Chancellor had no application in this case, the furniture being equally liable with other property of defendant to the claims of his creditors, and not as was alleged exclusively bound by the lien for rent. Nor was Mrs. Christie bound by any principle of law to take it, rather than any other personal estate of the defendant.

Fourth. That the decretal order should have at least awarded to Mrs. Christie the quarter's rent due prior to the decree of January, 1826 (viz. on the 16th of November, 1825) and an apportionment of the second quarter's rent up to the time of the decree.

Lance, for the appellants, cited 1 Brev. 170, 187. Smith v. Lascelles, 2 Term Rep. 187. Can an equitable interest be restrained? Com. 529. 1 Madd. Cha. 529. 2 Caines' Ca. in Er. 210. 2 Johns. Cha. Rep. 100, 140. Bankruptcy does not prevent a distress.

Clarke, contra. A negro is the property of the mortgagee, after the debt becomes due. 8 Johns. Rep. 97. 5 Johns. Rep. 258. 2 Ves. Jun. 378. Pow. on Mort. 3.

Curia, per COLCOCK, J. The Court unan-

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imously concur with the presiding Chancellor, that the negro was not liable to the distress for rent. The case is certainly within the spirit if not the letter of the act of 1799, which was intended to restrain the rigour of the common law on this subject. The act declares that no slave shall be liable to be distrained or shall at any time be distrained for house rent or any other rent, unless such slave shall bona fide belong to such person or persons as may be lawfully liable to or chargeable with the rent. 1 Brev. 242. Now it cannot be said that this negro was bona fide the property of Mr. Smyth; she was mortgaged to Mr. Grimke. The time of pay-



ment had been passed for years. The only interest then which Mr. Smyth could have in her was an equitable interest, which certainly was not a subject of distress. It would seem to me a work of supererogation to refer to many authorities on this point, when there are two or three of our own in which it is expressly decided that a mortgagee after the day of payment is considered as the

owner of the property. In the case of Wolf v. O'Farrel, 1 Const. Rep. Tread. 151, although the paper in that case was a bill of sale by way of mortgage, the general doctrine is expressly recognized by all the Judges. And so in the case of Payne v. Kershaw, 1 Harp. Rep. 275. The motion therefore is refused.

Decree affirmed.

# CHANCERY CASES

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

IN MAY TERM, 1826.

JUDGES PRESENT.

ABRAHAM NOTT, Presiding Judge.  
C. J. COLCOCK.  
DAVID JOHNSON.

### I McCord, Eq. \*490

\*ALLEN GIBSON v. WILLIAM B. WATTS.  
(Columbia. May Term, 1826.)

[*Contracts* ⚭99.]

The party holding the pen and stating the terms of the contract will not be presumed to have made a mistake against himself.

[Ed. Note.—For other case, see *Contracts*, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. ⚭99.]

[*Evidence* ⚭441.]

It cannot be proved by parol, that either party had a right to rescind a written contract. The parol arrangements are merged in the written contract.

[Ed. Note.—Cited in *Bulwinkle & Co. v. Cramer & Blohme*, 27 S. C. 383, 3 S. E. 776, 13 Am. St. Rep. 645; *Gill v. Ruggles*, 104 S. C. 468, 89 S. E. 505.

For other cases, see *Evidence*, Cent. Dig. § 1756; Dec. Dig. ⚭441.]

[*Evidence* ⚭415.]

Where a mistake has been made by a scrivener, or error in calculation, or other obvious mistake in matter of fact in a written contract, parol evidence may be let in.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1870; Dec. Dig. ⚭415.]

[*Contracts* ⚭333.]

A bill need not state a contract to be in writing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1196, 1640-1657, 1659; Dec. Dig. ⚭333.]

[*Evidence* ⚭397.]

[The fact that the counsel of a party was surprised by the production of a certain writing as evidence, the bill not stating that the agreement was in writing, is no ground for relieving such party by allowing parol evidence to vary the same, if he was previously cognizant of the evidence.]

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1756-1765; Dec. Dig. ⚭397.]

The complainant and defendant had been copartners in trade in Columbia, South Caro-

lina, and had dissolved on the 25th of May, 1825. This was a bill to account. At the dissolution of their copartnership, they had a large parcel of cotton on hand, in the possession of their factor in Charleston, which Watts agreed to buy of the firm, and gave the following receipt for the same to Gibson.

"Cotton on hand, Watts and Gibson, bought by Watts."

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\*The cotton was then set forth in detail, by parcels and bags, amounting in all to 152,-182½ pounds.

The paper then proceeds as follows.

24 June. 1825.

"Received of Watts and Gibson the foregoing number of bales of cotton, weighing as mentioned; for which I promise and agree to account to said firm or their credit at twenty-eight cents per pound; said firm defraying all expenses on it previous and up to the 25th of May; after which time, I incur all responsibility and expense.

William B. Watts."

No question arose except as to this sale of cotton, which amounted to \$42,611.10. On this subject the bill stated, that on the 25th of May, 1825, Watts agreed to purchase from the firm of Watts and Gibson a large parcel of cotton which they then owned, to wit 152,-182½ pounds, at twenty-eight cents; and which at that time was in their factor's hands in Charleston; and in case Watts did not take the cotton he was to forfeit \$2,000; and in pursuance of this agreement, on the 24th of June, 1825, Watts received of the firm of Watts and Gibson the cotton on his own individual account, and agreed to account to said firm or their credit at twenty-eight cents, the firm paying all expenses previous to the 25th of May, 1825, after which



Watts was to incur all expenses and responsibility; and that Watts had since sold the cotton, but at what price complainant was uninformed. The bill did not set out a copy of the contract, or state it to have been in writing. It prayed that Watts might account for this purchase at twenty-eight cents, &c.

The answer to this point stated, that about the 25th of May, 1825, defendant and complainant agreed that defendant should take all the cotton then on hand (the quantity of which was not then known) at twenty-

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eight \*cents per pound, upon the condition, that after the cotton should be sold and the account sales returned, either party, finding it to his interest, might pay to the other \$2,000, and thereby both defendant and complainant would again become equally interested in and entitled to the profits, and equally liable for the losses upon the sales of the cotton: and although defendant did afterwards, on or about the 24th of June, 1825, when the quantity of the cotton was ascertained, give his receipt to complainant for about 149.122 pounds, yet he averred that the original contract above stated was never changed, and that either party would be at liberty upon the returns of account sales of the cotton, to pay the other \$2,000, and thereby again become equally interested in the profits and losses of the cotton: nor had defendant yet made his election, whether he would pay complainant \$2,000 and again become equally interested with him in profit and loss, or account to complainant for his share of the cotton at twenty-eight cents, as the account sales of said cotton have not yet been fully returned.

On the hearing before the Chancellor, Gregg and Holmes, for the defendant, offered parol evidence to the following points, which were submitted to the Chancellor in writing, viz.

1. To prove what was the contract between the parties on the 25th of May, 1825, referred to in the bill, and set forth fully in the answer.

2. And that the same contract was continued by the parties, after the date of the receipt.

3. And that after the date of the receipt the complainant claimed an interest in the cotton contained in the receipt, and exercised some ownership over it.

4. That the receipt was not intended to

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vary or change \*the previous verbal contract, but was intended to be drawn in conformity to it.

5. That it was not intended to reduce the whole previous verbal contract to writing.

6. That the great object of the receipt was, to specify in writing the quantity of cotton that the defendant should account for, ac-

cording to the terms of the previous verbal contract.

7. And that after the date of the receipt both parties considered the previous verbal contract still of force, and acted accordingly.

8. And that the receipt was drawn, as it now appeared, by mistake.

9. And to enable the Court to put a correct construction on the receipt.

M'Cord and De Saussure contended that the evidence was inadmissible.

De Saussure, Chancellor. The object then of this application is to be permitted to produce parol evidence to prove that by the parol agreement, which it is alleged was made prior to the reduction of the contract to writing, each party was to be at liberty to put an end to it whenever he pleased; and to have the cotton, or its amount sales, brought back into joint stock for the benefit or loss of the concern. The loss it is stated is very large on the sales of the cotton: and the defendant seeks to establish by parol evidence the existence of such a parol agreement in order to throw the loss on the concern.

This question has been well and fully argued, and I have considered it carefully.

It was conceded that there was no fraud on the part of Mr. Gibson; and that he had no hand in procuring the omission of such a clause in the written receipt or agreement as, it is alleged, ought to have been inserted.

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\*But it is stated that Mr. Watts himself omitted the clause by accident, or because it was not intended to supersede the parol agreement and its terms. To this it is answered that Mr. Watts himself drew up the whole agreement in his own hand writing; that it is not a mere receipt for the cotton in reference to a pre-existing parol agreement; but that the paper goes on to state the terms on which he did receive the cotton; saying, "which cotton I promise and agree to account for to said firm of Watts and Gibson, or their credit, at twenty-eight cents per pound, said firm defraying all expenses on it previous and up to the 25th of May, after which time I incur all responsibility and expense."

It certainly does appear very extraordinary, that the party himself interested, holding the pen and stating the terms of the contract even to minute expenses, should omit so vital a clause as the one alleged to have been omitted by him by mistake, or from thinking it unnecessary. The effect of such a clause too would have been so extraordinary, as to render it extremely improbable that two men of business, sitting down gravely to make a contract, should consent to a condition which would be sure to destroy the contract altogether; for it required no gift of prophecy to foresee, that if such a condition was made a part of the contract, it would be finally destroyed. If the

cotton sold at a loss exceeding two thousand dollars, Mr. Watts would be sure to avail himself of the condition, by rescinding the contract, and throwing the loss on the concern. And if it sold to advantage, Mr. Gibson would have assuredly rescinded the contract, and claimed an equal share of profit. The statement made by the bill is far more reasonable and probable, which alleges that it was agreed during the verbal communications, which related to and preceded the written agreement, that until the business was perfected by the receipt of the cotton,

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William B. Watts \*should be at liberty to put an end to these verbal arrangements on paying \$2000. The locus pœnitentiæ was thus verbally reserved till the actual transfer of the cotton, and the reduction of the terms to writing. The real question, however, is not as to these probabilities. It is, whether the defendant is at liberty to produce parol evidence to prove a condition attached to the written contract, which would essentially vary it, and indeed lead unavoidably to its destruction?

I have had occasion lately to look into this subject fully, and I have considered it since the argument in this cause.

The rule under the statute of frauds is quite clear, that such parol evidence is inadmissible; and the decided cases very generally illustrate and enforce the statute. It is certainly true, that in some cases exceptions to the rule have been made in practice, founded on the strong desire of the minds of the Judges to get at the whole of the facts and causes; and which have gone far to defeat the statute itself.

The truth is, the statute of frauds, forbidding parol evidence to establish certain contracts, is a reproach to human nature. It indicates the deepest distrust of human integrity, or correctness of recollection. Some nations carry it further, and require not only that all contracts should be made in writing, but should be made before a public officer, a notary, or Judge; as we require it, in one case—the renunciation of dower or inheritance by a wife. This distrust is extended to all cases where the persons called to be witnesses—even where parol evidence is admissible—are to be supposed to have any bias. The test of that bias is, by our law, the having pecuniary interest in the cause. We disregard the bias of relationship, however close, except as to husband and wife, and which is surely a stronger cause of partiality than even the pecuniary interest. Other nations

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have \*made close relationship a ground of exclusion of witnesses, more wisely perhaps than our rule. We must, however, be guided by our law. That, as we have stated, excludes parol evidence in cases which come within the provisions of the 17th section of the statute of frauds, as this one we are con-

sidering clearly does. The counsel for the defendant thinks, that the case before us comes within the exceptions made in practice to the rule laid down in that statute. Upon the best consideration of the case, I am of opinion, that it does not come within any of the exceptions. The parol evidence proposed to be introduced is evidence to vary the written agreement. It is to shew that by the parol agreement, which preceded the written, there was a condition, that each party might rescind it; and it is to give effect to that parol evidence. The answer given by the decided cases is, that these parol arrangements are merged in and concluded by the written agreement, which, in this case, contains no such clause or condition. It is urged, that the written was not intended to supersede the parol agreement. The law says, the written does supersede the verbal agreement, and no parol evidence shall be received to shew the contrary. It is urged, that it ought to have been inserted. The answer is, that the intentions of the parties must be judged by the written agreement; and that comes with double force, when the party complaining of the omission drew the instrument, and inserted particularly all the other terms. It is said, that the complainant acted subsequently in such a manner as to shew that he considered himself as having an interest in the property. The acts so spoken of are not distinctly stated to the Court. If true, they might arise out of obvious considerations. Such acts, if established by parol evidence, could not be used to explain the terms of the written agreement. But that would amount to a new agreement, which would require to

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be \*in writing. At any rate, such new substantive agreement to rescind must have no reference to, or connection with, the parol agreement of the first contract, which the law forbids us to hear. Besides, no such new and substantive agreement to rescind is set forth or relied on in the answer. The allegata and probata must agree. It is not necessary to examine the decided cases generally. One which was particularly referred to I will notice. It is *Rugely v. Davidson*, 2 [Mill] Const. Rep. 33. On examining that case, it does not assist the defendant. On all the points of the case Judges Colcock and Johnson were with Judge Cheves in his able argument. On the point of the rejection of the parol evidence, to control the legal effect of the endorsement, Judge Nott concurred with those Judges. Upon the whole, I am of opinion that the parol evidence, offered in this cause to vary the written agreement, must be rejected.

The defendant appealed on the ground, that the evidence was admissible.

James G. Holmes, for the appellant. The bill in this case did not state that the contract was in writing: when the written contract was produced on the trial it was a sur-



prize to them. The complainant, then, by his bill, put himself upon his verbal contract, and not upon a written contract, which he should have set out in his bill. Not having done so, he should not now be allowed to give in evidence the written contract. But this receipt, if it were a contract—which it is denied to be, being only a receipt—was only evidence of the contract made in May, and might be rebutted by shewing that they had superseded that contract by a verbal contract made afterwards. Both were parol contracts, neither being under seal, and there was no distinction between written and unwritten parol

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contracts. \*They were of equal rank, and the same evidence might be given as to the one or the other. This was not a case within the statute of frauds. On the 24th of June there was no necessity to reduce the contract to writing, for the writing said "received"; therefore the cotton being already received, it was of course delivered, and no writing was necessary to the validity of the contract. Roberts on Frauds, 61. 3 Atk. 387. Phillips's Evidence, 496. Dinkle v. Marshall, 3 Binney's Rep. 587. But this was not a contract, yet the bill stated that they had agreed. This was no agreement. The proof did not correspond with the proof. The answer stated that they had made a contract or agreement, which must have been a different thing from the receipt offered in evidence. Independent facts or contracts may be proved by parol. 15 Mass. Rep. 85. A receipt in full of all demands may be confined to some particular transaction by parol evidence.

W. F. De Saussure, contra. The evidence was inadmissible. To admit such evidence would be suffering parts of conversations loosely spoken to affect the solemn agreements of parties. 2 Atk. Rep. 383. 4 Bro. C. C. 219. 7 Ves. 218. 3 Campb. Rep. 426. This is said to be a receipt and not a contract. But it is as good a bill of sale as can be drawn, and is in the usual form. The defendant can not allege a mistake here, for the contract was written by Watts himself. It was not like a mistake made by an agent. The party wished to avoid his own act. It is too late now to pretend a mistake.

McCord, on the same side. The usurpations of the English Courts, which have been adopted in this country without reason or reasoning in their construction of statutes, have

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already become a subject of much discussion in England, and it is time that the Courts in this country should look to the correctness of English cases, before they are adopted as law in this country. These observations are led to by noticing the decisions on the statute of frauds, and several others of equal importance, such as the statutes of limitations, uses, the registry act, &c. They have become so ramified, that no one ever thinks of look-

ing to those statutes to see what the legislature intended. To know what is the law you must examine the cases, where the statute is hardly mentioned, and is not to be regarded, if Lords Eldon, Loughborough, Mr. Justice Park, or Best said otherwise. But the spirit of the age is in favour of strict construction. Bonum est secundum literas et leges, et non secundum propriam mentem, judicare. Mr. Miller, in his late "Enquiry into the Present State of the Laws of England," pp. 269, 301, 313, has reiterated many complaints urged as early as the reign of Henry VIII. by "Seinte Jerman," in his "Treatise concerning Sutes in the Chauncery by Subpena."—"The common law of the realm (he said) was now taken for nothing. It all goes to the conscience of the Chancellor." "It is not reasonable, that for a particular man's cause, which hath hurt himself through his own negligence, and by his own folly, the good common law of the realm, that is this, that matter in writing, without condition, may not be answered but by matter in writing, or by matter of record, should be made void, or be set at nought by the suit of any particular person in the Chancery, or in any other place." Appendix to Doctor and Student, p. 22.

"Moreover, (says the same old author) you speak much of conscience, and though law will, yet whether it will stand with conscience. In my conceit, in this case I may liken my Lord Chancellor, which is not learned in the laws of the realm, to him

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that stands in \*the sale of Whitehorse, far from the horse, and holdeth the horse, and the horse seemeth and appeareth to him a goodly horse, and well proportioned in every point, and that if he come near to the place where the horse is, he can perceive no horse, nor proportions of any horse. Even so it fareth by my Lord Chancellor that is not learned in the laws of the realm; for when such a bill is put unto him, it appeareth to him to be a matter of great conscience, and require the reformation; and the matter in the bill appeareth so to him, because he is far from the understanding and the knowledge of the law of the realm, and the goodness thereof; but if he draw near to the knowledge and understanding of the common law of the realm, so that he may come to the perfect knowledge and goodness of it, he shall well perceive that the matter contained in the bill put to him in the Chancery is no matter to be reformed there, and namely in such wise as is used."

These remarks of "Seinte Jerman" were thoroughly applicable to so strange an application as this is on the part of the defendant's counsel. It is attacking the soundest principles of the law. It has been said, that this is not a case within the statute of frauds. No body says it is. But if the

contract had not been reduced to writing, it would have been one of those contracts for goods which would have been void under the 17th section of the statute, as there was no actual delivery; for the cotton was in Charleston, and the contracting parties in Columbia. The argument on that subject has been misunderstood. What was contended for, and what the Chancellor meant, was, that this was one of those contracts which had been executed in pursuance of the statute, and was a contract which would have been within the statute, if not reduced to writing, there being no delivery, or change, of possession; and that in all cas-

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es where the contract would have been \*with- in the statute if not reduced to writing, as in cases of sales of land, promises to pay the debt of another, &c. and a contract for the sale of goods above £10 without delivery, in such cases if the contract was reduced to writing, that parol evidence, if admissible in other cases, to explain, vary or correct a written contract, would be totally inadmissible in such cases; because the act says such contracts shall be totally void if not reduced to writing, and therefore as no part could be valid but that reduced to writing, even if there were some other stipulations not reduced to writing they would be void, and it would not only be useless, but in the teeth of the statute, to suffer any such evidence to be given. 2 Evans's Pothier, 203, 204. Wherever originally the contract is required to be in writing, no variation could be made but in writing. 2 Pothier, 204. Lond. Ed.

This is clearly the rule at common law. The contract being once reduced to writing can only be varied or explained by writing. Roberts on Frauds, 9. The statute only enhances the duty of caution. This case does not come within any of the rules of exception which have been so prodigally made by the English Courts, and are collected by Roberts in his Treatise on Frauds, from p. 10 to 89 inclusive. The use and intent of an agreement cannot be varied by parol. Rob. 118, n. This was said to be an executor's contract. If so, there is more necessity for adhering to the rule than in any other cases. Rob. 172. It is said some thing was to be done to this cotton, it was to be weighed, &c. and therefore it was not such a case as would have been within the statute. It is only necessary to refer to that class of cases to shew that this was not one. Rob. 171. 174. In Preston v. Merceau, 2 Black. Rep. 1249, no suppletory evidence was held admissible. In Parkhurst v. Van Cortlandt, 1 Johns. Cha. Rep. 279, it is said, that where a contract is reduced

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to writing all previous ne\*gotiations resting in parol are resolved into the writing. A contract could not rest partly in writing

and partly in parol. Stephens v. Cooper, 1 Johns. Cha. Rep. 425. In Mumford v. M'Pherson, 1 Johns. Rep. 413, it is said, "all previous conversations are merged in the writing." See cases referred to in Fell on Guarantees, 57. 59. In Vandervoort v. Smith, 2 Caines' Rep. 154, no evidence was admitted to explain any particular which composed part of the policy. The contract must be silent as to the matter offered to be proved. Here the contract is neither silent as to the quantity, price nor time. All that is necessary to constitute a contract is here stated. The defendant can give evidence of no matter so stated. Nothing but fraud or mistake can induce the Court to admit parol evidence. 2 Caines' Rep. 160. see also Putnam v. Bowen, 1 Caines' Rep. 358, and note. So in Meres v. Ansell, 3 Wils. Rep. 275, the Court said, the rule was the same in law and equity; and refused the evidence in a case, where it was evident the contract did not contain all that was agreed upon. Any pretence of mistake in this case is idle. It was his own act, done upon deliberation, on an important transaction, upon which he must have deliberated, and acted with caution. The statements were his own. The whole in his own hand writing. Even the figures to a very large calculation of various parcels of cotton, the weight of each bale enumerated, amounting to 152,182½ pounds. The party has not been able to state in what particular the mistake occurred, how it was made, or any thing particular. The answer alleged no mistake. None is pretended there; nor is there any charge of fraud. Gibson's character was beyond the reach of such an imputation. It was defendant's own act, and therefore the case of Cheriote v. Barker, 2 John. Rep. 351, applied; for there, on the same pretences, the Court refused to admit

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parol evidence to shew that an \*insurance of "freight" meant "freight-earned." See M'Dowall v. Beckly, 2 Const. Rep. 265. Lord Hardwicke, in Pateriche v. Powlet, 2 Atk. 383, refused the evidence as contrary to the common and statute law. All the cases in the time of Lords Northington and Thurlow, reported in Brown, were clearly with him. In Portmore v. Morris, 2 Bro. C. C. 219, Lord Kenyon, Master of the Rolls, rejected evidence to shew that an annuity was intended to be redeemable. In Hare v. Shearwood, Buller, for the Lord Chancellor, supported the same doctrine, though there was an admission by the defendant that such an agreement was made. 3 Bro. C. C. 168.

Gregg, in reply. It is not easy to see what this case has to do with the statute of frauds. It is not a case within the statute. There is a distinction between those cases where the statute applies, and where it does not apply. The general rule of law, as it has



been stated, is admitted; but even Chancellor Kent has fallen into error in supposing the rules of evidence to be the same in law and equity. The position is denied. It is against the opinion of Spencer and Thompson, *Van Cortland v. Parkhurst*, 14 Johns. Rep. 15. The proposition is true generally, but not universally. Equity entertains different jurisdiction from that of the Law Courts, and in such respects permits different rules of evidence. By the law cases it would appear that this evidence is not admissible; but it is because those Courts have no jurisdiction of such a case as this. This is the case of a mistake only to be corrected in equity. How can a mistake be corrected in any case but by parol evidence? *Baker v. Paine*, 1 Ves. Sen. 456. *Shelburne v. Inchiquin*, 1 Bro. C. C. 3. *Marquis of Townshend v. Stangroom*, 6 Ves. 333. In equity the defendant is often permitted to give parol evidence, when it is inadmissible on the part of the complainant. The difference was between the resistance to

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specific perform<sup>a</sup>nce and enforcement of it. It is admissible in the former. *Woollam v. Hearn*, 7 Ves. 212. Chancellor Kent himself has decided a case in our favour, or one similar to this. *Stephens v. Cooper*, 1 Johns. Cha. Rep. 429. Mistake always formed an exception to the general rule. *Gillespie v. Moon*, 2 Johns. Cha. Rep. 593. The evidence offered was, to prove that the agreement, as stated in the answer, was the true agreement under which the parties acted from the 25th of May till June, and afterwards. The contract stated in the answer is not so absurd as has been contended by counsel, or as the Chancellor thought. It has often been decided, that a bill of sale, absolute on its face, may be shewn by parol to be a mortgage. *Marks v. Pell*, 1 Johns. Cha. Rep. 594. *Strong v. Stewart*, 4 Johns. Cha. Rep. 167.

But the bill in this case has not set out the contract. It has set out a parol contract. It does not state the contract to have been in writing, therefore the probata and allegata do not correspond. The complainant, by his manner of stating the contract, shewed that there was first a parol contract, and therefore laid the case open to parol evidence.

*Curia, per NOTT, J.* It is unnecessary to the determination of the question now submitted to us, to enter into a consideration of the statute of frauds. The first was a parol contract, and being without consideration could not have been enforced even if the statute of frauds had never existed. It was nothing more than a treaty containing the terms of a contract intended to be entered into, from which either party might have receded at any time before it was executed on either side. The contract was afterwards executed by the delivery of the cotton, and a

promise to pay a stipulated price would have been obligatory if no writing had been given. The simple question therefore is, whether, ac-

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cording to the \*rules of the common law, the parol evidence which was offered ought to have been received, to vary the written agreement into which the parties had entered.

With regard to the general rule of law there is no doubt. And the cases which are thought to have the most immediate relation to the subject have been referred to in the opinion which has been already delivered in the case of *Hampton v. Blakely* [3 McCord, 469]. It has there been shewn, that when a mistake has been made by the misconception of a scrivener, or error in calculation, or any other obvious mistake in matter of fact, parol evidence may be let in to shew such mistake. No such mistake is alleged in this case. It is contended, that although the contract was reduced to writing, it was still understood that the contract should not be changed from the original verbal agreement. But it is a very well settled rule of law, that all parol agreements are concluded by a subsequent writing, and that no parol evidence can be admitted to shew a contract different from what the writing purports. The contract in this case was drawn by the defendant himself, and it was his own fault if he did not insert all the provisions of the agreement.

It is said that the bill does not state an agreement in writing, and that the party was surprized by the production of such an instrument. His counsel may have been surprized and ought to have been surprized, that his client had not instructed him more correctly with regard to his defence. But the defendant could not have been surprized at the production of a contract written with his own hand. If the evidence offered in this case might be received, there is no case in which a parol condition might not be annexed to a written agreement. I am of opinion therefore, that the evidence was properly rejected, and that the decree of the Chancellor ought to be affirmed.

Decree affirmed.

I McCord, Eq. \*506

\*HENRY F. FARLEY and Others v.  
THOMPSON FARLEY.

(Columbia. May Term, 1826.)

[*Equity* ⇐42.]

With great reluctance the Court dismisses a bill for want of jurisdiction, where the exception is not taken till nearly the close of a protracted litigation.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 119, 120; Dec. Dig. ⇐42.]

[*Executors and Administrators* ⚡439.]

No person, though next of kin, can sue at law or equity for the personal property of an intestate, unless he take out administration.

[Ed. Note.—Cited in *Bradford v. Felder*, 2 McCord, Eq. 170; *Screven v. Bostick*, Id. 417, 16 Am. Dec. 664; *Hopkins' Ex'rs v. Mazyck*, Rich. Eq. Cas. 282; *Buchan v. James, Speers*, Eq. 379; *Villard v. Robert*, 1 Strob. Eq. 416; *Kaminer v. Hope*, 9 S. C. 258; *Richardson v. Cooley*, 20 S. C. 350.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1784; Dec. Dig. ⚡439.]

[*Executors and Administrators* ⚡423.]

None but the administrator or executor of a deceased person can call upon a third person to account for any thing due the deceased.

[Ed. Note.—Cited in *Bradford v. Felder*, 2 McCord, Eq. 170; *Hopkins' Ex'rs v. Mazyck*, Rich. Eq. Cas. 282; *Buchan v. James, Speers*, Eq. 379; *Villard v. Robert*, 1 Strob. Eq. 416; *Kaminer v. Hope*, 9 S. C. 258; *Richardson v. Cooley*, 20 S. C. 350.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. ⚡423.]

[*Equity* ⚡43.]

Where a party can have complete remedy by an action of detinue or trover for personal property such as slaves, and equity will not entertain jurisdiction, to obtain its aid the complainant must make out a case proper for its interposition.

[Ed. Note.—Cited in *Young v. Burton*, McM. Eq. 260, 267.

For other cases, see *Equity*, Cent. Dig. § 137; Dec. Dig. ⚡43.]

[*Executors and Administrators* ⚡544.]

The defendant, making himself executor de son tort, will not give jurisdiction, where there is remedy at law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2594-2603; Dec. Dig. ⚡544.]

[*Executors and Administrators* ⚡544.]

It seems, in some particular cases, equity has decreed specific performance of agreements in relation to personal property; but never against one not a party or privy to such agreement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2594; Dec. Dig. ⚡544.]

[*Specific Performance* ⚡69.]

In some cases of a peculiar character equity will decree a delivery of a specific chattel.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 200-202; Dec. Dig. ⚡69.]

[*Discovery* ⚡20.]

If a bill for discovery, it must be distinctly so, and call for something which is not in the complainant's power to set out in his bill.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 27; Dec. Dig. ⚡20.]

[*Equity* ⚡39.]

Where the complainant calls for a discovery of certain slaves, naming them, and their increase, if defendant answers that there are none but such whose names the bill mentions, the Court will send complainant to law.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 114; Dec. Dig. ⚡39.]

[*Contracts* ⚡311.]

A bond, by which the obligor binds himself alone, dies with him.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1448; Dec. Dig. ⚡311.]

The complainants, who were the heirs at law of Archer Farley, filed their bill in this case to recover of the defendant about twenty negroes, naming them, and their issue, as the stock and increase of certain negroes which were alleged to have been conveyed by a bill of sale from Mary Farley and James Watkins to Archer Farley, dated the 23d of May 1792, and loaned by Archer to her during her life time, on the security of a bond taken from her of the same date for redelivery of the property at her death. And secondly, should they fail in establishing their claim under the bill of sale, they claimed their father's share of these negroes as being the property of Mary Farley.

The defendant, being particularly interrogated as to the execution of the bill of sale and bond, denied in his answer any knowledge thereof, and said he did not believe they were executed; because, first, he doubted the genuineness of the signatures; and secondly, that he never heard of any such transaction, although he was living in the family with his mother and brother at the time; and thirdly, because in the year 1794 he and his brother Archer, by the consent of their mother, made a division of the property belonging to the estate of their father, Forest Farley, which remained in their hands, and in the hands of their mother; and upon that division these negroes were allotted to him. That a few years afterwards he removed to this state with his mother, bringing these negroes with him as his own property, and had always since considered and used them as his own, never hearing of any claim to

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the contrary until \*within a short time before the filing of the present bill. By way of suggestion in his answer he objected to the jurisdiction of the Court of Equity, because the complainants could have ample remedy in a Court of law. The names of the negroes were stated in the bill, and the answer stated that there were no others.

The case was opened for trial before his Honour Chancellor Thompson in June 1823, and when the evidence was nearly closed his Honour ordered the case to be sent to the Court of Law, upon an issue to try, first, the validity of the bill of sale and bond; and secondly, whether the negroes in question were the property of Mary Farley, deceased; with an order that the bill, answer, and the examination of the different witnesses by commission, should be read in evidence on the trial.

The issue was tried before Judge Gaillard, on the western circuit, April term, 1825. A great deal of evidence was introduced on both sides. His Honour left the case entirely to the jury. They found the following verdict. "We find that the bill of sale and bond in the within issue mentioned were duly executed, and are valid, and that the negroes in



question are the property of Archer Farley, deceased." This verdict was returned to the Court of Equity in June term 1825, Chancellor Thompson presiding, who decreed in favour of the complainants. From which the defendant appealed, and made the following points; to reverse the decree of the Chancellor, and to decree for the defendant on the grounds,

First. That the evidence taken in the case entitled the defendant to a decree, notwithstanding the verdict of the jury.

Second. That the Court of Equity had not jurisdiction of the matter, inasmuch as the complainants would have adequate remedy in a Court of Common Law.

Third. That under the peculiar circum-

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stances of this \*case the defendant ought not to be made liable for the hire of the negroes or the costs of the suit.

There were other grounds taken for a new trial of the issue at law, which it is unnecessary to mention.

P. Fanou, for the defendants. The complainants have adequate remedy at law, by an action of detinue, or trover. There is nothing peculiar in the circumstances of this case to give jurisdiction. No equity is made out. None for the delivery of the specific chattels. The ordinary damages at law would fully compensate the complainant, who has not alleged in his bill any affection, or particular circumstances, that would induce this Court to deliver these specific negroes. They were not favourite house or body servants, which would entitle them to this protection of the Court. There is nothing of honour or affection existing between master and servant in this case, or of irreparable injury which calls for the arm of this Court. It is the ordinary case of trover and conversion of the most ordinary and common property in the country. There is another objection equally fatal to the bill. The administrator of Archer Farley, and not the complainants, ought to have sued. None but the legal representative of the deceased can sue for the personal estate. This can not be said to be a case of partition, for then all persons interested should have been made parties. There was administration taken out in this case, and the administrator alone could sue for this property.

Irby, contra. The jurisdiction of the Courts of Equity, in cases like this, has never been doubted. The late Court of Appeals in Equity uniformly sustained the jurisdiction in such cases. To prevent a multiplicity of suits where the complainant has a claim against the defendant as executor de son

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tort, he may join another \*claim, which of itself might not have been within the jurisdiction. It was too late at this stage of the proceedings to make a question of jurisdic-

tion; it was decided against the defendant by the Chancellor before whom the case was first tried.

PER CURIAM. We doubt if any appeal could have been taken up from such a decision. It was interlocutory.

Irby. The case of *Wilson v. Cheshire*, (ante, p. 233) decided in January 1826, is decisive as to the question of jurisdiction. The jurisdiction should have been demurred to, and can not be questioned on the hearing, except where the want of jurisdiction is obvious. In such cases the exception might be taken at any stage. The Court of Equity maintained a similar case in *Williams v. Maxwell*, which came up from Laurens in May 1824,<sup>1</sup> and decided by the late Appeal Court in Equity. That was a bill brought by the children of Maxwell, and the objection was made to the jurisdiction, on the grounds that the administrator only could sue, and that there was adequate remedy at law. This defendant should have pleaded or demurred to the jurisdiction.

O'Neill, same side. None but the administrator can sue at law; but it is different in this Court. He will have to account to these complainants, as the administrator, here; and the complainants swear that the estate has been settled; and there can be no doubt that the complainants have the equitable

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right; if so, that \*alone gives jurisdiction. That he has funds to pay debts is the only reason, in this Court, why the administrator should sue. At law, the legal right to sue is necessary to be shewn; but not here. It is not necessary to join a trustee, where he has completed his trust, when the cestui que trust has a claim against some third person. The administrator in Virginia could not sue here. In *Williams v. Maxwell* the heirs were suffered to call an administrator to account; although there was an administrator of their father's estate, yet the Court supported the bill.

Could this decree be pleaded in bar to an action at law by the administrator? It could: for shewing the estate to have been settled would satisfy the administrator, that if he got a judgment at law, the Court of Equity would enjoin him, the property having been properly distributed. So soon as the Court at Law saw that the decree of the Court of Equity had properly settled the matter, their judgment would be held conclusive.

As to the sufficiency of parties, he cited *Clifton v. Haig's Ex.* 4 Desaus. Rep. 343. It is sufficient to have the parties necessary only to a fair settlement of the claims of the parties. Suppose this had been a suit against

<sup>1</sup>The Reporter has examined that decree as it appears on the Register's book. The children did file the bill and obtained a decree, but no objection appears to have been taken to the jurisdiction.

the administrator, would not the Court support the jurisdiction? Where is the difference then? The defendant here is an executor de son tort of the complainants' father. The slightest intermeddling makes a party executor de son tort; and this ground must give jurisdiction.

As to jurisdiction generally, the bill, in relation to the bond, was in the nature of a specific performance: It claimed an equitable adjustment under that contract, not attainable, at law.

Mary Farley came into possession under a

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contract \*with the complainants' ancestor, under whom they claim; and her possession is such as gives jurisdiction, when she claims the property adversely to such contract. The bill calls for a discovery of the negroes. That gives jurisdiction.

This application presents the case in two points of view. They claim the negroes as the property of their intestate, and also as the property of their mother, whose will was not proved by the defendant until after this suit was brought on: and then the complainants disputed it on the ground of fraud; hence the order of the Court, that it should be contested before the Ordinary. The defendant administered on the will; and suing as administrator, it gives jurisdiction.

It is not, in every case, that the question of jurisdiction can be made at any stage of the proceeding. It can not be so allowed where the question of jurisdiction must have been as evident on putting in the answer as at any other time.

The chancellor ordered the issue to inform his conscience; and upon receiving the verdict, found no light to change his mind. It was then decided by a law Court.

After an issue at law, the chancellor will not turn the party out of Court for want of jurisdiction. 2 Vern. 503. In *Taylor v. Mayrant*, 4 Desaus. Rep. the Court entertained jurisdiction; and in that case they took part of the verdict found on the issue at law, and, rejecting the rest, granted relief. 2 Madd. Cha. 363.

W. R. Davis. Want of jurisdiction need not be pleaded. It is denied in the answer, in the way of a plea. That is sufficient. Want of jurisdiction was never supported in the old Court of Equity. It was the cause of its abolition. It was a fruitless labour

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to ob\*ject to jurisdiction before them; that was the reason, why it was not more warmly urged then.

If the object of the complainants was not to avoid a multiplicity of suits, why did they not sue every body concerned? It is said jurisdiction should be supported, because there is a will in question; and that defendant is administrator and executor de son tort to the father's estate; but does that prove that an action of trover might not lie?

Why were not letters of administration taken out in this state? Their neglect to do so cannot give jurisdiction. The objection that defendant was as much bound to take out administration as complainants cannot alter the question. In *Clifton v. Haig's Ex.* the Court only determined that they will decide when the parties are present who really have a claim, and will not delay a cause to make parties who are only concerned pro forma, or rather nominally.

As for a discovery of the negroes, it might as well be called for in a case of assault and battery.

As to jurisdiction for partition it cannot be supported; for all the persons interested in the estates in question are not parties. The greatest number are left out.

It is said we have been at law. This is denied. It was not a law trial. It was to be sure before twelve men. Chancery cannot deputize another Court. It is sent to law for investigation. Paley says a ministerial power may be deputed, but not a case, where judgment is required. Now here the law Judge has made no report back to the Chancellor. Then there is no exercise of the Chancellor's judgment, if he reviews the verdict at law, without knowing the facts upon which the jury found their verdict. The jury could not report the evidence. His Honour Judge Gaillard did not. He did not charge the jury, nor did he recapitulate or comment on the evidence. How could the

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Chancellor know that \*the case was doubtful, as decided by the jury, unless the evidence had been reported to him. In the case quoted from *Vernon* no question was made as to the jurisdiction.

O'Neill. In England, specific performance has never been decreed of personal property; and they own no slaves. The rule of reason is changed in this country. The Court will order a specific chattel to be delivered in some cases. The party here can not be compensated at law; for a recovery on the bond would be in Virginia currency. 1 Johns. Cha. Rep. 166.

*Curia, per COLCOCK, J.* When there has been much and protracted litigation, and the cause is on the eve of a termination, and the question of jurisdiction is for the first time made, it is with great reluctance that the Court will dismiss a bill. But when the question is made at the commencement of the suit, and urged at all its various stages, the reluctance is much diminished; for under such circumstances it is the duty of the complainant thoroughly to investigate the subject, and actually to ascertain the ground on which he stands. The complainants claim as the representatives of Archer Farley their father, and at the conclusion of the bill, in a very brief manner by way of prayer, urge that if the property should be found not to



have belonged to their father, then it must be considered as their grand mother's, and in that case they would ask for distribution of it, and claim as her representatives. Now, with the same propriety they may have carried back their claim through two or more generations, and thus have opened an investigation of the title to this property for the last century. Nor is this all. Those through whom or under whom they claim, or may have claimed, may have been in

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debt, \*and may have left other representatives beside themselves. Now, what a door for endless litigation would be opened to say, that each creditor or each representative might come into Court to claim his share of the estate of an intestate. To avoid all these difficulties the law has said, that when one dies intestate administration of his estate shall be granted, and it has settled the order in which the rights of those claiming administration shall be determined.

If an application is made to a Court for distribution it must be through an administrator or executor. In Cooper's Equity Pleadings, 35, it is said, that an executor before probate may file his bill, and it is sufficient if he afterwards takes out probate at any time before hearing. Yet, in a bill for an account of the personal estate of J. S. though the person who has a right to administer to J. S. is a party, that is not sufficient without administration actually taken out; and this rule is well supported by the case of *Humphries v. Humphries*, 3 P. Wms. 349. Colonel Lancashire gave £10,000 to his daughter, and the same sum to his wife. The complainant married the daughter, and the defendant the widow of Colonel Lancashire. The brother of Colonel Lancashire and his wife were left executors. Both died, and the bill was filed by the son against his father for an account of the estate of Colonel Lancashire. The complainant's wife was of course the person entitled to administration on her father's estate. Yet the Chancellor says, there can be no account taken of the personal estate of Colonel Lancashire without making his executor or administrator a party to the bill. For aught appears to the contrary, there may be debts due from Colonel Lancashire which may take up part of the assets, and therefore the administrator of the Colonel must be made a party, else no proper account can be taken; and if

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any account \*should in fact be taken it may all be overhauled again when such administration shall be taken out.

This ground is so conclusive, that it would be unnecessary to say any more on the argument made to the jurisdiction of the Court, did we not look to the further prosecution of the case by the parties.

In support of the jurisdiction of the Court it is said,

1. That there is no adequate remedy at law.

2. That the defendant ought to be considered as executor de son tort, and consequently accountable in the Court of Equity. And

3. That this is a bill for a specific performance.

It is urged, that the remedy at law would not be complete, because the bond given for the delivery of the property is in the penalty of only £2,000 currency, which would not cover the value of the property; and that an action of trover or detinue would only eventuate in damages; and that in the mean time the property might be carried off, and the complainants have to look to an insolvent person for the damages.

As to the bond. Upon an examination of it, it appears to be given for £2,000 Virginia money, by Mary Farley alone, to Archer Farley. Whether that sum would be sufficient to cover the value of the property or not is not an important inquiry, for no suit can be maintained on that bond against the defendant or any other person. Mary Farley alone was bound, and the obligation died with her.

The action of trover has been used for many years, and although in some instances it may not have proved an effectual remedy, it is believed, that it may have proceeded in a great measure from the negligence of those who have used it. It does not enable one to recover the specific article, nor indeed will an action of detinue always effect the object. Yet the same may be said of a bill in chancery, unless process be obtained to

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restrain \*the party in possession from removing it without the jurisdiction of the Court. And when an action at law is brought an order for bail may be obtained; and perhaps if this did not afford sufficient security, upon a proper case being made out, the auxiliary aid of the Court of Equity might be obtained. But in ordinary cases, and in this case for aught that appears to the Court, the remedy by an action of trover would be as adequate as it unquestionably is the plain remedy to which the complainants, after administering, should have resorted. Under this head of the argument it was urged, that even where there is a remedy at law, if it be difficult, equity will maintain jurisdiction; and this, as a general position, is admitted, though the cases which come within it are of rare occurrence and peculiar character. The case before us, however, appears, not only from the circumstances of its having been sent to law, but from all its circumstances, to be one which can be better investigated in a Court of Law than by a Court of Equity.

On the second ground, that the defendant was executor de son tort. If he had been guilty of such intermeddling as would have made him an executor de son tort, its effect

would have been to give a common law jurisdiction, for a trespass would certainly not be the foundation of equity jurisdiction. I am aware, however, that there are many cases where a Court of Equity will proceed against one who has intermeddled, although he is not a legal representative; but it must be in a case where there is no remedy at law.

On the third ground that this is a bill for specific performance. It is granted that the Court of Equity have decreed the specific performance of an agreement which related to personal property; as in the cases cited in 1 *Mad. Cha. Rep.* 403. *Buxton v. Lister*, 3 *Atk.* 384. But never against one who was not a party to the agreement or a legal rep-

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presentative of such party. And \*it is also admitted that it seems to constitute a very peculiar part of equity jurisdiction, in some cases of anomalous character, to decree the delivery of a specific article. But so rare are those cases that I have been able to find but four; and the case before us could not by the most strained conceit be brought within the rule of those cases. They are for the recovery of articles which, from some peculiar causes, are held in such estimation by the owners, that no damages which could be obtained from a jury would be an adequate compensation for the loss of them: as in the case of *Fells v. Read*, 3 *Ves.* 70. which was for a silver tobacco box, inclosed in two large silver cases, adorned with engravings, belonging to a society, and used in a particular manner or on particular occasions by them, in which case the Chancellor speaks of the Pusey horn, and patera of the Duke of Somerset, as articles of like character; or, as in the case of *Lloyd v. Laring*, which was a bill to recover the jewels and dresses, &c. of a chapter of freemasons, 6 *Ves.* 773; or the case of *Lowther v. Lowther*, 13 *Ves.* 95, for a picture of Titian's worth £5000, for which an ordinary jury could not perhaps have been induced to give as many pence.

And lastly, the complainants' counsel contend that the bill should not be dismissed for want of jurisdiction, because where the Court has obtained jurisdiction on one ground, it will retain it for all other purposes, and that this is a bill for discovery and for an account of Mary Farley's property. If it be a bill of discovery the object has been very irregularly and unskillfully pursued; for I can observe no fact, which the defendant is called on to discover, which is not stated in the bill. As to the negroes, their names are stated in the bill, and the defendant answers, correctly stated, and on all other facts of importance he denies any knowledge. If the doctrine as laid down be

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correct, I can not see how it can \*apply as to the estate of Mary Farley; for it is not directly charged in the bill that she had

any, and that which they suppose may turn out to be hers they have proved to have been Archer Farley's. If it is meant that by charging a possible liability a bill may be sustained, it is carrying the doctrine farther than the reason of the rule could have intended, and farther than this Court can be induced to go. In the case of *Rees v. Parish*, (*ante*, p. 56) decided April 1825, the opinion of the Court was expressed on this point, and the defendant having denied that there were any issue of the slaves in a bill for discovery on that point, the bill was dismissed. Upon the whole the Court are of opinion that the motion must prevail and the bill in this case be also dismissed.

Bill dismissed.

## I McCord, Eq. 518

JOHN ILEY and Wife and Others v. JACOB NISWANGER.

(Columbia. May Term, 1826.)

[*Fraudulent Conveyances* ⇨208.]

A voluntary settlement, by a person not in debt, cannot be impeached by a subsequent creditor, unless made with a view to future indebtedness, or attended with some other circumstance of fraud.

[*Ed. Note.*—Cited in *Howard v. Williams*, 1 *Bailey*, 581, 21 *Am. Dec.* 483; *Henderson v. Dodd*, *Bailey*, Eq. 140; *Walker, Evans & Cogswell v. Bollmann Bros.*, 22 *S. C.* 526, 528; *Smith v. Smith*, 24 *S. C.* 315.

For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* §§ 631, 633; *Dec. Dig.* ⇨208.]

[*Fraudulent Conveyances* ⇨54.]

But void if made by a person indebted, as to subsequent creditors.

[*Ed. Note.*—Cited in *Walker, Evans & Cogswell v. Bollmann Bros.*, 22 *S. C.* 526, 528.

For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* § 128; *Dec. Dig.* ⇨54.]

[*Fraudulent Conveyances* ⇨208.]

But the debt must be sufficient to raise a reasonable presumption of fraudulent intent, and beyond one's current expenses.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* §§ 631, 633; *Dec. Dig.* ⇨208.]

[*Fraudulent Conveyances* ⇨318.]

When a deed is set aside by prior creditors, subsequent creditors may come in. It is as if it never existed.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* § 981; *Dec. Dig.* ⇨318.]

[*Fraudulent Conveyances* ⇨210.]

Quare, How far notice of a prior voluntary settlement affects a subsequent creditor.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* § 634; *Dec. Dig.* ⇨210.]

[*Fraudulent Conveyances* ⇨126.]

No objection to an account that it contained items for tobacco and whiskey extravagantly used.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, *Cent. Dig.* § 402; *Dec. Dig.* ⇨126.]

[This case is also cited in *Izard v. Middleton*, *Bailey*, Eq. 237; *Davidson & Simpson v. Graves*, *Riley Eq.* 234; *Bates & Co. v. Cobb*, 29 *S. C.* 404, 7 *S. E.* 743, 13 *Am. St. Rep.* 742, regarding voluntary conveyances.]



The complainants, in this case, filed their bill against the defendant for certain negroes which they claimed under a voluntary gift from Richard Hodges, the father of the complainant's wife; and to set aside a subsequent sale of the negroes made by Hodges to the defendant. The case was originally heard before Chancellor De Saussure, June 1824, who decreed, that the complainants' deeds of gift were fraudulent and void; being voluntarily made at a time when their father was largely in debt, and including a greater part of his personal property. Part

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of the defendant's debt, for which the negroes had been given by Hodges in payment, had been contracted before the execution of the deeds, and a part afterwards. It was argued before Chancellor De Saussure, that the defendant, when he contracted subsequent debts, had notice of the voluntary deeds, and therefore was bound by them. To which his Honour replied, "If he did know of the existence of the deeds before he gave the credit, he knew that they were voluntary and void, as to creditors, if the donor was considerably in debt, as he really was."

From Chancellor De Saussure's decree there was an appeal taken up to the late Appeal Court in Equity, December 1824, and was there discussed before Chancellors De Saussure, Gaillard, Waties, Thompson and James, who confirmed Chancellor De Saussure's decree, but referred the case to the Commissioner, to ascertain the correctness of some parts of the defendant's accounts, \$340.93, which were objected to as immoral and illegal, being for tobacco and whiskey. See the report of the case in Harper's Equity Reports, 295. The Commissioner, in obedience to the order of the late Court of Appeals, reported June 1825, that of the defendant's accounts for 1820, 1821, 1822, the sum of \$295.93, was for tobacco and spirituous liquors, got by Hodges of the defendant; and not being for the benefit of Hodges' family, he recommended that so much should not be allowed out of the sale of the negroes conveyed to the complainants by Hodges, but that the defendant should look to Hodges for that amount.

Chancellor Thompson, before whom the case was heard, on exceptions to the report which presented the whole account of the defendant against Hodges, set aside the report so far as it related to the sum of \$295.93 for tobacco, spirituous liquors, &c. which was disallowed, and ordered it to be allowed the defendant, being as legal and proper as any other.

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\*The complainants appealed.

Farrow, for the appellants. The defendant Niswanger had notice of the deeds of gift, and should not be allowed to object to them as he contracted with notice and there-

fore it could not be said to have been a fraud on him. It was no surprise to him.

As to the account for tobacco and whiskey, the late Court of Appeals, by referring it to the commissioner to ascertain the nature of the accounts, meant to decide against the propriety of allowing such accounts against these complainants. It was encouraging dissipation and dissoluteness of the lowest kind. The defendant was to blame, in suffering Hodges to have such extensive credit for such articles.

Dunlap, contra. The first question was decided by the former decree. The latter was not. It stood, as all other accounts. The defendant was not answerable for the imprudence of Hodges.

*Curia, per NOTT, J.* The questions which appear to arise out of this case are,

First. Whether a voluntary transfer, made by a person very much in debt at the time, of all or nearly all his personal estate is void against subsequent creditors?

Second. Whether, if not void as to subsequent creditors, yet if set aside in favour of subsisting creditors, it shall be considered void in toto; so that subsequent creditors may have the benefit of it?

Third. Whether a subsequent creditor will be barred, in consequence of having notice of the prior voluntary transfer?

Fourth. Whether there are any particular circumstances attending this case which ought to defeat the claim of the defendant Niswanger.

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\*Before I enter into a consideration of the several questions submitted to the Court, I would observe that I consider the whole case as settled by the decree of the former Court of Appeals; and that decree will be obligatory on this Court, unless it shall appear to be so contrary to some established principle of law as to authorize a revision of it. I also put out of view the case of a voluntary settlement, where the donor is not in debt at the time. Such a settlement or transfer, I take it, cannot be impeached by a subsequent creditor, unless made with a view of future indebtedness, or attended with some other circumstance of fraud than what arises from its being voluntary. *Russell v. Hammond*, 1 Atk. Rep. 15. *Stileman v. Ashdown*, 2 Atk. Rep. 477. *Brown v. Jones*, 1 Atk. Rep. 190. *Wheeler v. Caryl*, Amb. 121. *George v. Milbank*, 9 Ves. 193. 3 Johns. Cha. Rep. 381.

It appears also to be as well settled, that a voluntary settlement made by a person indebted at the time is invalid. The bare circumstance of his being indebted at the time is usually received as evidence of fraud. Lord Hardwicke said, in the case of *Lord Townshend v. Windham*, 2 Ves. Sen. 10, that he took it, "that a man actually indebted, and conveying voluntarily, always meant to defraud creditors." In the case of *Russell*

v. Hammond, 1 Atk. Rep. 15. Lord Hardwicke says, he has hardly known a case, where the person conveying was indebted at the time, that the settlement was not deemed fraudulent. And in the case of *Fitzer v. Fitzer*, 2 Atk. 511, the same learned Judge asked the counsel, if there was an instance in that Court, where a conveyance from husband to wife, without any pecuniary consideration moving from the wife, had been held good against creditors. It appears therefore, that when a person indebted at the time makes a voluntary settlement, such settlement will be set aside, even in favour of subsequent creditors.

But it still remains a question, whether,

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in such case, \*the indebtedness must approach insolvency; or be such as authorizes the inference that a fraud was intended; or whether a single debt or debts to a small amount, bearing no proportion to the amount of the estate of the donor, will be sufficient. In the case of *Lush v. Wilkinson*, 5 Ves. 384, Lord Alvanley appears to have been of opinion, that even as to prior creditors a single debt will not be sufficient; but that it must depend on the question whether he be in solvent circumstances. Mr. Atherley, on the other hand, is of opinion, that any debt, however small, will be sufficient. *Ather. 212—21*. Chancellor Kent, however, in the case of *Read v. Livingston*, 3 Johns. Cha. 507, seems to think, that the subsequent creditors ought to go so far as to shew, and only so far in shewing, debts that would be sufficient to raise a reasonable presumption of a fraudulent intent. And I am disposed to concur in that view of the subject. A subsequent creditor can come in only on the ground of actual fraud. There is no man but is somewhat indebted for his current expenses; but such debts furnish no evidence of actual fraud. And so it was decided by the Constitutional Court, in the case of *Hudnal v. Teasdale*, 1 McCord's Rep. 227 [10 Am. Dec. 671]. But in this case, it appears that the party was largely indebted at the time of the gifts to his daughters. In the decree, it is stated to be equal to the value of his property. It is therefore certainly a case within the rule previously laid down, and furnishes abundant evidence of a fraudulent intention.

But the decree may be supported on the second ground. Chancellor Kent, in the case above alluded to, lays it down as a settled rule, that when a deed is set aside by prior creditors, subsequent creditors are entitled to come in. In the case in 12 Ves. 136, Lord Rosslyn held, that if a deed were held fraudulent as to subsisting creditors, the subject is thrown into assets, and all subsequent

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creditors are allowed to participate in the distribution. 1 Madd. Cha. 277, 278.

How far notice of the settlement may affect a subsequent creditor is a question of some

difficulty. Though the difficulty cannot be great in this particular case. According to the principles laid down, the defendant is entitled to come in for his share, even though he had no notice. For when once the deed has been set aside as fraudulent, it is as though it had never existed; and therefore the creditor, having had notice, can make no difference. But, besides, the donor was indebted to the defendant himself previous to the settlement. So that there does not appear to be any good ground to interfere with the first decree.

The whole case then resolves itself into the question submitted in the last ground. It appears that the former Court of Appeals entertained doubts of the fairness and correctness of the defendant's account: and the subject was therefore referred to the Commissioner for examination. The Court decided that the defendant was entitled to receive payment out of the proceeds of the trust property, notwithstanding the debt was contracted after the property was made over, if there was nothing unfair or incorrect in it. The Commissioner does not report, that there is any thing incorrect or unfair in the account, except that it was for tobacco and whiskey: but these are as legitimate articles of barter as any whatever. And although Hodges may have used them lavishly, yet it was his own folly, with which the defendant is not chargeable, if he took no undue advantage of Hodges' situation, which is not alleged.

Decree reversed.

I McCord, Eq. \*524

\*J. MILES v. J. R. ERVIN.

(Columbia. May Term, 1826.)

[Attorney and Client ⇨123.]

The law will not permit an attorney to avail himself of the circumstances arising out of that relation, to make a contract, relative to the property in litigation, to the disadvantage of his client.

[Ed. Note.—Cited in *Wise v. Hardin*, 5 S. C. 329.

For other cases, see Attorney and Client, Cent. Dig. § 239; Dec. Dig. ⇨123.]

[Attorney and Client ⇨123.]

Every contract between persons holding such relation is not necessarily void.

[Ed. Note.—Cited in *Wise v. Hardin*, 5 S. C. 329; *Wilson v. Cantrell*, 40 S. C. 128, 18 S. E. 517.

For other cases, see Attorney and Client, Cent. Dig. § 239; Dec. Dig. ⇨123.]

[Attorney and Client ⇨123.]

The law looks with jealousy upon such contracts, on account of the influence of the attorney over his client. He must shew that he has not used it to the prejudice of his client, and that his client was as well advised on the subject as himself, and that he gave a full and fair price.

[Ed. Note.—Cited in *Le Conte v. Irwin*, 19 S. C. 559.

For other cases, see Attorney and Client, Cent. Dig. § 239; Dec. Dig. ⇨123.]



## [Attorney and Client ⇨123.]

[Where an attorney contracts with his client relative to the subject of the relation between them, the burden of proof is upon the attorney, it seems, to show that no advantage was taken by him of his situation.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 248; Dec. Dig. ⇨123.]

## [Attorney and Client ⇨125.]

[An attorney, while his client was ignorant of the result of litigation in which his title to land was in issue, agreed with a third person to participate in the profits which might accrue from a purchase of the land, from the client. Such third person accordingly made the purchase, and, after the litigation ended in establishing the title, sold the land at a great advance in price and divided the profits with the attorney. *Held*, that the attorney was liable for the amount so received, regardless of the question of fraud.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 252; Dec. Dig. ⇨125.]

The bill charged, that the complainant was seised of a tract of land granted to him in the year 1811, and that a certain John Harper having trespassed on it, complainant employed J. R. Ervin as his attorney at law to sue him; and he accordingly brought suit against the said Harper in the year 1812, and in March 1813 obtained a verdict against him with damages and costs, which was appealed from for delay. That whilst the said cause was pending on the appeal the complainant conversed with the said J. R. Ervin, who assured him that the appellant Harper had no chance of success on the appeal, as complainant's title was good. But in the year 1815 the said Ervin informed complainant that he had been mistaken in his opinion, and he then considered Harper's chance of getting a new trial pretty certain, as complainant's title was doubtful; and he advised the complainant to sell the land for what he could get. That the complainant's fears being thus excited, he offered to give his said attorney a bale of cotton, as an additional fee, if he would exert himself in his cause; and soon afterwards, being under the impression, from what his attorney had stated, that he had really discovered some defect in his title, he, the complainant, sold the land to Robertson Carlross, for three hundred dollars, which was not more than an eighth part of its value. This occurred whilst the said Ervin was attending the Court of Appeals at Columbia. That complainant afterwards learnt that the appeal had been abandoned by the counsel of Harper, and the cause struck

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off the docket \*without argument; which induced the complainant to believe that the last advice of his said attorney was a contrivance to obtain a new fee, by which complainant was a great loser, and he declined paying him the stipulated bale of cotton. That the complainant has since discovered that the said attorney had another motive for advising him to sell, and misrepresenting his title; for at that very time he had en-

tered into copartnership with the said Robertson Carlross, to purchase the said land together, which they accomplished by means of the said representations; and it was concealed from complainant that his attorney was interested in the said purchase by the title being taken in the name of Carlross alone, who, by their private agreement, was to resell the land and pay to said Ervin half the advantage derived from such sale, and he to be equally liable for half the damages, if any should be ever sustained on the warranty given by Carlross to the purchaser, and for a recovery by any paramount title. That the said Carlross afterwards sold the land in question to one John Brown for \$2,500, and had paid one half thereof to the said Ervin, the attorney of complainant. The bill prayed that the said James R. Ervin be decreed to pay the sum of \$2,500 to the complainant, who lost that amount by the breach of the confidence he reposed in him.

The defendant, J. R. Ervin, in his answer, stated that the complainant some time about the year 1811 applied to the defendant to bring a suit for him against one Harper, to try the title of a tract of land. That defendant understanding there was an older grant for the land, advised him that the production of such older grant would defeat him. But the complainant insisted that he should go on. Defendant commenced the suit and employed one Harten to make a survey; and after some time the cause was tried, and a verdict found for the plaintiff Miles in the

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suit against Harper, from which \*an appeal was taken up, on the ground that the cause ought to have been continued at the instance of the defendant. That he, defendant, examined the re-survey, and found that part of the land claimed by the plaintiff was located by Harper under an old grant, and Harper stated on oath that he was the tenant of D. Blythe, representing the Alston estate; and this defendant was then, and was still of opinion, that there are older grants for the land in the Alston family. Defendant, after the verdict at law in favour of Miles, entered up judgment, and notified John Miles, the complainant, that he should not attend to the case on the appeal; and other counsel were appointed. That in the progress of the cause, before the verdict, R. Carlross took an active part, and assisted and employed counsel to aid defendant in conducting the cause. The defendant advised John Miles to build a house on the land and put a tenant there, which he did; and stated that the ground on which Harper sought to obtain a new trial would not avail him, and that Miles had nothing to fear from Harper's title, but that he had something to fear from Alston's title to the land, which was well known and much spoken of in the neighbourhood, and held by their tenants; and Miles had seen a plat

made by Leget, surveyor for Harper, which included part of the land claimed by Miles.

Defendant was informed that Harper, who had held the land as tenant of Alston, but paid no rent, applied to R. Carloss to join him in getting a new grant for the land; and after some time Carloss and Frederick Miles agreed to employ John Miles as their agent to obtain a grant for the land, and bring a suit in his name, and they would pay the expenses. Defendant further stated that after entering up the judgment, as above stated, he considered all his duties as at an end, until about the month of November, 1815, at which time R. Carloss informed defendant that John Miles had offered to sell him the

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land in question for \$500; and that he, Carloss, finding J. Miles had refused to consider himself his agent, had offered him \$300 for the land, and requested defendant to join him in the purchase, to which defendant consented; which defendant thought was fair, upright, and just for him to do. That some little time after the complainant came to the defendant and informed him of the offer of Carloss to purchase the land, and asked what would certainly be the result of the trial of his cause on the strength of his title; to which defendant answered that he had no doubt of the case being decided eventually against Harper, "but that with regard to Alston's title, his was doubtful and uncertain, and of which the complainant well knew." On this advice the complainant said that he would not sell to Carloss at his offer, and would risk Alston's title, and agreed to give this defendant a bale of cotton to attend the Constitutional Court and get the verdict confirmed. If not, he was not to get any thing for his trouble. Whereupon the defendant set off immediately for Columbia to attend the Court, and during his absence Miles conveyed the land to Carloss on the 22d of November, 1815, without the knowledge of the defendant.

After defendant's return home Miles refused to pay him the bale of cotton, though the verdict was confirmed by the Court. Some time afterwards R. Carloss said to the defendant that he should have one half of the land: subsequently thereto Carloss sold the land so purchased, and some other lands, to John Brown for \$2500. And some time in the winter or spring of 1820 the defendant gave to R. Carloss an indemnity for one half of the lands, provided a recovery should be had against him on account of the sale thereof to John Brown; and the said Carloss sent to this defendant the bond of J. Brown, with a balance due thereon of \$900; and wrote that he would deliver him other

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papers to the amount of \$100, which he had never done, and that the said bond was all that he received or expected to receive. The defendant positively and unequivocally de-

nied, that he at any time whatever made any false or untrue representations to the complainant with regard to the land or his title, but in all his actings and doings with the complainant he was guided by truth, and to the utmost of his knowledge advised him of the true standing of his case, and that subsequent events had fully confirmed him in the opinion which he then gave. And that in September, 1820, the complainant stated to the defendant, that Carloss, for himself and this defendant, had agreed that if his claim should turn out eventually to be good, that he would pay him \$2000 for the land, or \$1700 in addition to the \$300 already paid; and he called upon this defendant to pay his proportion, which was refused. Complainant Miles then offered to be satisfied with the payment of \$200 by Carloss and defendant which was also refused. Defendant believed, that complainant Miles was not induced to sell the land to Carloss by any advice given to him by defendant, but by his want of money, and by the advice of William Thomas, with whom he consulted; and defendant had been informed by Carloss that after the verdict at law was established in the Constitutional Court, Miles, the complainant, said he had not been fully paid the value of the land, and demanded about fifty dollars more, which was paid him.

A receipt was produced dated the 25th of October, 1815, signed by J. Miles, by which he acknowledged to have received from R. Carloss fifty-eight dollars, in part payment for a tract of land, supposed to contain 640 acres (the one in dispute) which he promised to make a good title for to R. Carloss, on his paying 4,000 weight of seed cotton, one half on the execution of the title, and the other half on the following January or March.

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\*A memorandum was produced dated the 15th of January, 1820, signed by James R. Ervin, which stated that R. Carloss had bought of John Miles certain lands for \$300, which was for the joint benefit of said Carloss and J. R. Ervin, and that the land, or part thereof, had been sold and conveyed by Carloss to John Brown for \$2,500 which was for the benefit of Carloss and Ervin, and that in case any or all the land should be recovered from the said J. Brown, his heirs or assigns by law, he the said J. R. Ervin was to be accountable to Carloss for one half the damages, costs and charges to which Carloss might be put in consequence of any such suit or recovery: and Ervin acknowledged in the writing that he had received from Carloss the bond or note of J. Brown for \$1,000 payable on the 1st of January, 1820, in part of his share or dividend of the said purchase, the balance if any to be ascertained on settlement.

R. Carloss testified, that he had some conversation with the Miles, John and Francis, relative to the land in question, which led



to an agreement that he, Carloss, should be let in to have half the profits of the purchase, on paying half the expenses, and he, Carloss, employed an attorney—Mr. Witherspoon, and Mr. Miles another—Mr. Ervin. A suit was brought in the name of John Miles against Harper, and a verdict obtained, and an appeal took place. John Miles wanted a greater advance of money from the witness which was refused. Miles offered to sell Carloss his share of the land for from \$300 to \$400 which was not agreed to. Witness saw Colonel James R. Ervin the defendant in this suit, and asked him to join in the purchase of the land from J. Miles, and told him that he thought it could be got for \$300, if he Ervin, would not encourage Miles. On the 23d of October, 1815, Miles agreed, in writing, to sell the land to witness for \$300. The witness also paid for the re-survey and attendance of the surveyor.

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And in November, \*1815, Miles gave witness a conveyance of the land in pursuance of the agreement, and witness paid Miles the amount of the consideration, to wit \$300, in cotton. Witness then wrote to Ervin to tell him, that if he did not pay him part of the money he should not have any part of the land, on which Ervin sent him fifty dollars in part. The agreement was reduced to writing on the 15th of January, 1820, between Carloss and Ervin. It was of course some time after the verbal agreement; prudence required that it should be kept secret for some time. Ervin when he agreed verbally to join in the purchase with witness, did not say whether he could throw cold water on the title of Miles to the land? On being cross-examined this witness said, that after the decision of the suit at law, Miles v. Harper, Miles worried witness, and said he had not given him enough for the land, and witness to satisfy him gave him his note for forty-five dollars in January, 1810, which had been paid. In the year 1820 the secret leaked out; for before that Miles knew nothing of the transaction between witness and Ervin about the land. Witness attended to the suit of Miles against Harper, and paid half the expenses. Witness did not employ J. R. Ervin as counsel. He was employed by Miles. The object of the witness in procuring Ervin to join him in the purchase was, to have a lawyer to defend the suits. The sale of \$2,500 to Brown covered and conveyed the land in question, and part of another tract of inferior value worth about \$500. But much of this tract was taken off, and the remainder was of little value.

Colonel Rogers, a witness for defendant, testified, that he knew the land in question. It was always considered Alston's land, and Miles lived near it. Witness told Miles that they would all lose the land as it was Alston's. Miles said Harper had dug up the corner trees, but he knew the places. This

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was in 1820. Harper had previously acknowledged himself the tenant to Blythe for the Alstons. He afterwards denied that he was tenant. Harper had lived there a long time. In 1803 he told witness he would run the land, but witness then discouraged him by telling him it was Alston's. Miles was a poor man. Witness would not have given a cent for Miles' title when he sold to Carloss. The land was not good, nor of much value. Miles told witness he was going to sue Ervin, and said he had discouraged him as to the title, and said that it was bad, and that Alston's was better. Witness did not think that was a misrepresentation, but the truth. Witness had seen the titles of Alston. Efforts had been made to locate the land without success, but thought it could be located.

Mr Thomas testified that Miles told him that Carloss had offered him \$300 for a quit claim to the land, or \$500 for a warranty title. Witness advised him to take the \$300, because he had been informed that the Alstons had a good title to the land, which was indeed generally known. Witness, soon after, heard the bargain with Carloss was completed. Mr Ervin was not present at the conversation. Miles always lived within five or six miles of the land. Miles was poor, but had a little property; a horse or so. Witness thought well of him, and would trust him for \$100.

Mr Sanders testified, that he was present at a conversation between Miles and Ervin in September 1820. Miles acknowledged that in 1812, and subsequently, Ervin advised him that his title was good against Harper, but doubtful as to Alston. At that time Miles made no complaint that Ervin had deceived him. Miles agreed to give Ervin a bale of cotton, to go to Columbia to support the verdict he had obtained against Harper for the land. And Miles stated, that Carloss had promised to give \$1,000 for the land if the cause was finally gained. He admitted that,

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whilst Ervin was gone to Columbia, \*to attend the suit, he had made the contract of sale with Carloss. On his cross examination, testified that he had put down the date, September 1820, because there were considerable quarrels between Miles and Ervin; and he put down in writing the conversation, from which he had refreshed his memory. Gadi Witherspoon was present: he was since dead. Miles accused Ervin of cheating him out of \$1,000, by throwing cold water on his title. Ervin denied it; and said that he had never got more than a bond for \$900. After much altercation, Miles offered to take and be satisfied with \$100. Ervin said he would not give him that money, unless he would guaranty the title against Alston.

Col. Rogers (re-examined) testified, that a small house, an old one, was removed by Miles, and put upon the land in question, but

no person lived there. Cox had lived there a long time as tenant of Blythe.

Josiah J. Evans, Esq. testified that he received instructions, three or four years ago, from Mrs Alston to pursue her rights to certain tracts of land, and among others, the land now in dispute. He examined the papers and thought the chain of title was perfect down to Mrs Alston, to the land now held by Brown, which was the same land formerly held and claimed by Harper. Witness employed a surveyor to locate the land, but he did not succeed. The surveyor stated that he had no doubt the land was there, but he could not locate it, because the neighbors refused to shew their plats or their lines. Before any thing was done the suit abated by the death of Mrs Alston. It was not yet revived, because the Alstons declined suing at a risk; but would reward the counsel liberally if he succeeded, which terms witness doubted if he would accept. The suit was in 1820—1821. Witness understood that the lines had been destroyed except one tree. Heard formerly the line was plain. He thought the Alstons had not been in posses-

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sion themselves, but they once had a tenant on the land, not latterly. Harper lived some years on the place he occupied, and Miles took possession afterwards, and built on it. The heirs in the Alston family had been *femes covertes* till Dr. Blythe's death. The witness did not consider the recovery of the land by the Alstons as by any means certain, by reason of the difficulty of the location, the statute of limitations, &c. In 1815, the title could have been sustained if the location could have been made out.

The record of the verdict of Miles v. Harper was in the spring of 1813; deed from Carloss to Brown, 13th of January 1819, for the land in question.

De Saussure, Chancellor. The first question is, did the defendant Ervin abuse the confidence reposed in him by John Miles, and advise him erroneously and wilfully as to the nature and quality of the land in question; and to use the expression of the witness, "throw cold water on it"? This is charged in the bill and denied in the answer; and it is satisfactory to be able to say that there is no evidence to support the charge or to contradict the answer. Carloss does state in his testimony, that he proposed to Ervin to throw cold water on the title, so as to discourage Miles, and induce him to sell the land low. But Ervin did not express his assent to this proposition. And it is in evidence that the opinion given by Ervin to Miles was, that his title (his new grant) was good against Harper, but was very doubtful as to the Alstons, who, it was believed, had an older grant and title. Now this advice was what was proper to be given, for Mr Evans, who has examined the titles of the Alstons professionally, is of opinion, that it is a good paper title, and

can be sustained against all the claimants, unless defeated by subsequent and adventi-

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tious circumstances, such \*as the difficulty of location from the destruction of the lines, the statute of limitations, &c. And one witness, Mr Rogers, testifies that Mr Miles admitted that he had been dealt fairly with by Ervin, as to this advice.

The next question is, was Mr Ervin at liberty to become the purchaser of the land, jointly or in concurrence with Mr Carloss, from Miles?

If the relation of client and attorney had been entirely at an end, then undoubtedly Mr Ervin would have been at liberty to have dealt with Mr Miles, in relation to the property in question, as well as any other person; for that relation does not continue, after the occasion of it is at an end, to operate as an eternal bar to the dealings of the parties. It does not, however, appear to me, that the relation was at an end in this case. A verdict at law had been obtained by Ervin for Miles; but a motion was pending in the Constitutional Court for a new trial, which it was the duty of Ervin to have attended to generally, even exclusive of the particular fee of a bale of cotton, promised by Miles for that particular portion of the service; and it was during his attendance at Columbia on that duty, that Miles contracted to sell the land to Carloss; so that the relationship of client and attorney subsisted at the time of the sale; but the sale was to Carloss, without any knowledge on the part of Miles that Ervin was concerned with him in the purchase. The evidence, however, of Carloss is explicit, that he had requested Ervin to be concerned with him in the purchase of the land which he wished to make from Miles, and to which he had agreed; though he did not accede to the plan of throwing cold water on the title. Nor is the fact of his being so concerned in the purchase at all disputed. For Mr Ervin, in a memorandum in writing dated the 15th of January 1820, given to Carloss, stated that Carloss bought the land in question from

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Miles \*for \$200, for the joint benefit of said Carloss and said Ervin; and that Carloss had sold the land or part of it for \$2,500, of which he, Ervin, had received a bond for \$900, as part of his share of the gain; and he indemnifies Carloss in case of loss. And Carloss has, in pursuance of the agreement between him and Mr Ervin, actually delivered him one of the bonds of Brown, to whom Carloss sold the land, at an advance of nearly eightfold; a moiety of which Mr Ervin accepted as his right, founded on the preceding contract. We are brought then distinctly to the question, "whether the policy of the law forbids an attorney to be concerned in such a dealing with his client for the property in litigation then under his charge, even though there be no proof nor reasonable ground to



believe that there has been any abuse of confidence or fraudulent imposition on the client?"

This is a question of importance, and not clear of difficulties. The rule, long since laid down in equity and practised upon, is, that agents generally cannot so deal with their principals, without being subject to have their contracts set aside, or the advantage gained refunded: and this, without reference to the fairness or unfairness of the bargain in relation to the property, the subject of their care as agents. This is manifestly a rule of policy, calculated to prevent such dealing altogether; because the opportunities of advantage, and the temptations, are very great: and it was thought to be wiser and safer to prohibit all such dealing, rather than to attempt to examine the nature of the dealing in each particular case. The counsel for the complainant have cited many of the decided cases on the subject. They are also collected in the case of *Butler v. Haskell*, 4 Desaus. Rep. 652.

It has been much agitated, whether this rule ought to be applied to the relation sub-

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sisting between attorney and client; and there has been some diversity of opinion. It is obvious, that the temptation is often as great in that relationship as in any other. Why it should not be applied is not easily discerned. The rule is not founded on any statute, but has grown up out of successive decisions, founded on experience of the necessity of such restraints on agents of every description, in order to secure fair dealings. The Courts have shewn the same jealousy of solicitors as of other agents, and will not permit them to change their connection with one party and transfer it to the other, evidently lest they should be tempted to betray the secrets of the cause first confided to them. In *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261, it was decided, that an attorney or solicitor could not give up his client and act for the opposite party in any suits between them, though it was his partner only who had been the confidential adviser, and the partnership was at an end. And this is in conformity to the older decisions, and to correct principle.

In the case of *Hall v. Hallet*, 1 Cox's Ca. 134, Lord Thurlow decided, that an attorney should not have the benefit of a bargain made with the administrator of an estate, who had employed him; and added emphatically, (p. 140) "that no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure." And Lord Thurlow added, that counsel ought not to receive a fee from a party against his former client, though in another suit, if he knows any thing which might be injurious to his former client.

On the other hand, in *Cane v. Lord Allen*, decided in the House of Lords, and reported

in 2 Dow's Rep. 289, Lords Eldon and Redesdale both expressed their opinions, that if the decision in the Irish Court of Chancery went on the ground that an attorney could

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not enter into a contract with his client, there was no such doctrine in the law.

Upon this decision I may be permitted to remark that Lord Redesdale was clearly of opinion, "that the relation of attorney and client did not exist between these parties so as to place Cane, the attorney, in a situation to throw any obstacle in the way of his making this purchase, and he took no advantage of confidence placed in him by Lord Allen, or of any superior knowledge of the value of the estate acquired as agent." It would appear then that the question did not arise in the cause, and that the declarations of these great Judges on the point were mere dicta. Again, it may be remarked, that the long acquiescence of many years was made a substantive ground of the judgment of the Court in that case. Another remark I would make is, that Lord Eldon himself states, "that if one, not employed before as an attorney, was employed for the sale of the estate, and advised his employer to sell it to himself (the attorney), the Court of Equity would say, 'the nature of your employment was such as rendered it incumbent on you to give the best advice to your employer.' And unless he withdrew from that connection, or put himself completely at arm's length, he must shew, in case the contract was questioned, that he had given the same disinterested advice that he naturally would have given if the contract had been made with another party."

It does appear to me, that requiring the attorney to withdraw from the connection does seem to admit, that whilst the connection lasts it would be improper in him to become the purchaser from his client; and such purchase would not be sustained. If we look into the older cases, we shall find in *Walmesley v. Booth*, decided by Lord Hardwicke, and reported in 2 Atk. 25, 27, that relief was given against an attorney on a large bond obtained by him from Japhet Crook

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(one of the most cunning and wicked of men) for essential services alleged to have been rendered him, and for future services. On the first hearing Lord Hardwicke was so impressed with the bad character of Crook, that he decided against his estate: but on the second hearing, he was clearly of opinion, that an attorney could not be permitted so to deal with his client; he said that the case is stronger between attorneys and clients than any of the cases to which it had been compared by the counsel; to wit, dealing with young heirs, marriage, brokerage, bonds, &c. The reason the Court goes upon is, "the great power and influence that an attorney has over his client," and the Court would not

sustain the bond, because it might encourage attorneys, after they had got into the secrets of their clients, to extort from them unreasonable rewards to themselves.

In *The Drapers' Company v. Davis*, 2 Atk. Rep. 295, a solicitor took a judgment from his client for £400 whilst the cause was pending; and though the account had been allowed, and the bond given 17 years before, the judgment was set aside and the securities ordered to be given up. And so in more modern cases. In 2 Ves. Jun. 119, 201, *Newman v. Payne*, Lord Rosslyn states that there are peculiar restraints upon attorneys, and that they are not to deal with their clients upon exactly the same terms upon which men at large deal with each other. Relief was given in the case.

In *Morse and Royal*, 12 Ves. 355, 371, 372, Lord Erskine states certain contracts to be void by the policy of law; such as deeds of gift by a client to an attorney, by an heir to a guardian, the purchase of a reversion from a young heir, a trustee selling to himself; which are all subject to be set aside without evidence of fraud. And he cited (p. 372) the case of *Middleton v. Welles*, decided in the House of Lords in 1785, reported 4 Bro. P. C. 245 (Edit. Toml.), in which Lord Thurlow

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said, \*(9 Ves. 294) "*Middleton* deserved to be and, under other circumstances, might have been an object of that party's bounty; but the deed taken by an attorney, whilst he was the attorney of the party, could not be supported without striking at the root of property; and referred to *Walmsley v. Booth*, and *Sanderson v. Crosse*, both cases of attorneys." The opinion of Lord Thurlow in this case of *Welles v. Middleton*, so much cited by Lords Erskine and Eldon, was not published until Mr Cox reported it in his *Chancery Cases*, Vol. I. p. 112. It is there stated fully; and he distinctly lays it down, that the Court will, on general principles of policy, set aside any gift made by a client to an attorney, during the time that the attorney has in hands the transaction of the client's affairs, without any proof of actual fraud, even though made in lieu of his bill; and he adds in his strong way, "that if it were not so, there would be no end of the crushing influence of an attorney, who has the affairs of a man in his hands." He set aside the deeds in that case, though there was no evidence of fraud; and on appeal, the decree was affirmed. In *Gibson v. Jeyes*, 6 Ves. 266, Lord Eldon set aside the sale of an annuity by an attorney to his client. He said, (p. 271) "the relation between the parties must be changed; that is, the confidence in the party, the trustee, or attorney must be changed." He added, that an attorney, buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing, for that vendor, with a stranger. And in

page 277 he adds, that an attorney may deal with his client for an estate; a trustee with his cestui que trust; but the relation in some way must be dissolved. "It was the duty of the attorney dealing with the client, to have directed him to get another attorney to advise her, and not doing so, the whole

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onus is thrown upon \*the attorney." And in p. 280, "an attorney becoming the purchaser shall not hold an advantage gained by his negligence."

In *Wood v. Downes*, 18 Ves. 119, it was decided by the Lord Chancellor that beneficial contracts and conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, should stand as a security only for what was actually due, and purchases by an attorney were decreed to be a trust. In page 123 Lord Eldon says, that an agreement beneficial to the attorney could not stand in a Court of Equity against a client. And in page 128 he gave to the client the benefit of the purchase of a mortgage of £1,100, bought up by the attorney for £630. He said the question was, whether an attorney, employed to recover part of an estate, can, by availing himself of his situation and acting upon the opportunity of bargaining for the purchase of a mortgage which the client might have had, keep the advantage gained, and hold the mortgage not only for £630, which he gave, but for the whole amount of the mortgage, which was £1,100. And so of another portion of the estate, where the attorney really purchased from another person, one Pardoe, such interest as he had in the estate, relief was given to the client. This is a very strong case, and shews how far the Court will go to protect clients from the acts of their attorneys. It is a leading case on the subject.

In *Strachan v. Brander*, 1 Eden's Rep. 303, Lord Northington set aside deeds between a young man ignorant of his rights and poor, and one who undertook to support him in taking possession of his estate. In our country, fortunately, and to the honour of the profession, these cases are very rare. In the case of *Stanjaine v. Smith*, decided by the Court of Appeals, an attorney was prevented from availing himself of a great advantage gained over a debtor whom he had

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in his \*power. After this full examination of the doctrine on this subject as illustrated by the decided cases, we come to the application.

Mr Miles employed Mr Ervin to bring a suit to maintain his claims to a tract of land. He advised him correctly, that his title is good against Harper, against whom the suit was to be brought, but doubtful as to an outstanding title supposed to exist in the Alstons. Mr Ervin goes on with the suit, and whilst that was pending he is applied to by Mr Carlless, who knew of his employment by



Miles, who proposed to him to unite with him in the purchase of the land in question from Miles, which could be got low if he, Ervin, would throw cold water on his title, and thus discourage his expectations. Mr Carloss swears that Mr Ervin said nothing as to the throwing cold water on the title, but concurred in the purchase. Accordingly, whilst Ervin was attending to the suit at Columbia in the Constitutional Court, Carloss applied to Miles to purchase the land, and offered him \$300, which, after some negotiation, was accepted. Conveyances were subsequently made to him.

After some time Carloss sold the land to Brown for \$2,500, and after further interval Carloss caused one of Brown's bonds for \$900 to be delivered to Ervin, as his part or share of the profit under the agreement to purchase for the joint benefit, which he accepted and now holds. Is he, under all these circumstances, entitled to hold this advantage?

I have reflected a good deal on this question, and have been embarrassed by it. There is no doubt that Mr Ervin thought he was fairly at liberty to make such a bargain and derive the advantage which was obtained. And there is no proof that he entered into the views of Carloss to throw cold water on the title of his client Miles, which he expressly denies in his answer. But it

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\*is quite certain that he consented to join with Carloss in the purchase of the land, and was prosecuting the suit at Columbia when Carloss made the purchase, the profits of which he afterwards shared with Carloss. The relation of attorney and client was subsisting at the time of the sale to Carloss; and this is the very danger which the policy of the law guards against to avoid the crushing pressure of the power and influence of an attorney over his client. It was argued that Mr Ervin did not become directly the purchaser from Miles; but that makes no difference. He was secretly concerned with Carloss and got the benefit of the contract; and this concern in the purchase was concealed from Miles, as Carloss expressly swears, from prudential considerations. What those prudential considerations were is not stated. But it manifestly must have been the apprehension that if it were made known to Miles that his attorney was concerned with Carloss in the purchase, it might alarm and induce him to hold back and decline to sell the land at a very low price. It was further argued for the defendant, that Carloss included other lands in his sale to Brown, but it was proved that part of that land was taken off by other titles, and that what remained was of little value. Again, it was urged that Miles gave only a quit claim title to Carloss for his \$300, but that Carloss gave Brown a warranty title for the price of \$2,500. It must however be remembered that Carloss

did not estimate the addition of a warranty in the title from Miles to him as of very great consequence, for he offered only \$500 for the land, with a general warranty: yet he got \$2,500 from Brown. And it cannot fail to strike the mind, that neither Carloss nor Ervin seemed to have dreaded the outstanding title of the Alstons to the land, which could not be located, and might be defeated by the statute of limitations, since

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Carloss readily gave \*a title with general warranty to Brown, in which Ervin afterwards concurred.

It is said that at any rate, if complainant is entitled to relief against defendant, he ought to be protected against the effect of the warranty.

I rather incline to think that this is correct, as undoubtedly the general warranty procured some augmentation of price from Brown.

Upon the whole, I have come to the conclusion, that as the relation of attorney and client subsisted at the time of the purchase of the said land from Miles by Carloss, and as Ervin was secretly concerned with Carloss in that purchase, before divesting himself of that relation, and without putting himself at arm's length (as the cases quaintly express it), the complainant is entitled to relief, without positive proof of fraud on the part of the attorney.

What that relief ought to be is now to be considered.

The complainant requires that the defendant should be made liable for the whole amount of the purchase money, to wit, \$2,500, obtained on the sale by Carloss to Brown. But I am of a different opinion. The claim is against the defendant for the benefit which he derived from his concern in the transaction, which he ought not to have meddled with, whilst the relation of attorney and client subsisted; and that was a bond of Brown's for \$900, which, it assumed, was clear of all his share of the expenses.

It is therefore ordered and decreed, that the defendant do deliver to the Commissioner of the Court, the bond of Brown for \$900, or pay over to him the money he may have received thereon; to be held by the Commissioner, in trust, for the use of John Miles, until he shall have secured, to the satisfaction of the Commissioner, the defendant against the effect of the warranty title given by Carloss to Brown, in which Ervin made

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\*himself liable to Carloss; and until the farther order of the Court.

From this decree the defendant appealed and assigned for cause,

First. That an attorney may purchase from his client, if he shews that he acted fairly; which in this case the decree admits, and the proof establishes.

Second. That the decree is erroneous, in not making Ervin secure on the warranty before he has to pay the money.

Third. That the decree ought to allow the defendant the benefit of the bale of cotton, and the money paid Carloss, and also a reasonable fee for attending to the case against the heirs of Alston.

Miller, for the appellant. The doctrine generally, that an attorney cannot buy of his principal, does not apply as rigidly to a mere attorney in Court; as he has no power, as in this case, to sell. And most of the cases, in which the general rule has been laid down, were mere agencies to sell.

Morse v. Royal, 12 Ves. 351. 371, was a case of a deed of gift, which stands upon a principle different from this, and is intended to prevent exorbitant demands. Nor does an attorney stand as trustee; though a solicitor to sell is such a trustee. This was not ipso facto void; it was only incumbent on the attorney to shew fairness.

Drapers' Comp. v. Davis, 2 Atk. 295, was a case like those of exorbitant gifts or demands by attorneys, who are not to deal with their clients upon exactly the same terms as other men; but it shews they may contract on certain terms.

In 1 Cox's Cases, 134, the broad doctrine has been laid down: but it is a case of express fraud; and the decision must have been on that ground.

In 2 Dow's P. R. 289, it is said an attorney

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may contract if he shews he has given the same advice to his client, as if he had sold to another person. He must shew fairness only. This was the latest English case, and Lords Eldon and Redesdale both concurred.

In Jeyes v. Gibson, 6 Ves. 266, the contract was set aside for unfairness. The attorney must always shew it fair; besides in England, it seems, the attorney is always employed to investigate the value of the premises, which is not the practice here; he knows generally as little, as to the value, as any person in the community.

In 1 Mad. Cha. 94, it is said a client may make a voluntary gift to an attorney; and the case of Gibson and Jeyes is referred to.

Butler v. Haskell was the case of a trustee, but there the opinion of the Court went upon the ground of fraud connected with the trust. This doctrine was the rage at one time; but it has been narrowed down a little since.

In Perry v. Dickson, and in McGowen v. McGuire, 4 Desaus. 486. 504, the Court did support the purchase, it being shewn to have been made at a better price than any other person would have given; and made at auction.

The principle then is not settled, and this case depends upon the question, "whether Ervin acted fairly or not?"

He contended there was no fraud, and collated the evidence to shew it.

Evans, contra

*Curia, per JOHNSON, J.* The Court concur in the opinion expressed by the presiding Judge, as to the liability of the defendant, and will take occasion, hereafter, to express the reasons on which that concurrence is founded.

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\*The order directing that Brown's bond should be delivered to the Commissioner, or that the money received by defendant should be paid to him, does not and could not impose on the complainant any imperative obligation to comply with the terms on which it is to be transferred to him. Inconvenience and probable loss might arise to the defendant, if the complainant should refuse or neglect to do so, and no possible injury can result to complainant from a modification of the decree so as to require that the indemnity contemplated should precede the delivery of the bond or the payment of the money. It is therefore ordered and decreed that on the complainant's securing the defendant, to the satisfaction of the Commissioner, against his liability on the warranty title executed by Carloss to Brown, and on his liability on his contract with Carloss, that the defendant shall forthwith deliver to the Commissioner Brown's bond for \$900, and pay over to him what money he may have recovered thereon, if any; or that he shall pay the amount of the said bond to the Commissioner, to be by him delivered and paid over to the complainant.

Mr. Justice JOHNSON afterwards delivered more at large the following opinion of the Court.

On a former occasion this Court expressed its concurrence in the judgment pronounced, in this case, by the Circuit Court; but not entering fully into all the reasonings on which that judgment is founded, it has devolved on me to express those on which the concurrence of this Court proceeds. The authorities which have been put in requisition have left a gleaming so scanty and barren, that the labour of collecting them would not be compensated by any lights they might throw on the subject; and have been so ably and fully digested, that nothing is left to this Court, but to extract from them the true principle, and to apply it to the case under consideration.

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\*The policy of the law is clearly opposed to contracts between client and attorney in relation to property in litigation, and of which the latter has the charge, I think on the soundest reasoning. The value of property we know depends almost exclusively on the certainty of the title; and from the na-



ture of his profession the attorney is supposed to be more competent to judge of it than the client. To discharge the duties which that relation imposes his client must commit to him all the information he possesses on the subject. That relationship too begets the most unlimited confidence, for without it the client's rights are endangered; and to permit the attorney to use those means to the prejudice of the client would be to subject him to what is aptly enough termed a crushing influence.

The true rule then I take to be this, that the law will not permit an attorney to avail himself of the circumstances arising out of that relation to make a contract relative to the property in litigation to the disadvantage of his client. But I do not think that it necessarily follows, that every contract between persons standing in this relation, and about such a subject matter, is absolutely void; nor do I think that such a conclusion is sustained by the current of decisions. Neither of the parties is supposed to be subject to any of those legal personal disabilities, which incapacitate them from contracting, and *prima facie* they would be bound by their contract; and when a rule of law is interposed to avoid, or to enforce its fulfilment if it is executory, on the maxim, *cessante ratione cessat ipsa lex*, we are led to inquire whether the case is within the reason of the rule.

In this inquiry, the jealousy with which the law views such a contract is ready to lend its aid in support of perhaps trivial circumstances tending to bring the case within the rule. But the danger to which the client is exposed, from the supposed influence which

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his attorney \*has over him, is the reason on which it proceeds; and the inquiry is, whether he has or has not used it to his prejudice; and if it should appear that the client was as well, or better, advised than his attorney on all matters connected with the contract—which, without disparagement to the profession, does frequently happen—and has received a full and adequate price, where, I would ask, is the hardship or injustice of sustaining such a contract, although one of the parties should capriciously ask to be absolved from it? Surely there is none: and the rule never could have been intended to operate on such a case.

This view of the subject is, I think, fully sustained by the reasoning of Lord Redesdale in *Cane v. Lord Allen*, when in sustaining the judgment of the Court he remarks, that *Cane*, the attorney, took no advantage of the confidence placed in him by Lord Allen, or of any superior knowledge of the value of the estate, which he acquired as agent. And also by that of Lord Eldon, who in the same case remarks, that it would be incumbent on the attorney to shew, that he had given the same disinterested advice that he

would have done if the contract had been made with another party. In *Harris v. Freemanheere*, 15 Ves. 42, it is said that an attorney may purchase from his client; but to support such a purchase he must be able to prove, that he paid the full amount that could have been obtained from any other person.

With respect to the cases on which the opinion of the Chancellor appears to have been founded, it may be remarked, that although from the generality of expressions it is to be inferred that the isolated circumstance of the contract being between client and attorney was sufficient to avoid it, yet it will be seen upon an examination of the cases in which relief has been given, that some circumstances entered into them demonstrating the influence which the relationship be-

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tween the parties had over the \*contract, furnished either by some positive act of fraud, or deducible from its inequality. I conclude, therefore, that all contracts between attorney and client, in relation to the property in litigation, are not necessarily void on the ground of that relationship; but that to render it so it must appear that it was used to the prejudice of the client. As a matter of proof, it is impossible to lay down any rule as to what will, or will not, constitute sufficient evidence of it. It may consist in all the variety which exists between the most glaring and dishonest frauds, or be deduced from circumstances found in the twilight which separates them from perfect fairness, aided by the suspicion with which such contracts are regarded. These observations are not deemed necessary to the case under consideration, but were rendered so by a shade of difference, between the opinion of the Chancellor who tried the cause, and the views taken by this Court, and to fix a principle which is involved in some difficulty.

The features of this case are, if the evidence is to be credited, too strongly marked to admit of any doubt in the application of the principle. The defendant did, it would appear, whilst his client was ignorant of the result of a cause in which the property was in litigation, participate in a contract, by which the client parted with it at an inadequate price, and however disinterested his intentions might have been in a moral point of view, as a legal deduction it must be presumed that there was some cause operating on his mind; and in the absence of any other it will be referred to that which was intended to be guarded against by the rule, and this itself would be decisive of the case. But if the witness Carloss is to be believed, there are other circumstances which ought to weigh. For although he does not state that the defendant yielded to it, he does say, that he suffered his ear to be polluted with the degrading proposition to throw cold water on his client's hopes.

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\*The decretal order entered at the last Court has not been carried into execution; and the possibility that the plaintiff may not think proper to give the security, required as a condition precedent, has suggested the propriety of providing for that contingency; nor is the amount secured by defendant on account of the sale to Brown, either in cash or on bond, precisely ascertained by the decree.

The defendant has also advanced a sum of money on account of his contract with Carloss; and the complainant is indebted to him a bale of cotton by contract, as a fee for attending to the case against Harper in the Constitutional Court, which on every principle of equity and reciprocity he is entitled to have refunded and paid. But the propriety of allowing him a compensation for any services he may render as an attorney in any future case that may involve the title to the land is not seen, and is disallowed.

It is therefore ordered and decreed, that the Commissioner do state an account between the parties, debiting the defendant with the amount he may have received on the contract for the sale of the land to Brown, and what may remain due on Brown's bond, with interest from the time it became due, and credit him with the amount paid on his contract made with Carloss and the value of the bale of cotton; and that if the complainant shall, within one year after notice of the account so to be stated, enter into bond with sufficient security to be approved by the Commissioner, to indemnify and save the defendant harmless on account of his liability on his contract with Carloss to share any liability to which Carloss may be subject on his warranty on the sale to Brown, that then the defendant pay to the complainant the balance that may appear due on the account so to be stated, either in cash or by the delivery of Brown's bond

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\*for the purchase money, if any thing be still due and owing thereon. But if the complainant shall fail to give such security within the time aforesaid, then the bill to stand dismissed.

Decree affirmed.

## I McCord, Eq. 551

MYLES BURKE and Wife v. THOMAS J. WILDER, Executor, and Others,

(Columbia. May Term, 1826.)

[Wills 497.]

A provision made for a child in ventre sa mere, which is afterwards born before the death of the testator, was held not to extend to an after born posthumous child, although the division of the property was suspended till the oldest son became twenty-one, and the division to

be made between "all his children now born or to be born."

[Ed. Note.—Cited in *Myers v. Myers*, 2 McCord, Eq. 263; 16 Am. Dec. 648.

For other cases, see Wills, Cent. Dig. § 1084; Dec. Dig. 497.]

The provision made for the wife allotted to her before the son's becoming twenty-one.

[Descent and Distribution 47.]

When a posthumous child is not provided for by the testator, the other children and not the mother must contribute to make up his portion equal to the other children.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 128; Dec. Dig. 47.]

This bill was filed by the complainant Burke, and Ann his wife who had been the widow of the defendant's testator. John Tisdale, the defendant's testator, executed his last will and testament on the 21st of October 1820, at which time his wife Ann was pregnant, of which child she was afterwards delivered, in the life time of the testator, named Munford Tisdale. The testator did not die till several years after, when he left his wife pregnant with another child, which was born after his death. That part of the will now in question is in the following words.

"Secondly. Unto my beloved wife, Nancy Tisdale, I give and bequeath these four negro slaves, viz. Calla, Jim, Joe, and Hester, and the future increase of the said females.

"Third. Unto my beloved children Ransom, Mary Ann, and John Tisdale, I give and bequeath jointly, these twelve negro slaves following, viz. Hood, Melina, Binah, Betty, Fanny, Jordon, Allen, Giles, Eave, Edmund, Dick, and Harriet, and the future increase of the said females. The said last mention-

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ed twelve slaves and \*the future increase of the said females to be equally divided between my said children Ransom, Mary Ann, and John Tisdale, as they respectively marry or arrive at the age of twenty-one years.

"Fourth. Should my beloved wife Nancy be delivered of the child with which she is now pregnant, then my will and desire is, that that child shall have and receive these four negro slaves, viz. Frank, Dave, Lucy, and Robert, and the future increase of the said Lucy. These last mentioned negro slaves to be kept, together with the slaves mentioned in my other children's bequest, until the said child shall marry or come of age: but should the child die before he or she should marry or come of the age of twenty-one, then in that case the legacy hereby given to that child shall be equally divided between my beloved wife Nancy and my other children, share and share alike.

"Fifth. My will and desire is, that my executors, herein after named, do at a reasonable time sell for cash these three negro slaves, Nanee, Amy, and Auros, and pur-



chase out of the amount of sales, and such money as may be due my estate, three other negro slaves, to be purchased. And my negro slaves Jesse and Molly be equally divided between my beloved wife Nancy and all my children now born or to be born. That part or portion of said negro slaves last mentioned which may fall to my said children is to go with the rest of their estate, and to be equally divided between them or the survivors, as he, she, or they may marry, or arrive at the age of twenty-one years.

"Sixth. Unto my beloved wife Nancy, and my dear children now born or to be born, I give and bequeath all my plantation and tract of land whereon I now live, to them and their heirs and assigns for ever; to be equally divided between them when my son Ransom shall marry or arrive at the age of twenty-one years.

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"Seventh. My will and desire is, that my executors do sell my grey horse, and any other property which I may have, and not herein disposed of, to be sold to the best advantage, at their discretion.

"Eighth. My will and desire is, that all the rest of my horses, all my cattle, hogs, household and kitchen furniture, and plantation tools, be kept together and used for the mutual benefit of my beloved wife and children, until my son Ransom shall marry or arrive at the age of twenty-one years, then such as remain shall be equally divided between my beloved wife and children.

"Ninth. My will and desire is, that the work and labour of those negro slaves herein given to my children shall be appropriated to the maintenance, support, and education, and other necessary expenditures which may be necessary, or incurred on their account.

"Tenth. If any of my debts should remain unpaid, and there should not be a sufficiency to pay them without encroaching on the legacies, then in that case my will and desire is that my beloved wife and children shall go equal shares in the payment of such debts."

The bill prayed that the widow's share should be allotted to the complainants, and stated that as to her share the property was not to be kept together, but only as to the children; and prayed that the posthumous child should be permitted to come in for a share with the other children, although the provision mentioned in the will for a posthumous child was then intended for Munford Tisdale, who was then in ventre sa mere. The complainants also contended that they were entitled to one fifth, and not to a sixth, as the provision made for her was in contemplation of all children born or to be born; but that each child could only get such proportion as would be made by the number of children to be born. The bill also claimed the specific chattels bequeathed to the widow, and prayed an account.

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\*The defendant, Wilder, the executor, in his answer stated, that besides the defendants, Ransom Tisdale, Mary Ann Tisdale, John Tisdale, and Munford Tisdale, there had been born a posthumous child, Wade Washington Tisdale, and submitted to the Court whether that child was entitled to a proportion of the property under the will, and whether by the 6th and 8th clauses of the will the proportion of the widow could be allotted off before Ransom married or came of age. The executor also asked for the construction of the Court on the 4th clause of the will. It was admitted that Munford Tisdale was the child in ventre sa mere at the execution of the will.

Thompson, Chancellor. With respect to the partition and division prayed for in the bill, the Court is of opinion that it cannot be granted. The will positively directs, that the legacies, together with the other property, both real and personal, should be kept together until the testator's son Ransom should marry or arrive at age. The power of this Court extends no farther than to construe a will, and not to make it; and this will is too plain to require construction. The second point is equally clear. It is evident from the whole context of the will, that the testator did not look at the circumstances of his estate at the time of making his will, and by using the words "children born or to be born," embraced the child with which his wife was enseint, as well as those which had already been born or to be born. The Court is therefore of opinion that the payment of the specific legacies and the partition of the estate shall be postponed until Ransom Tisdale shall arrive at age or be married, and that the posthumous child is entitled to an equal distributive share of the estate of the testator with his widow and the other children.

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\*From this decree the complainants appealed.

W. Mayrant, for the appellants.  
Haynesworth, contra.

*Curia, per COLCOCK, J.* In this case I cannot conceive how a doubt could arise as to the intention of the testator. In the first clause of his will he gives absolutely and unconditionally four slaves to his wife. In the fourth he gives four negroes to the child with which his wife was then pregnant, which, he says, are to be kept together, with the bequest to his other children. And in the fifth he directs, that certain negroes be sold and others bought, which, with his slaves Jesse and Molly, should be equally divided between his wife and all his children now born or to be born. and then adds, that the part or portion of the negro slaves last mentioned, which may fall to his children, is to go with the rest of their estate, and be

equally divided when they marry or arrive at the age of twenty-one. So far, there is, certainly, nothing which conveys the idea that he intended the share given to the wife should be kept with those given to the children for any length of time. On the contrary, in the last clause referred to, he seems most clearly to distinguish between that which he has given to the wife and that which he gives to the children, and directs the latter only to be kept together. In the next and subsequent clause of the will he does direct that the property therein bequeathed should be kept together until his son Ransom should arrive at age. I can perceive no reason then, why that part of the testator's property which is specifically given to his wife should not now be delivered to her. Some difficulty seems to be presented, in determining what portion of the property mentioned in the fifth clause the wife is

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entitled to, arising from the words \*born or to be born; but when we advert to the situation of his wife at the time he made the will, and the different clauses in which these words are used, I think, it is clear that he referred to the child with which his wife was then pregnant and to that alone, and did not and could not have intended to make a provision for all his children who might thereafter be born. These words are used only in the fifth and sixth clauses; in the first of which five negroes are bequeathed, and in the latter his plantation. Can it be imagined, that he could have intended that all the children his wife might ever have should participate in this small portion of his property, when the rest of it was disposed of to those who were then in being? Besides the inequality in such disposition of his estate, it seldom happens, that a man looks so far forward as to be making provision for children not expected to be soon born. And when the words are applied to the child the construction, contended for by the defendants, would evidently violate the obvious intention of the testator and do manifest injustice to the posthumous child. I therefore consider the testator as dying intestate as to him, and that he must come in under the clause of the act of 1791 and receive a share to be made up by contributions among the other children. The decree

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does seem to direct that the widow should also contribute, but I cannot suppose that that was intended; for the words of the act are very explicit and do not seem to afford room for doubt. The words are, "If no provision be made by the will of the testator for any child or children that may be born after his death, such child or children shall be entitled to an equal share of all real and personal estate given to the other child or children, who shall contribute to make up such share or shares according to their respective interests or portions accruing to them under such will. Pub. Laws, 491. The widow is not mentioned or referred to. If

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then the \*posthumous child does not take under the fifth clause the widow is entitled to one fifth.

As to that property which he directs to be kept together, the Court have discovered no sufficient reason to direct a distribution at present: but as to the share to which the wife, under the fifth clause, is entitled, it is ordered that a writ of partition do issue and that the executor deliver up to complainants the negroes specifically bequeathed to the wife in the first clause of the will.

Certificate. In this case the Court being of opinion that the posthumous child, Wade Washington Tisdale, does not take under the will, and that the complainant Nancy Burke, late Nancy Tisdale, is entitled to the fifth part of the property bequeathed in the fifth clause of the testator's will. It is ordered that a writ of partition do issue to divide the property contained in said clause between the said Nancy and her four children, Ransom, Mary Ann, John and Munford, that her part or portion be delivered to her, and that which belongs to the children be kept together as directed by the will. It is further ordered and decreed that the four negroes named in the second clause of the will and left to the said Nancy be immediately delivered to her. In other respects the decree of the Chancellor is affirmed.

C. J. COLCOCK.

D. JOHNSON.

NOTT, J. I concur in this opinion except as to that part relating to the youngest child, on which I give no opinion.

Decree reversed.

















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